

# When Are Elections Good Enough? Validating or Annuling Election Results

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## I. Introduction

The high-profile annulment of the 2017 Kenyan presidential election surprised many election watchers in Africa and across the globe. All elections suffer from challenges and irregularities, to varying degrees of seriousness, including poll worker error,<sup>1</sup> acts of God,<sup>2</sup> and violence,<sup>3</sup> without these challenges necessarily changing the outcome of the vote or leading to a full annulment. A decision to annul an election is one that should not be taken lightly. Repeat elections impose unexpected costs on state budgets and candidates; the normal operation of legislatures and governments may be disrupted while a revote is organized; candidates may refuse to participate in the fresh elections, leading to a political crisis;<sup>4</sup> and repeat elections may themselves be subject to irregularities.<sup>5</sup>

Most concerning, however, is the potential for bad actors to use annulment of results (under the guise of ensuring “secure elections” or as redress for “widespread irregularities”) as a tool to thwart the will of voters. In Iraq, the Election Commission annulled votes in 1,021 polling stations on allegations of fraud, excluding primarily out-of-country voters from seven countries as well as internally displaced voters residing in Sunni-predominant provinces of Anbar, Erbil, Saladin, Diyala, Nineveh and Kirkuk – a move that some at the time claimed was politically motivated.<sup>6</sup> Similarly, the annulment of the presidential election in Zanzibar in 2015 was perceived to be politically motivated to avoid an opposition victory.<sup>7</sup>

That being said, where an election has been so compromised that the result cannot be said to reflect the will of the voters, annulment will be an appropriate remedy. Surprisingly, the legal issues surrounding annulments have not been explored more fully outside of a strictly United States (U.S.) context.<sup>8</sup> From a

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<sup>1</sup> Joshua A. Douglas, “A ‘Checklist Manifesto’ for Election Day: How to Prevent Mistakes at the Polls” (2016). *UKnowledge Law Faculty Scholarly Articles*. 601.

[https://uknowledge.uky.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1601&context=law\\_facpub](https://uknowledge.uky.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1601&context=law_facpub).

<sup>2</sup> Stephanie Sigafoos et al., “Storm a hindrance on primary election day in the Lehigh Valley, but the voting goes on,” *The Morning Call*, May 15, 2018, <http://www.mcall.com/g00/news/elections/mc-nws-election-day-lehigh-valley-20180514-story.html?i10c.encReferrer=&i10c.ua=1&i10c.dv=14>.

<sup>3</sup> Clark Gibson, Karen Ferree, and James Long, “Election Violence and Voting in Emerging Democracies,” UC San Diego Policy Design and Evaluation Lab, <https://pdel.ucsd.edu/elections-governance/election-violence.html>.

<sup>4</sup> Samuel Gebre and Felix Njini, “Low Voter Turnout, Violence Overshadow Kenyan Election Rerun,” *Bloomberg*, October 26, 2017, <https://www.bloomberg.com/news/articles/2017-10-26/kenyans-vote-in-election-rerun-boycotted-by-main-opposition>.

<sup>5</sup> Anthony Langat, “The Cost of Kenya’s Repeat Election,” *U.S. News & World Report*, October 25, 2017, <https://www.usnews.com/news/best-countries/articles/2017-10-25/kenyas-repeat-election-comes-with-a-heavy-price-tag>.

<sup>6</sup> “Iraq’s election commission annuls thousands of votes,” *Al Jazeera*, May 30, 2018, <https://www.aljazeera.com/news/2018/05/iraq-election-commission-annuls-thousands-votes-iraq-180530201934317.html>.

<sup>7</sup> “The Political Crisis in Zanzibar,” Center for Strategic and International Studies, March 18, 2016, <https://www.csis.org/analysis/political-crisis-zanzibar>

<sup>8</sup> A number of publications have examined the situation in the United States, and we have relied on their insights when discussing the American context. See, for example, Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS; and William and Mary School of Law, *Election Law Manual*, 9-7 to 9-8, <http://www.electionlawissues.org/Resources/Election-Law-Manual.aspxhttp://www.electionlawissues.org/Resources/~/media/Microsites/Files/election/Chapter%20Nine%2>



global perspective, when are elections considered good enough? And what is needed to make a determination whether to validate or annul an election?

The answer to these questions is not straightforward, and different jurisdictions have taken different approaches. In some contexts, there may be a readily quantifiable number of votes affected by one or more irregularities. In other cases, however, such as voter intimidation, cyberattacks, or electoral disinformation (consider the recent activities of Cambridge Analytica in the U.S. and Kenyan elections),<sup>9</sup> determining the impact of an irregularity on an election will be difficult or impossible. With that difficulty in mind, it is critically important for jurisdictions to have clear and pre-determined rules governing when annulment is available as a remedy, both to ensure that annulment is available if needed, but also so that annulment is not misused to frustrate the will of the voters.

This paper outlines various legal approaches to election annulments, explores different grounds for annulment, and outlines procedural considerations for courts and adjudicators when determining whether to annul an election result, drawing on international principles and global jurisprudence. It does not examine systemic issues, such as weak legal frameworks, or the distorting effect of private money in politics, but focuses instead on irregularities in the process that can call the legitimacy of an election into question.

While annulments can happen in single polling places or in particular districts, this paper focuses on annulments of entire elections, especially at the national level, since they raise a distinct set of legal and practical problems and have particularly strong implications for the legitimacy of elections and democratic government more broadly.

## II. Annulments as a Remedy for Electoral Irregularities

### Legal Approaches to Annulment

Almost all jurisdictions allow for the annulment of elections, but the grounds for annulment, and the way challenges to results are handled, vary from place to place. In a minority of jurisdictions, especially in Latin America, the law specifies the irregularities or other circumstances under which annulment may be ordered.<sup>10</sup> In Mexico, for example, if the vote margin between candidates is less than five percent, elections can be annulled if it is proven, through corroborated and objective evidence, that a candidate's campaign overspent by five percent of the total amount authorized, illegally purchased media coverage,

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[0-%20Proofed2.pdf](#).

<http://www.electionlawissues.org/Resources/~media/Microsites/Files/election/Chapter%20Nine%20-%20Proofed2.pdf>.

<sup>9</sup> See Eric Auchard and David Ingram, "Cambridge Analytica CEO claims influence on U.S. election, Facebook questioned," *Reuters*, March 20, 2018, <https://www.reuters.com/article/us-facebook-cambridge-analytica/cambridge-analytica-ceo-claims-influence-on-u-s-election-facebook-questioned-idUSKBN1GW1SG>; and Nation Reporter, "Cambridge Analytica says it worked for Uhuru Kenyatta," *Daily Nation*, March 20, 2018, <https://www.nation.co.ke/news/politics/How-Cambridge-Analytica-influenced-Kenyan-poll/1064-4349034-le7xbuz/index.html>.

<sup>10</sup> See ACE Electoral Knowledge Network, "Annulment and re-running of an election at district level," <http://aceproject.org/electoral-advice/archive/questions/replies/606553070>.

received unlawful donations, or misused state resources.<sup>11</sup> It is not necessary to prove quantifiably that the result of the election was changed by such conduct, provided the margin of victory was less than five percent. In other places, annulment of the results in a certain percentage of polling places will automatically result in annulment of the entire election.<sup>12</sup>

While such approaches, which might be described as “prescriptive,” have the advantage of simplicity, they can be problematic because the presence or absence of a particular irregularity, even a very serious one, is not always a reliable indicator of the fairness or legitimacy of the election result.<sup>13</sup> One can imagine a scenario in which prescriptive rules lead to the annulment of an election whose outcome, tainted as it may have been by irregularities, clearly reflected the will of the voters. Under such circumstances, an annulment would be unnecessary and could do lasting harm to public confidence in elections. For example, in the Mexican case mentioned above, a minor misuse of state resources could be cited to undo an otherwise fair election, with all of the associated financial and political costs.<sup>14</sup> Conversely, an adjudicator applying a prescriptive law might find it impossible to annul an election, the results of which have clearly been affected by fraud or error, because of the absence of one of the prescribed grounds.

Prescriptive approaches that are poorly designed can lead to unforeseen or unintended consequences in practice. In Afghanistan in 2010, certain “triggers” were established to determine when the election dispute resolution (EDR) body should investigate the legitimacy of ballots in a particular ballot box. These triggers included: polling stations with results of 600 votes or more (more than 100 percent anticipated turnout); polling stations with more than 100 votes that were 95 percent or more in favor of only one candidate; or both conditions in the same polling station. However, weaknesses in procedures and training led to these triggers being used, in some cases, as *conclusive evidence* of outcome-determinative irregularities, rather than as a first step in an investigation process.<sup>15</sup> The more or less automatic exclusion of the ballot boxes in question contributed to, rather than reduced, the atmosphere of uncertainty that prevailed during and after the election.

The importance of considering the impact of irregularities on the outcome of an election is illustrated by the annulment of the 2010 Icelandic Constitutional Assembly election. The Icelandic Supreme Court invalidated the election of Assembly members based on multiple irregularities, including the use of ballots and voting screens that did not protect secrecy of the ballot. The court weighed the impact of these irregularities as a whole but paid particular attention to the lack of protection for secrecy of the

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<sup>11</sup> Political Constitution of the United Mexican States, September 15, 2017, [http://portal.te.gob.mx/sites/default/files/consultas/2012/04/08\\_fede\\_cpeum\\_decreto\\_150816\\_ingl\\_s\\_pdf\\_12437.pdf](http://portal.te.gob.mx/sites/default/files/consultas/2012/04/08_fede_cpeum_decreto_150816_ingl_s_pdf_12437.pdf).

<sup>12</sup> ACE Electoral Knowledge Network, Op Cit, note 10.

<sup>13</sup> Venice Commission, *Opinion on the Electoral Legislation of Mexico*, Opinion No. 680 / 2012 CDL-AD(2013)021, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)021-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)021-e).

<sup>14</sup> While judicial interlocutors in Mexico have told us this provision in the law would not be interpreted as an automatic trigger for annulment, but rather as a trigger for further investigation, it is not hard to imagine that a party seeking an annulment would argue for a stricter interpretation of the law.

<sup>15</sup> International Foundation for Electoral Systems (IFES) *Electoral Integrity Assessment, Afghanistan 2013*, 68.

ballot: “a fault in this regard is by its very nature conducive to influence the outcome of elections.”<sup>16</sup> However, neither the court nor the litigants questioned whether the results influenced the outcome by candidate as a matter of fact. By deciding on annulment based on the presence of serious irregularities without considering whether the results were impacted, the court made what was arguably a bad decision.

Rather than incurring the cost and delay of holding a new election, the government simply passed a law appointing those who had been elected in the nullified vote to the Constitutional Commission, a decision that was not particularly controversial, since few people doubted that the results from the election accurately reflected the will of the people.<sup>17</sup> Under the circumstances, it might have made more sense for the court to look for alternative remedies, such as censuring the electoral authorities, rather than annulling the election.

The better approach as a matter of principle, and by far the more common approach in practice, is for an election to be annulled only when fraud or irregularity has affected the outcome of an election (i.e., the numerical result and declaration of a winner). Where the outcome has not been impacted, other remedial action, such as prosecution for fraud, may still be appropriate, but the results are allowed to stand. This “outcome-determinative” approach is followed in almost all Council of Europe countries,<sup>18</sup> as well as the U.S.,<sup>19</sup> Canada,<sup>20</sup> and Australia.<sup>21</sup>

Between the prescriptive approach to annulment on the one hand and the outcome-determinative approach on the other, the United Kingdom (U.K.) and a number of commonwealth countries with similar electoral legal frameworks have followed a middle path. That approach was most famously summarized by Lord Denning in *Morgan v. Simpson*,<sup>22</sup> as follows:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, **irrespective of whether the result was affected or not**

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<sup>16</sup> Decision of the Icelandic Supreme Court December 8, 1994, in case no. 425/1994.

<sup>17</sup> Reynir Axelsson, “Comments on the Decision of the Supreme Court to invalidate the election to the Constitutional Assembly,” [http://stjornarskrarfelagid.is/wp-content/uploads/2011/07/Article\\_by\\_Reynir\\_Axelsson.pdf](http://stjornarskrarfelagid.is/wp-content/uploads/2011/07/Article_by_Reynir_Axelsson.pdf).

<sup>18</sup> The various approaches in the Council of Europe countries are surveyed in the Venice Commission *Report on the Cancellation of Election Results*, CDL-AD(2009)054, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)054-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)054-e).

<sup>19</sup> See the discussion in William and Mary School of Law, *Election Law Manual*, 9-6 to 9-9. See also Mark Braden, *Disputed Elections Post Bush v. Gore*, 6-8, <https://www.democracy.uci.edu/files/docs/conferences/2011/I-%20Disputed%20elections%20post%20Bush%20v.%20Gore%20-%2000404111%20Mark%20Braden.pdf>.

<sup>20</sup> See the decision of the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, para 2, at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12635/index.do>.

<sup>21</sup> *Commonwealth Electoral Act 1918*, as amended. Sections 362 and 365.

<sup>22</sup> [1975] 1 QB 151; [1974] 3 All ER 722; [1974] 3 WLR 517. It should be noted that *Morgan v. Simpson* dealt with irregularities resulting from irregularities in the conduct of an election. The UK Representation of the People Act, 1983. S. 164. <http://www.legislation.gov.uk/ukpga/1983/2/section/164> also allows for the annulment of an election if a candidate or his or her agent has committed certain “corrupt or illegal practices,” such as bribery and intimidation of voters, and that “such practices so extensively prevailed in an election that they may reasonably be supposed to have affected the result.”

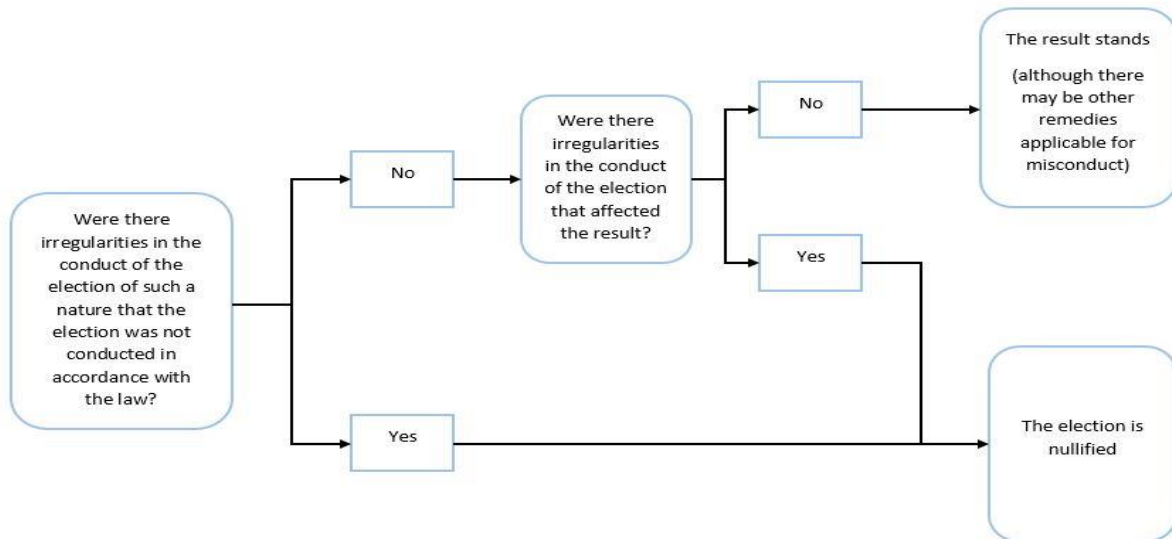


[emphasis added]. That is shown by the *Hackney* case,<sup>23</sup> where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – **provided that it did not affect the result of the election**. That is shown by the *Islington* case,<sup>24</sup> where 14 ballot papers were issued after 8:00 p.m.
3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless **if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated**. That is shown by *Gunn v Sharpe*,<sup>25</sup> where the mistake in not stamping 102 ballot papers did affect the result.

This formulation, which remains valid in the U.K.<sup>26</sup> and other jurisdictions that share the same legal tradition, creates a two-step approach to annulment cases, which is summarized in the flowchart below:

U.K. "Two-Step" Approach to Election Annulments



While this approach allows flexibility in addressing situations of great seriousness, there is no simple way of distinguishing between the two scenarios outlined above. Ultimately, this approach requires the court to make a judgment call as to the seriousness of particular irregularities. As can be seen in the 2017 Kenya annulment case, this can be an extraordinarily difficult call to make, especially when an adjudicator is working under tight timelines and with only partial information.

<sup>23</sup> 2 O'M. & H. 77.

<sup>24</sup> 17 T.L.R. 210.

<sup>25</sup> [1974] Q.B. 808.

<sup>26</sup> See UK Electoral Commission, *Challenging Elections in the UK*, 2012, [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0010/150499/Challenging-elections-in-the-UK.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf).

This way of approaching annulment was built into the Kenya Election Act, section 83 of which provided that:

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **or** [emphasis added] that the non-compliance did not affect the result of the election.

In reaching its decision, the Kenyan Supreme Court acknowledged that, as the respondent had claimed, “there was no evidence demonstrating that the alleged irregularities were of a sufficient magnitude to affect the results.”<sup>27</sup> However, the court found that “illegalities and irregularities” existed in the electoral process, especially counting and transmission of results, that rendered the result of the election “opaque and unverifiable, and therefore indeterminate.”<sup>28</sup> Further, these irregularities were such that the election was not in line with the Constitution and applicable laws (the first part of the section quoted above) and ordered a revote. Since the time of that decision, some commentators have questioned the court’s decision in part due to dissatisfaction with the mixed approach to annulments set out in the law, which has since been amended to a “outcome determinative” approach.

In summary, there are three approaches to annulment internationally:

- 1) A prescriptive approach, in which annulment depends on the presence of certain kinds of irregularity, without regard to their impact on the outcome of the election;
- 2) An outcome-determinative approach, in which fraud or irregularities can lead to the annulment of an election, provided that they affect the result of the election (i.e., the allocation of mandates); and
- 3) A mixed approach in which certain irregularities are so serious that they provide grounds for annulment even in the absence of proof that the result was affected, while other irregularities can provide grounds for annulment only if they did affect the result.

### **When Irregularities Are Outcome-Determinative**

While the outcome-determinative approach seems the most reasonable in principle, it can be exceedingly difficult to apply in practice. Jurisdictions in which an outcome determination is a precondition for annulment have approached this problem in various ways.

The issue has been explored most thoroughly in the U.S., where two distinct approaches have emerged at the state level. In some U.S. states, a challenger must prove that the election result would have been different *but for* the irregularity (the “but for” test).<sup>29</sup> Where a challenger can demonstrate that the winner would not have won but for the irregularity, the election may be annulled. Where the challenger

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<sup>27</sup> *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others* (2017).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Election Law Manual*, William and Mary School of Law, Election Law Program Website, Chapter 9. 7-8. Available at <http://www.electionlawissues.org/Resources/Election-Law-Manual.aspx>.

can demonstrate that s/he would have won but for the irregularity, the challenger may be declared the winner.

In other U.S. states, a challenger only needs to prove that the irregularities have made the will of the voters uncertain (the “uncertain outcome” test). Where a challenger can prove that an irregularity *could have* affected the result, an annulment may be ordered, but a different winner will not be declared, as is sometimes the case under the “but for” test.<sup>30</sup>

Outside the U.S., jurisdictions express their approach in various ways, but the challenge in practice is largely the same: what does a challenger need to prove to establish that irregularities have affected the outcome? On the whole, non-U.S. jurisdictions lean toward the “uncertain outcome” test. The Venice Commission’s *Code of Good Practice in Electoral Matters* provides that the law in Council of Europe member states should provide for annulment of elections “where irregularities *may have* affected the outcome” [emphasis added]. In the U.K., where a challenger seeking to overturn the result of an election based on certain kinds of misconduct by the winning candidate must show that “such practices so extensively prevailed in an election that they *may reasonably be supposed* [emphasis added] to have affected the result.” In Australia, misconduct by a candidate provides grounds for annulment if “the Court is satisfied that the result of the election *was likely to be affected* [emphasis added], and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.”<sup>31</sup>

Tests to determine whether irregularities are outcome determinative:

**The “but for” test:** Where a challenger can demonstrate that the winner would not have won but for the irregularity, the election may be annulled.

**The “uncertain outcome” test:** Where a challenger can prove that an irregularity could have affected the result, an annulment may be ordered, but a different winner will not be declared, as is sometimes the case under the “but for” test.

Each of these approaches is legitimate and there is no point of principle that would decisively favor one over the others. The “but for” test requires a greater degree of certainty before annulment may be ordered, which may make it difficult or impossible for a challenger to prove the outcome would have been different, especially on the expedited timelines that often govern election results cases. Annulment under this standard will only be available in more clear-cut cases. The more relaxed “uncertain outcome” standard gives adjudicators more latitude to use annulment as a remedy in cases where it may be difficult or impossible for challengers to produce definitive evidence that an election has been affected by irregularity.

Given this apparent trade-off between responsiveness and certainty, the appropriate standard for a particular jurisdiction will depend in part on the strength of rule of law and the competence and impartiality of the EDR body. Where courts are strong and public confidence in their impartiality is high, it may be appropriate to allow the adjudicator greater discretion in deciding whether results have been affected. Jurisdictions where there is a greater risk of partisan bias among decision-makers might want

<sup>30</sup> Ibid.

<sup>31</sup> *Commonwealth Electoral Act 1918*, as amended, section 362(3).

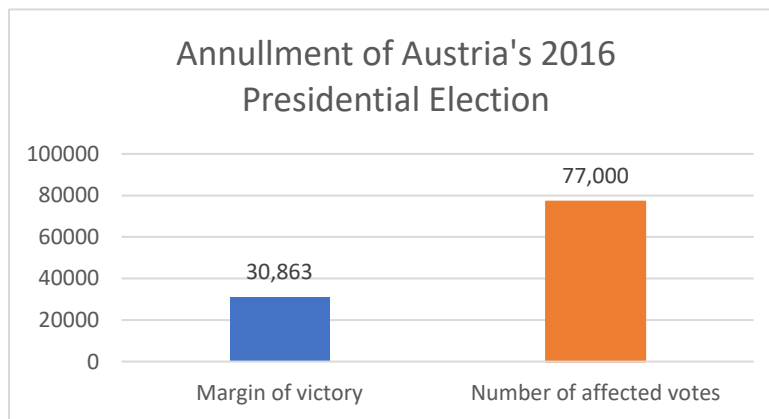
to consider restricting the discretion of adjudicators and allowing annulment only where there is clear-cut evidence that the outcome of an election has been affected by fraud.

The difficulty in determining whether a particular irregularity has affected the outcome of an election was undoubtedly part of the reason for the recent amendments to the Mexican electoral law, which provide for annulment if certain irregularities are found *and* the result of the election is close (i.e., the margin between candidates is less than five percent of valid votes cast). While this approach might be characterized as mechanistic and potentially unfair, it does provide a straightforward and easily verifiable way of dealing with challenges to election results that avoids the difficult and potentially divisive analysis required by the outcome-determinative test.

### When Tainted Votes Are Determinable

An important consideration in determining if an election result was impacted is whether the number of tainted votes can be determined. Determining the number of tainted votes can be relatively straightforward; for example, when ineligible voters have been allowed to vote or eligible voters have been wrongfully turned away from a polling place.

Where the number of votes affected by an irregularity can be calculated, the most common and simplest approach is to compare the number of votes tainted by irregularity to the number of votes separating the top two candidates. Where the number of tainted votes exceeds the margin of victory, then a finding that the irregularity may have affected the election is supported. The Constitutional Court in Austria applied this approach, sometimes referred to as the “magic number” rule, when it annulled the results of the second round of the 2016 presidential election due to various violations of the Federal Presidential Elections Act.<sup>32</sup>



However, as the Supreme Court of Canada observed in *Opitz v. Wrzesnewskyj*,<sup>33</sup> the “magic number” rule is problematic since it does not address the fact that tainted votes do not necessarily all go to the winning candidate but are most likely to be distributed among the various candidates. In *Opitz*, there was a 26-vote difference between the winner and the loser, and the court found that no more than 20

<sup>32</sup> See the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Observation Report, 3, <https://www.osce.org/odihr/elections/austria/264241?download=true>.

<sup>33</sup> 2012 SCC 55.

votes were invalid due to irregularities. The court applied the magic number rule and upheld the election, but it left open the possibility that another, “more rigorous,” test might be developed, perhaps using statistical analysis, to determine whether the result of an election has been affected.<sup>34</sup>

Given this limitation, the magic number rule is most suitable for jurisdictions using the “uncertain outcome” test discussed above. In jurisdictions following the stricter “but for” approach, a challenger will generally be required not only to show that a certain number of votes have been wrongfully cast or voters wrongfully excluded but also to provide some evidence as to how those votes were cast or would have been cast.

Courts have accepted various forms of evidence, including circumstantial evidence and statistical analysis in addressing such situations.<sup>35</sup> In some cases where the identity of disenfranchised voters is known, the court has allowed voters to give evidence on how they would have voted if they had been allowed to do so. In other cases, courts have deducted tainted votes from candidates in proportion to their share of valid votes cast in the polling places in question (so-called “proportional deduction”).<sup>36</sup> However, in one high profile case, a court refused to apply proportional deduction on the ground that it was illogical to assume that tainted votes cast necessarily reflect the proportions of valid votes cast.<sup>37</sup>

As with approaches to the wider outcome-determinative problem, there is no single correct approach to how to account for the impact of tainted votes on the outcome of an election. The important thing is that the approach to be used is clear, pre-established and consistently applied so that election contestants understand from the outset how a challenge to results will be considered.

### **When Tainted Votes Are Undeterminable**

When it is not possible to determine the number of votes tainted by irregularity, determining if the outcome of an election has been affected can be extremely challenging for an adjudicator. For example, how can the impact of voter intimidation on Election Day or of voter bribery be determined? In such cases, the determination as to whether the election has been affected will inevitably involve judgment of a qualitative nature. However, decisions of this kind pose a particular danger to the legitimacy of the electoral process because of the risk that an adjudicator will make a weak or ill-founded judgment or because of the possibility that bias will influence, or be perceived to influence, the decision.

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<sup>34</sup> Following up on this suggestion, Canadian researchers Francis Hane and Heather Emptage have proposed a statistical analysis of the likely distribution of the untainted votes among candidates to determine how likely it was that a losing candidate had in fact won the election. Using this approach, they claimed there was a 0.48 percent chance that the challenger in *Opitz* would have won the election if there were no irregularities. We are not aware of any case where the proposed analysis has been used in resolving an election dispute. See *Disputed Election Results: A More Rigorous “Magic Number Test”*, in *Constitutional Forum/Forum Constitutionnelle*, Vol 22, No 3 (2013), 27-34, [https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/21082/15934](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/21082/15934).

<sup>35</sup> William and Mary School of Law, *Election Law Manual*, 9-37.

<sup>36</sup> Steven F. Huefner, “Remedying Election Wrongs,” 44 HARV. J. ON LEGIS, 282.

<sup>37</sup> *Borders v. King County*, Chelan County Superior Court No. 05-2-00027-3, available at State of Washington, Office of the Secretary of State website accessed July 21, 2005.

Consider, for example, the 2018 mayoral election in Chisinau, Moldova, which was annulled by a court on the ground that the outcome of the election had been affected by what seem to be relatively minor campaign violations, including postings on social media on Election Day encouraging voters to vote.<sup>38</sup> Many inside and outside Moldova have questioned this decision, especially in light of the fact that the second place candidate had strong ties to the ruling party.<sup>39</sup> Regardless of whether the court was influenced by partisan consideration, it is certainly been perceived as having been so, with serious implications for the credibility of the courts and the legitimacy of whoever is ultimately elected mayor.

Another instructive example is the 2014 presidential election in Afghanistan, during which allegations of fraud by the opposition candidate led to an agreement to conduct a full, nationwide audit of all ballots, ostensibly to determine whether outcome-determinative irregularities existed. Further allegations of fraud and interference in the audit process by both sides eventually brought the process to a standstill, and pressure to find a solution – even one that might be seen as outside the legal framework for the elections – was increased by concerns that failing to find a mutually acceptable solution would lead to serious instability.<sup>40</sup> The election management body (EMB) ultimately agreed not to release the final results of the audit as part of political negotiations that led to the National Unity Government that rules Afghanistan today, a compromise that may have averted a broader political crisis but certainly did nothing to build public confidence in electoral democracy in that country.<sup>41</sup>

While the Afghanistan example did not strictly deal with an election annulment, it demonstrates the importance of establishing clearly defined rules and procedures for responding to allegations of fraud or other irregularity, particularly in environments where the capacity of courts and EMBs is not strong.

The risks of ill-considered or partisan annulment decisions can be addressed to a degree through legislation that clearly delimits the scope of the adjudicator’s discretion. Measures to restrict discretion include requiring actual proof that an election outcome has been influenced by irregularity, as in the “but for” test, and establishing a higher standard of proof in annulment cases (see the discussion under standard of proof below).

### III. Grounds for Annulment

Taking into account the legal approaches explored above, there are a wide range of irregularities that could provide grounds for annulment of an election. Although media attention usually focuses on

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<sup>38</sup> Adam Taylor, “Moldovan prime minister says his government is victim in election chaos that blocked rival from office,” *The Washington Post*, June 27, 2018, [https://www.washingtonpost.com/news/worldviews/wp/2018/06/27/moldovan-prime-minister-says-his-government-is-victim-in-election-chaos-that-blocked-rival-from-office/?noredirect=on&utm\\_term=.7102fb7b8c78](https://www.washingtonpost.com/news/worldviews/wp/2018/06/27/moldovan-prime-minister-says-his-government-is-victim-in-election-chaos-that-blocked-rival-from-office/?noredirect=on&utm_term=.7102fb7b8c78)

<sup>39</sup> “Court invalidates mandate of Chisinau mayor-elect Andrei Nastase, protests announced,” Moldova.org, June 19, 2018, <http://www.moldova.org/en/court-invalidates-mandate-chisinau-mayor-elect-andrei-nastase-protests-announced/>

<sup>40</sup> IFES and Democracy International (DI), *Election Audits: International Principles that Protect Election Integrity*, April 2015, 6, [https://www.ifes.org/sites/default/files/2015\\_ifes\\_di\\_election\\_audit\\_white\\_paper\\_0.pdf](https://www.ifes.org/sites/default/files/2015_ifes_di_election_audit_white_paper_0.pdf).

<sup>41</sup> *Ibid.*, 7.



Election Day, issues that can call the integrity of an election into question can arise at any stage in an electoral process.

In some jurisdictions, pre- and post-election allegations of fraud or other irregularities are common, often with little or no supporting evidence. Sometimes these claims are a way of undermining the legitimacy of the winners of the election. In other cases, candidates use allegations of fraud or other wrongdoing as a way of saving face following an election defeat or to facilitate a negotiated outcome. In Afghanistan in 2014, a presidential candidate refused to accept the results of the election because of alleged vote-rigging and fraud and threatened to set up his own alternate government.<sup>42</sup>

The timing of a violation has important implications for the availability of annulment as a remedy. As is discussed further under procedural considerations, many jurisdictions use expedited timelines for handling election related cases that, in some cases, include requirements that cases be brought shortly after they occur. In some U.S. states, failure to challenge a pre-election violation in a timely way will prevent a subsequent challenge to the results. At the same time, there are reasons why a court or adjudicator might be hesitant to address some claims before an election. As courts do not want to be seen as unduly interfering with the political process, they might be hesitant to address claims before an election; there is a tension between allowing the election process to progress organically and protecting the sanctity and integrity of elections as they are being held.<sup>43</sup>

The following sections outline some key potential grounds for annulment, although this is not an exhaustive list. Ultimately, any fundamental irregularity in the electoral process could potentially be grounds for the annulment of an election result, depending on the law of the country in question. For example, in a petition filed challenging the results of the fresh Kenyan presidential election in October 2017, the following grounds were raised by the plaintiff to support the request for annulment: the failure to conduct fresh candidate nomination; the withdrawal and boycott of the opposition candidate; recently passed Election Law amendments that were alleged to be unconstitutional; violence, intimidation, improper influence and corruption; arbitrary relocation of polling stations on Election Day; abuse of state resources and unlawful government advertising; lack of independence, impartiality and competence of the EMB; illegally appointed election officials; failed biometric voter identification and errors in the transmission of results; failure to ensure a secure and accurate voter register; and low voter turnout.

While this petition was ultimately unsuccessful, it demonstrates the range of grounds on which results may be challenged and the tendency of plaintiffs to allege multiple different grounds for seeking an annulment, whether legitimately, or to cast doubt over the electoral process more generally, which, in

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<sup>42</sup> William R. Sweeney Jr., Chad Vickery, and Katherine Ellena, "Yes, the U.S. presidential election could be manipulated," *The Washington Post*, September 2, 2016, [https://www.washingtonpost.com/opinions/global-opinions/yes-the-us-presidential-election-could-be-manipulated/2016/09/02/b125885e-6afe-11e6-ba32-5a4bf5aad4fa\\_story.html?noredirect=on&utm\\_term=.93f66bff8f7d](https://www.washingtonpost.com/opinions/global-opinions/yes-the-us-presidential-election-could-be-manipulated/2016/09/02/b125885e-6afe-11e6-ba32-5a4bf5aad4fa_story.html?noredirect=on&utm_term=.93f66bff8f7d).

<sup>43</sup> *Election Litigation: National Center for State Courts Election Litigation Resources*, summary by Margaret S. Williams, Federal Judicial Center, 2012, <https://www.fjc.gov/content/national-center-state-courts-election-litigation-resources-1>.

turn, reinforces the importance of clear definitions of legal rules on the grounds for annulment and the procedures to be followed in annulment cases.

## **Voter Registration Irregularities**

Many jurisdictions struggle to maintain voter rolls that are accurate, inclusive, up to date, and transparent. Where flaws in a voter registration system make it difficult or impossible for people to register to vote, or facilitate fraudulent voting, the integrity of the election may be called into question.

An example of the potentially serious impact of voter registration irregularities can be seen in Iraq's 2018 parliamentary elections. The late decision by the Independent High Electoral Commission (IHEC) to capture voters' information biometrically required 23 million voters to update their voter registration information in order to obtain new voting cards between September 17 and November 9, 2017. Time and logistical challenges meant that the conversion to a biometric identification (ID) system was not comprehensive and created a situation where more than one type of official voter ID card could be used during the May 2018 parliamentary elections, leading to an increased number of conditional ballots and disqualification of some voters. These voter registration challenges were compounded by the use of voter identification machines on Election Day, which frequently failed to authenticate voters who possessed biometric ID cards,<sup>44</sup> and ultimately raised concerns about the integrity of the elections and credibility of results. Allegations of fraud led the IHEC to annul the results from many polling stations, a decision the Federal Supreme Court reversed as unconstitutional.<sup>45</sup>

In the 2013 Maldivian presidential election, following the original first round on September 7, the Supreme Court annulled the elections and canceled the planned second round by a vote of four to three. Writing for the majority, Judge Ahmed Abdulla Didi referenced a confidential police report that claimed that 5,623 ineligible people had voted in the election, including dead people, individuals under 18, and people using fake identity cards. The dissenting judges, including the chief justice, said there was no legal basis for the annulment, as the allegations were not properly corroborated, nor were they clearly outcome-determinative.

## **Polling and Counting Irregularities**

Challenges to results based on Election Day violations pose particular problems for adjudicators, both because of the need to resolve complaints quickly and because problems are often dealt with in the first instance by officials on the ground who may not adequately document actions they have taken to address the problem or the reasons why. Where problems are widespread, officials in different places

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<sup>44</sup> To avoid problems with non-verification of voters, the IHEC approved an override feature in the software to allow polling station staff to let such voters cast their ballots. Purportedly, there was a 15 percent margin or less on the number of such "exceptions;" however, observers claimed the override procedure took place regularly in some polling stations, raising concerns about the integrity of the elections.

<sup>45</sup> "Iraq's Supreme Court rules yes on election recount, no on canceling votes," June 21, 2018, <http://www.kurdistan24.net/en/news/0313f414-c707-4490-ba30-28af7d703cd5>.

may deal with them in different ways, which may result in inconsistent or even contradictory treatment of voters.

The 2014 nationwide audit of votes in Afghanistan resulted in the amendment of the results in more than half of all polling stations.<sup>46</sup> Some of the irregularities exposed during the audit included incorrectly completed or manipulated results forms, incorrectly counted ballot papers, missing voters' lists, missing or broken security seals, and under-utilization of tamper-evident bags.<sup>47</sup> This evidence of uneven practices was further compounded by uneven decisions and practices within the audit itself, and ultimately the effort was abandoned. In the 2000 presidential race in the U.S., the infamous "butterfly ballot" episode in Palm Beach County, Florida was part of the election challenge that eventually made its way to the Supreme Court in *Bush v. Gore*.<sup>48</sup> The punch-card ballot layout was confusing, which led some voters to mistakenly punch the wrong hole and thereby vote for another candidate. As Professor Steve Bickerstaff has noted, "[m]any tried to correct their mistake, but ended up with a ballot that contained more than one vote for president," and these votes were ultimately disallowed.<sup>49</sup>

## Problems with the Transmission, Tabulation, and Certification of Results

The transmission, tabulation and certification of results are frequent sources of election disputes. It may be challenging to ensure that these processes are transparent and verifiable, which can lead to doubts that data was transmitted or that the results of calculations are accurate. Electronic results transmission systems may be subject to hacking or cyberattacks, which can call the reliability of results into question. While many systems use paper results forms to verify electronically transmitted results, discrepancies between the two can raise questions about the results transmission system as a whole, particularly if the paper-based verification process takes time.

In annulling Kenya's 2017 presidential election, the Supreme Court recognized that no evidence had been put before the court to show that voter registration, voting or counting were not conducted in accordance with the law. However, the court found that "illegalities and irregularities" existed in the results transmission process that rendered the result of the election "opaque and unverifiable, and therefore indeterminate." The Independent Electoral and Boundaries Commission (IEBC) faced challenges in producing the actual results forms on which the electronic results were based within the legally specified 48 hours from the date of service.<sup>50</sup> Collecting those forms would have involved collecting materials from 40,883 polling stations across 292 constituencies<sup>51</sup> or providing direct access to sensitive servers containing electronic results forms. In its judgment, the court stated that IEBC's

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<sup>46</sup> According to the European Union (EU) Election Assessment (EAT) Final Report, the IEC fully invalidated 1,039 polling station results (4.6 percent) and partially invalidated the results in 10,546 (46.2 percent) polling stations during the national audit. EU EAT, *Islamic Republic of Afghanistan: Final Report Presidential Election*, 42 (2014), [http://www.eueom.eu/files/dmfile/FINAL-REPORT-EUEAT-AFGHANISTAN-2014-c\\_en.pdf](http://www.eueom.eu/files/dmfile/FINAL-REPORT-EUEAT-AFGHANISTAN-2014-c_en.pdf).

<sup>47</sup> IFES, *Electoral Integrity Assessment, Afghanistan 2015*, 4.

<sup>48</sup> *Bush v. Gore* 531 U.S.98, 105-06 (2000).

<sup>49</sup> American Bar Association Standing Committee on Election Law, *International Election Remedies*, 2016, 189-190.

<sup>50</sup> Section 11(1) of the Kenya Supreme Court (Presidential Election Petition) Rules 2017.

<sup>51</sup> "Statistics of Voters," Independent Electoral and Boundaries Commission, <https://www.iebc.or.ke/registration/?stats>.

inability to provide evidence to support the results left it with no choice but to accept the petitioners' claim that either the servers had been infiltrated and the data compromised, or that the IEBC itself had intentionally or unintentionally compromised the data."<sup>52</sup>

## **Campaign Finance Violations**

Violation of electoral laws can trigger an annulment of the result, including violations within the campaign period, on campaign spending or abuse of state resources that can materially skew the playing field ahead of elections. As mentioned above, if the vote margin between candidates in Mexico is less than five percent, elections can be annulled if it is proven through corroborated and objective evidence that a candidate's campaign overspent by five percent of the total amount authorized, illegally purchased media coverage, received unlawful donations or misused state resources. The abuse of state resources has also been raised in a number of recent, high-profile election results petitions, including in Kenya in 2017 and in Zimbabwe at the time of writing.

## **Developing Threats, Such as Cyberattacks and Disinformation**

Changes in information technology have created new risks to electoral integrity that are posing growing challenges for election administrators and democratic elections generally. It seems doubtful that annulment can be an effective remedy for these new problems, although they are likely to be raised with increasing frequency in the future as grounds in election petitions as candidates seek redress for perceived or actual manipulation in the election process.

The growing reliance on information technology by EMBs in areas such as voter data, voting machines, and results tabulation and transmission systems have made electoral administration more efficient but also more vulnerable to hacking and cyberattacks. While cyberattacks are common and affect most government institutions, the time-sensitive nature of elections, the high stakes involved and the scrutiny that surrounds election results makes election processes particularly vulnerable. For example, the intelligence report release by the U.S. Office of the Director of National Intelligence in January 2017 noted that Russia had conducted "cyber-intrusions" into various election platforms of state and local electoral boards ahead of the 2016 elections, as well as hacking email accounts of political party leaders to release information discrediting one candidate in the presidential election.<sup>53</sup> Where such cases result in serious disruption to voting or the calculation and announcement of results, gathering evidence about the nature and impact of such activities can be difficult.

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<sup>52</sup> See section 299 of *Odinga and Musyoka v. IEBC et al.* (Supreme Court of Kenya 2017): "The IEBC in particular failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the petitioners' claim of hacking into the system and altering the presidential election results and its servers with Forms 34A and 34B electronically transmitted from polling stations and CTCs."

<sup>53</sup> See Office of the Director of National Intelligence, *Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution*, 3, [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

The proliferation of non-traditional sources of news and the growth of social media as a mechanism for distribution of information has had both positive and negative effects on democratic self-government. On the one hand, new technologies have made it easier to network and share information, especially for people without access to traditional forms of media. At the same time, it is clear that this new openness has facilitated the spread of false or inflammatory material that can do real harm to dialogue and reasoned decision-making. For example, in the 2014 Indonesian presidential election, a hoax news story that one of the candidates was not Muslim, but was secretly Christian, spread widely. While the candidate in question went on to win the election, it is troubling that such a falsehood was able to gain such currency. These kinds of hoaxes and fake news present particularly difficult challenges for election administrators and adjudicators in strongly polarized polities, where there may be little agreement on basic facts to begin with. Even if it can be proven that false information was widely distributed and that some voters were influenced, annulment might not be an appropriate remedy. More research is needed to identify and test possible responses to these kinds of problems.

The inadequacy of annulment as a remedy for these emerging threats to electoral integrity argues in favor of a focus on preventative measures; EMBs and other authorities should make every effort to limit the impact of these problems before each election. In particular, EMBs should identify, minimize, and mitigate the risks inherent in using technology for electoral purposes, and the International Foundation for Electoral Systems (IFES) has developed a Holistic Exposure and Adaptation Testing process that examines and addresses five different types of exposure related to the use of election technology: human, political, procedural, legal and technological.

## Referendum Irregularities

Referendums, which often run concurrently with candidate elections, are exposed to the same integrity vulnerabilities as general elections. Although referendums may be focused on an issue, rather than on a specific candidate, they are regularly focused on fundamental political or constitutional changes. Hence, the annulment remedy should be available and the same procedural considerations (discussed below) should apply.

The Venice Commission, in the *Code of Good Practice on Referendums*, states that “in the event of a failure to abide by the statutory requirements, for instance, if the cap on spending is exceeded by a significant margin, the vote must be annulled,”<sup>54</sup> which is closest to the “prescriptive” approach outlined in the first section of this paper.

Following the U.K. Brexit referendum, the U.K. Electoral Commission electoral commission found that the “Vote Leave” campaign had violated the rules by, among other things, exceeding spending limits,<sup>55</sup>

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<sup>54</sup> Jon Danzig, “The EU referendum must be annulled,” EUROPE: A blog by Jon Danzig, July 17, 2018, <https://eu-rop.e.ideasoneuropa.eu/2018/07/17/the-eu-referendum-must-be-annulled/>.

<sup>55</sup> Emma Graham-Harrison, “Vote Leave broke electoral law and British democracy is shaken,” *The Guardian*, July 17, 2018, <https://www.theguardian.com/politics/2018/jul/17/vote-leave-broke-electoral-law-and-british-democracy-is-shaken>.

which led some stakeholders to call for the annulment of the result and a revote.<sup>56</sup> However, it seems unlikely that these violations would support the annulment of results under the test set out in *Morgan v. Simpson* (discussed above). In Turkey, a 2017 constitutional referendum led to the adoption of a set of amendments to the Constitution that expanded the powers of the president.<sup>57</sup> Those in opposition to the referendum, along with international observers, claimed that a significant number of unstamped ballots were counted, which was contradictory to the law and possibly the result of fraud.<sup>58</sup> International observers noted that the vote had been carried out in a political environment in which fundamental rights and freedoms had been curtailed, as Turkey has technically been in a state of emergency since the coup attempt the previous year.<sup>59</sup> The main opposition party lodged an appeal with the European Court of Human Rights (ECtHR) seeking to annul the results of the petition, after appealing unsuccessfully to the Constitutional Court of Turkey.<sup>60</sup> However, the ECtHR ruled that the petition was inadmissible as the provisions on “free elections” in the European Charter could not be interpreted as extending to referendums.<sup>61</sup> However, as we state above, referendums are often exposed to the same integrity vulnerabilities as general elections, and the annulment remedy should be available for referendums on the same grounds as other elections.

#### IV. Procedural Considerations

Given the high stakes in annulment cases and the risks of ill-conceived or bad-faith annulment decisions, it is critically important that the procedures governing such cases be well-designed and established well in advance of the start of an electoral process. Key procedural considerations include: who has the burden of proof, the standard of evidence that will be applied, and the timelines that govern the process.

#### Presumption of Validity and Burden of Proof

The existence of unsubstantiated challenges to election results represents a challenge to the legitimacy of elected officials and the credibility of elections themselves. For that reason, official election results

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<sup>56</sup> Laura Kuenssberg, “Vote Leave broke electoral law, Electoral Commission expected to say,” *BBC News*, July 4, 2018, <https://www.bbc.com/news/uk-politics-44704561>.

<sup>57</sup> Kareem Shaheen, “Turkish election board rejects call to annul referendum result,” *The Guardian*, April 19, 2017, <https://www.theguardian.com/world/2017/apr/19/turkish-election-board-recep-tayyip-erdogan-referendum>; Commission on Security and Cooperation in Europe, *Highlights of Conclusions and Recommendations Drawn from OSCE Election Reports: October 2016 to September 2017*, 14-15, <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Addendum%20to%20Report%20-%20Democratic%20Elections.pdf>.

<sup>58</sup> OSCE/ODIHR, “Republic of Turkey Constitutional Referendum, 16 April 2017: Limited Referendum Observation Mission Final Report,” June 22, 2017, <https://www.osce.org/odihr/elections/turkey/324806>.

<sup>59</sup> Office of the United Nations High Commissioner for Human Rights, *Report on the Impact of the State of Emergency on Human Rights in Turkey*, March 2018, [https://www.ohchr.org/Documents/Countries/TR/2018-03-19\\_Second\\_OHCHR\\_Turkey\\_Report.pdf](https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf).

<sup>60</sup> “Turkey Opposition Appeals Erdogan’s Referendum in EU Court,” *Deutsche Welle*, July 4, 2018, <https://www.dw.com/en/turkey-opposition-appeals-erdogans-referendum-win-in-eu-court/a-39536871>.

<sup>61</sup> *Cumhuriyet Halk Partisi v. Turkey* (application no. 48818/17).



typically enjoy a presumption of validity and challengers bear the burden of showing why they should be set aside.<sup>62</sup> Following the 2017 Liberian presidential election, for example, the country's Supreme Court found that while the appellants had demonstrated that some violations existed in the election process, they had failed to discharge their burden under the law to prove that these violations were outcome determinative.<sup>63</sup>

While election results enjoy a presumption of validity in virtually all jurisdictions, the extent of a challenger's burden of proof varies depending on the jurisdiction and the circumstances of the challenge. In many cases it will be difficult or impossible for a challenger to obtain all the evidence needed to support a claim. Because an electoral process is a technically complex operation, relevant evidence, such as results sheets, rejected ballots, official forms and voter registry documents, may not be easily obtainable by an individual outside the EMB, or at least not within the tight deadlines that usually are set for election petitions. Indeed, as discussed further below, it is often difficult for EMBs themselves to obtain such evidence on short notice. A petitioner is typically required to produce evidence supporting his or her claim at the time of filing, and in some countries the complaint will not be considered valid if insufficient evidence is submitted, or it may be dismissed without the adjudicatory body seeking further evidence via an investigation.<sup>64</sup>

For these reasons, legislature and courts in many jurisdictions have developed rules of evidence that balance the presumption of validity against the need to get at the truth. In some European civil law jurisdictions, the presumption of validity is usually expressed as a requirement for a plaintiff to establish a *prima facie* case, following which the courts or electoral authorities have the authority to undertake further investigation.<sup>65</sup> In some common law jurisdictions, the plaintiff's burden does not extend to all elements of a challenge in all circumstances. For example, in the words of the Supreme Court of Canada:

“an applicant who has led evidence from which an irregularity could be found will have met his or her *prima facie* evidentiary burden. At that point, the respondent runs the risk of having the votes in issue set aside, unless he or she can adduce or point to evidence from which it may reasonably be inferred that no irregularity occurred, or that despite the irregularity, the votes in question were nevertheless valid.”<sup>66</sup>

Requiring challengers to establish a basic case at the time of filing is not unreasonable, as in IFES' experience globally, frivolous complaints and false allegations are common in elections. Indeed, many systems have expedited procedures for dismissing claims where insufficient evidence has been provided to deal with such cases. But such rules must be balanced against the need to ensure that legitimate

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<sup>62</sup> Chad Vickery ed., *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)*, IFES, 46, [https://www.ifes.org/sites/default/files/guarde\\_final\\_publication\\_0.pdf](https://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf).

<sup>63</sup> “Liberia court authorises presidential runoff with conditions,” *The Punch newspaper*, December 7, 2017, <https://punchng.com/liberia-court-authorises-presidential-runoff-with-conditions/>.

<sup>64</sup> Rule 11(b)(3) of the U.S. Federal Rules of Civil Procedure provides that a complainant must certify that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”

<sup>65</sup> Venice Commission *Report on the Cancellation of Election Results*, CDL-AD(2009)054, paras 65-66, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)054-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)054-e)

<sup>66</sup> *Opitz*, para 61.

complaints are heard and addressed. In *Namat Aliyev v. Azerbaijan*, the ECtHR charged domestic courts with the responsibility of taking reasonable measures to investigate alleged irregularities when the evidence provided by an applicant is insufficient to decide the case but nonetheless strong enough to warrant additional inquiry.<sup>67</sup>

In Kenya, for post-election petitions the burden is on the petitioner to prove his or her case. However, depending on the effectiveness with which s/he is able to do so, the evidential burden can be lessened to ensure a legitimate grievance is properly investigated. In some cases, if a legitimate grievance is demonstrated, the burden can shift to the EMB. This approach helps to ensure any inequalities in terms of access to evidence can be mitigated. The challenge to the results 2017 Kenyan presidential election is an instructive example. In that case, the court held that:

“Once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.”<sup>68</sup>

This shift in the burden was critically important to the success of the challenge, as the court was ultimately “satisfied that the petitioners have discharged the legal burden of proof as to squarely shift it to the [EMB and president-elect]. We are also of the firm view that having so shifted, the burden has not in turn been discharged by the [EMB and president-elect] as to raise substantial doubt with regard to the petitioners’ case.”<sup>69</sup>

These different approaches to the burden of proof reflect different balances between the presumption of validity and the need to get at the truth. A stronger presumption of validity may be most suitable in cases where the rules of evidentiary discovery give challengers the tools they need to gather the evidence required to make their cases. Where systems of evidentiary discovery are weak, or where courts are unable to compel defendants or third parties to comply with demands for information, a more flexible standard may be appropriate.

Because the gathering of evidence in annulment cases, and election cases generally, can be extremely difficult, the EMB’s role can be critically important. In some cases, the EMB will be the only party in a position to investigate irregularities. In other cases, the EMB may be best able to determine the impact

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<sup>67</sup> *Namat Aliyev*, supra 65, paras 88-89. “[i]n terms of initial evidence necessary for examination of this specific issue, the courts had to do nothing more than request the electoral commissions to submit those protocols to them for an independent examination. If such examination indeed revealed inconsistencies, a more thorough assessment of their impact on the election results would be necessary.”

<sup>68</sup> *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others* (2017).

<sup>69</sup> *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others* (2017).

of the irregularity. In Australia, the EMB has a formal and permanent role as a source of information and expertise in challenges to election results:

“The Australian Election Commission (AEC) has since 1983 clearly been accepted by the High Court as appropriately being involved in matters involving arguments about whether facts as pleaded disclose any illegal practice that may have led to the results of the election being likely to have been affected. This test necessarily involves the Court having regard to expert evidence from the AEC about the election and counting processes.”<sup>70</sup>

In the U.K., the traditional rule that the plaintiff bears the burden of proving all the elements in an election petition was questioned in a 2012 report by the U.K. Electoral Commission,<sup>71</sup> which asked whether it might make sense for the Electoral Commission to be given an investigatory role in election petitions since in many cases it is difficult for individual plaintiffs to investigate effectively. The paper also noted that since election petitions raise issues of interest to the wider public, it is in the public interest that all relevant evidence comes before the adjudicator.

EMBs should generally play a leading role in election investigations because they are better equipped than the police in terms of technical knowledge of election administration and access to the relevant evidence. Additionally, they should have authority to decide which claims to investigate – as long as the EMBs are not corrupt, and as long as they process claims in an unbiased manner irrespective of their source, and a right of appeal is in place. However, to play this role, the EMB must be equipped to properly conduct election investigations within tight timelines, and to handle and compile evidence appropriately to ensure it is admissible. As pointed out in general Comment 31 to the International Covenant on Civil and Political Rights: “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>72</sup>

## Standard of Evidence

The collection and corroboration of evidence is fundamental in an adjudication process that leads to the invalidation of votes.<sup>73</sup> There are varying degrees to which irregularities must be proven to the court in order to be considered as proven in the case.<sup>74</sup> Different jurisdictions establish different standards of evidence (i.e., the degree of certainty required for a court to accept a fact as proven) in challenges to election results. Which standard is used is based on many factors: for example, the legal traditions of the

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<sup>70</sup> Paul Pirani, ‘Elections and Administrative Law’, Paper to the AIAL Forum No. 68, Canberra, 2011 p. 38, available at <http://www.austlii.edu.au/au/journals/AIAdminLawF/2012/2.pdf>. See also by s. 359 of the *Commonwealth Electoral Act* which allows the AEC to be added as party to legal proceedings in which the validity of election results is challenged.

<sup>71</sup> *Challenging Elections in the UK*, [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0010/150499/Challenging-elections-in-the-UK.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf).

<sup>72</sup> IFES has outlined key principles for election investigations in a forthcoming publication *Standards, Techniques and Resources for Investigating Disputes in Elections (STRIDE)*.

<sup>73</sup> IFES and DI, *Election Audits: International Principles that Protect Election Integrity*, April 2015, 9.

<sup>74</sup> Vickery ed., *GUARDE*, 46 (Standards of Evidence)

county, the nature of the allegation being made, the remedy being sought, and the nature of the evidence to be introduced at trial.<sup>75</sup> There is no international consensus as to which standard must be met in order to prove electoral fraud, malfeasance or criminal malpractice.<sup>76</sup> However, there are three standards that are typically applied in election cases: preponderance of the evidence, evidence beyond a reasonable doubt, and clear and convincing evidence.<sup>77</sup>

<b>Preponderance of evidence</b>	One party has offered evidence that seems more likely to be true than not.
<b>Clear and convincing evidence</b>	Evidence must show that it is substantially more likely than not that the asserted claim is true.
<b>Evidence beyond a reasonable doubt</b>	Evidence of such a convincing character that one can rely and act upon it without hesitation.

“Preponderance of the evidence” is also called “greater weight of the evidence” or “balance of probabilities,” and is the idea that one party has offered evidence that seems more likely to be true than not.<sup>78</sup> When considering evidence under this standard, there must be a greater than 50 percent likelihood in support of a particular question of fact. This is the general standard that is applied to civil actions in many, if not most, legal systems.<sup>79</sup> Since election complaints are usually treated as civil cases, some jurisdictions may apply this standard to election disputes. It is debatable, however, whether the preponderance of evidence standard is appropriate in a case considering annulment of an election. Given the importance of speedy determination of election results and the potential costs associated with nullification, the public interest might best be served by a higher standard of proof.

On the other end of the spectrum, evidence beyond a reasonable doubt is generally the standard that must be met by the prosecution in a criminal case, but on rare occasions it is applied in civil cases. Under this standard, the applicant is required to introduce evidence of such a convincing character that one can rely and act upon it without hesitation. It does not, however, mean absolute certainty.<sup>80</sup> In at least one U.S. election case, the court applied a beyond a reasonable doubt standard when a stricter standard than preponderance of the evidence was required.<sup>81</sup> Using a reasonable doubt standard in election cases may be appropriate when the remedy is being sought in conjunction with criminal prosecution. The U.K. and

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid. See also Huefner; see also *Prodan v. Moldova*, ECtHR., App. No. 49806/99, Judgment of April 25, 2006 (discussing all three standards’ use in international law); *In re Gen. Election*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992) (comparing proposed use of preponderance of evidence and clear and convincing evidence standards in U.S. election case).

<sup>78</sup> Vickery ed., *GUARDE*, 46.

<sup>79</sup> *Id.*; see also *Prodan v. Moldova*, ECtHR, App. No. 49806/99, Judgment of April 25, 2006 (discussing all three standards’ use in international law); *In re Gen. Election*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992) (comparing proposed use of preponderance of evidence and clear and convincing evidence standards in U.S. election case).

<sup>80</sup> Lord Denning indicated in *Miller v. Minister of Pensions* that beyond a reasonable doubt does not “need to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt.” *Miller v. Minister of Pensions*, [1947] 2 All E. R. 372, 372-74.

<sup>81</sup> *Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994).

various commonwealth countries that follow the U.K.'s approach to election challenges require that challenges based on allegations of illegal conduct by the winning candidate must be proven to the highest standard. Nigeria applies the reasonable doubt standard even in civil actions if the civil suit would turn on the question of criminal guilt.<sup>82</sup> But some jurists and justices in Nigeria have warned that the “percentage of otherwise meritorious election cases which have been thrown out by our election courts and tribunals, on the basis . . . that the petitioners failed to prove the allegations beyond a reasonable [doubt] is very frightening.”<sup>83</sup> In other words, the reasonable doubt standard may be too strict to apply in typical election annulment cases, as opposed to criminal prosecutions for electoral offenses.

The third standard, clear and convincing evidence, represents a middle point between the other standards. It means that the proponent of the evidence must show that it is *substantially* more likely than not that the asserted claim is true.<sup>84</sup> What “substantially” means is not well-defined, but it is universally accepted to be more rigorous than preponderance of the evidence and less rigorous than proof beyond a reasonable doubt. It can be useful to think of this as requiring 75 percent certainty. In American jurisprudence, the clear and convincing standard originated as the standard of evidence in civil cases alleging fraud or quasi-criminal conduct by the defendant, and has since been extended to cases involving fundamental human rights and many kinds of situations where losing would cause the defendant to suffer irreparable non-monetary harm.<sup>85</sup> For example, the clear and convincing evidence standard has been applied in U.S. election cases involving restrictions on campaign advertising and campaign finance because the actions of the regulatory bodies implicate prior restraints on free speech rights.<sup>86</sup>

In Thailand, the Organic Act for the election of members of the Parliament and of the Senate states that the Election Commission will look at convincing evidence to determine if, for example, there has been a violation of the rules on electoral expenditure and means of election campaigns, or, if any candidate has committed a dishonest and unfair act in the conduct of the elections.<sup>87</sup> Similarly worded standards have been adopted in many international cases involving human rights.<sup>88</sup> In *Raila Amolo Odinga & Another v.*

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<sup>82</sup> See, e.g., Evidence Act (1990), Cap. (112), § 138(1) (Nigeria) (“If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal it must be proved beyond a reasonable doubt.”), <http://www.nigeria-law.org/EvidenceAct.htm#ProductionAndEffectOfEvidence>.

<sup>83</sup> *Mimiko's Case and the Issues of Burden and Standard of Proof in Election Petitions*, Compass Nigeria, February 17, 2010.

<sup>84</sup> See, e.g., *Grogan v. Garner*, 498 U.S. 279 (1991). The modern definition of clear and convincing evidence evolved in the U.S. legal system, but has since been adopted in international contexts as well.

<sup>85</sup> *Brandt Distrib. Co. v. Fed. Ins. Co.*, 247 F.3d 822 (8th Cir. 2001); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

<sup>86</sup> *Fulani v. Fed. Elections Comm'n*, 147 F.3d 924 (D.C. Cir. 1998); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995); *Pestak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991).

<sup>87</sup> Organic Act on the Election of Members of the House of Representatives and the Installation of Senators, arts. 57, 103, 107 (2007) (Thailand) (“In the case where during a period of time under Section 49 there is convincing evidence that any person gave, offered to give or promised to give money or properties for the benefit of inducing a voter to vote for any candidate or political party...”).

<sup>88</sup> Terminology largely synonymous with clear and convincing evidence used by various international courts includes references to the need for evidence that is “clear and cogent” or “cogent and compelling,” as well as stipulations that tribunals needed to be “convinced.” See, e.g., HCJ 6659/06 *Anonymous v. The State of Israel* [2008] (Isr.) (applying “clear and convincing” standard); HCJ 11225/03 *Bishara v. Att’y Gen.* [2006] (Isr.) (requiring

*Independent Electoral Commission & 2 Others*, the Supreme Court of Kenya held that in electoral disputes, “the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.”<sup>89</sup> Since this case did not turn on allegation of fraud or other criminal misconduct, the court applied the intermediate standard of clear and convincing evidence. In its judgment on the 2001 Zambian presidential election petition against President Levy Mwanawasa, the Supreme Court of Zambia referred to its previous case of *Lewanika v. Chiluba*, which affirmed that “it cannot be seriously disputed that Parliamentary Election Petitions have generally long required to be proved to a standard higher than on a mere balance of probability.”<sup>90</sup> Similarly, in a presidential election petition where the ruling of the court can affect the governance of the nation and the deployment of constitutional power and authority, “a fairly high degree of convincing clarity is required.”<sup>91</sup> The gravity and public importance of certain issues involved in a complaint can require that the standard of proof be raised.<sup>92</sup>

The choice of what standard to apply to each type of electoral complaint might be made by the EMB, set by legislation, or even mandated in a national Constitution. Regardless, the exact standard to be applied in any particular case should be established in advance of the hearing rather than chosen by the arbiter on an ad hoc basis.<sup>93</sup> Given the differences between legal systems, as well as the different kinds of issues raised by different cases, a diversity of approaches to the standard of evidence required in annulments around the world is to be expected.<sup>94</sup> However, there remains a strong argument that, given the serious consequences of annulment, a higher standard of proof should be required to overturn the results of an election. A number of commentators have argued for “clear and convincing” as the appropriate standard in challenges to election results, and this standard also seems to have become the default standard of evidence in international civil law.<sup>95</sup>

## Timeline

Even more than other election-related cases, challenges to election results need to be resolved quickly to preserve the integrity of the election outcome and to avoid prolonged uncertainty around governance. Failure to establish the results of an election can delay the formation of legislatures and

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“clear, convincing, and unambiguous evidence”); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ. 14 (June 27) (applying an unnamed standard between reasonable doubt and preponderance of the evidence), <http://www.icj-cij.org/docket/files/70/6503.pdf>.

<sup>89</sup> *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others* (2017), para 152.

<sup>90</sup> *Lewanika v. Chiluba*, (1998) ZLR 86 [SC] (Zam.), <http://www.saflii.org/zm/cases/ZMSC/1998/11.pdf>; see also *Mazoka v. Mwanawasa*, (2002) S.C.Z./EP/01/02/03/2002 (Zam.).

<sup>91</sup> *Mazoka v. Mwanawasa*, (2002) S.C.Z./EP/01/02/03/2002 (Zam.).

<sup>92</sup> *Bater v. Bater*, [1951] P. 35, 37 (C.A.) (U.K.).

<sup>93</sup> See *supra* Part 2 (describing the international standard of a clearly defined regimen of electoral standards and procedures).

<sup>94</sup> See discussion in GUARDE, 66.

<sup>95</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* 142 (2d ed. 1979); Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 *Fordham Int'l L.J.* 361 (1989); Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 *W. Va. L. Rev.* 933 (1987).



governments and exacerbate partisan tensions. For this reason, many jurisdictions have established special timelines and expedited procedures for handling such cases.

The suitability of a timeline in a particular jurisdiction will depend in part on the strength of the rule of law and, on the ability of litigants and adjudicators to gather the evidence necessary to resolve the dispute. The natural variability in timelines is undoubtedly why the Venice Commission has suggested only that judicial proceedings related to election results should be “as brief as possible.”<sup>96</sup>

In *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others*, the Kenyan Supreme Court pointed out that the resolution of challenges to election results, especially those involving recounts or the scrutiny of results, could not possibly be conducted in the 14-day period established by the law for verifying election results. The court was sharply critical of legislators for failing to extend this timeframe, since these problems had become clear following the 2013 election and had been raised by the judiciary with Parliament. The court asked Parliament to amend this deadline, stating that “the reasons for doing so are obvious.”<sup>97</sup> The importance of clear deadlines for resolving electoral disputes and establishing results are also demonstrated by the situation in Nigeria, where section 285 of the Constitution provides for 180 days for the trial of petitions at the election petition tribunals and 120 days at the appellate courts. The result of these rules is that more than two years after the 2015 general elections, some pre-election matters are still pending in the appellate courts.

In *Namat Aliyev v. Azerbaijan*, the ECtHR acknowledged the tension between a fair process and a fast process, with implications for the protection of due process in electoral cases. The court ruled that time limits designed to expeditiously resolve a case “may not serve to undermine the effectiveness of the appeal procedure, and it must be ensured that a genuine effort is made to address the substance of arguable individual complaints concerning electoral irregularities.”<sup>75</sup> In that case, the complainants were candidates in the 2005 parliamentary elections in Azerbaijan, who alleged that domestic authorities did not adequately investigate complaints of electoral irregularities, including because of very short deadlines. The ECtHR found that actions by the electoral commissions and domestic courts – including rejecting complaints, canceling a candidate’s registration, and annulling elections in certain constituencies without sufficient reason and without affording procedural safeguards to the parties – were in violation of Article 3 of Protocol No. 1 to the ECtHR, which guarantees “free elections.”

In summary, the law in each jurisdiction must strike a balance between the need for electoral violations to be investigated and addressed effectively, and the need for a speedy and final determination of election results.<sup>98</sup> Further, the laws governing the investigation and resolution of election petitions

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<sup>96</sup> Venice Commission, *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, 95, 52nd Sess., Op. No. 190/2002 (May 23, 2003). The Venice Commission points to two pitfalls in delaying and the resolution of an elections appeals process: “appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections.” *Id.*; see also Benjamin E. Griffith & Michael S. Carr, “Effective, Timely, Appropriate, and Enforceable Remedies,” in *International Election Principles: Democracy & the Rule of Law* 373-397 (John Hardin Young ed., 12th ed., 2009), and GUARDE, 46 (Standards of Evidence).

<sup>97</sup> *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others* (2017).

<sup>98</sup> IFES, *STRIDE*, 25.

should not be unnecessarily strict or prescriptive, as different claims call for different levels of scrutiny and investigation.<sup>99</sup> Laws should be flexible enough to account for this difference and other considerations at play, such as a heavy caseload on the EMB or resources available to investigate claims.<sup>100</sup>

## V. Conclusion

Contentious challenges to election results are not a strictly new phenomenon; however, candidates around the world are approaching these disputes in more sophisticated ways that increasingly complicate the jobs of EMBs and adjudicators. The rapid pace of change in information technology has also created new vulnerabilities to electoral integrity that EMBs, investigators and courts are generally not prepared to address in election annulment cases. In many cases, legal frameworks are not clear on when the annulment of results is an available remedy, which makes the outcome of challenges to results more difficult to predict and also, perhaps, less definitive from a political point of view. Courts and other election adjudicators may also be unprepared for the complexity, short timelines, and intense public scrutiny that characterize challenges to election results. Against that backdrop, the focus of most election administrators on Election Day is, reasonably, on polling and collecting and announcing electoral results, and they may not be thinking about how their actions might be challenged in the following days.

Every jurisdiction should clearly define what is required to annul an election *before* the election process begins. Countries must determine if they will apply a *prescriptive approach*, in which annulment depends on the presence of certain kinds of irregularity, without regard to their impact on the outcome of the election; an *outcome-determinative approach*, in which fraud or irregularities can lead to the annulment of an election, if they affect the result of the election (i.e., the allocation of mandates); or make a determination of the approach depending on the nature of the irregularity in question. Once the fundamental annulment threshold is defined, other core questions must be answered to address who holds the burden of proof, if there are instances when this burden will shift to the state, which standard of evidence will apply, how investigations will take place, what type of evidence will be required, and the timeline by which all parties must abide.

Amid the backdrop of increasing global challenges to democracy, election contestation has become more common, and losing candidates are increasingly sophisticated in their efforts to cast doubt on election results. This raises a fundamental question with respect to petitions seeking an annulment of an election outcome: when is an election good enough? To be able to respond effectively to this question, election administrators and election dispute adjudicators must clearly define why and how elections will be annulled before elections take place and provide training and education of stakeholders in the process. This is an essential step toward building trust in election results and responding to the new challenges faced by election dispute adjudicators.

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.



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