Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections

GUARDE

Edited by Chad Vickery

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International Foundation for Electoral Systems

Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections

(GUARDE)

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2011

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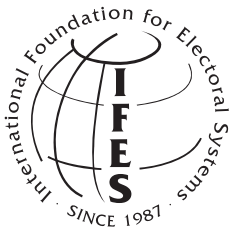

Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)

Edited by Chad Vickery

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Letter from the President/CEO

Since 1987, the International Foundation for Electoral Systems has supported the growth of democratic stability around the world, primarily by focusing on increasing the credibility and effectiveness of Election Day administration. As the global community has become increasingly interconnected, and election events from Florida to Afghanistan and from Minnesota to the Ivory Coast have captured the attention of the general public, there is an increased need to ensure that elections are free, fair, and credibly administered. To accomplish this, the complaints adjudication process must be transparent and reliable, and the final outcome must be accepted by all losing parties, the media and, of course, the voters.

Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE) was conceived and written with that objective in mind. We hope that it will provide election officials and other key stakeholders with information on international standards and best practices in complaints adjudication to ensure that the process is credible and accepted by the public.

GUARDE is the culmination of a two-year long effort at IFES, funded by the United States Agency for International Development (USAID) as a part of technical leadership programming by the Consortium for Election and Political Process Strengthening (CEPPS). As a member of CEPPS, IFES works to employ innovative techniques to support partners as they pursue reform objectives. Key among these objectives is the need for practical tools to ensure that electoral justice is pursued in a fair, effective, and credible manner.

My most sincere thanks go out to the enthusiastic team of writers, editors, and expert reviewers who produced this guidebook. Their dedication to addressing this important and complex issue has ensured that this publication will have an enduring usefulness for election stakeholders around the globe.

Bill Sweeney
IFES President/ CEO

Acknowledgements

The publication of this guide is the result of several years of work and the exceptional dedication of a large team of experts, editors, researchers and reviewers. I believe we have met our goal of giving practitioners both the normative justification and practical tools they need to design, justify, and implement effective electoral justice programs.

In Chapter 1, we present seven standards based on international public law obligations that will give practitioners and other stakeholders the normative foundation or signposts needed to design transparent, consistent and effective electoral complaints adjudication systems. Several people contributed to the drafting of this chapter by providing a great deal of research, guidance and debate about the definition of standards and the arguments that undergird each of them. This team included Typhaine Roblot, Jeremy Hunt, Jennifer Mishory, Erica Shein, and Bob Dahl.

Chapter 2 offers those who are either drafting or analyzing electoral complaints adjudication legal frameworks the basic legal components they need to consider. I want to thank Bob Dahl for capturing, on paper, his unique ability to analyze both the macro issues one must consider when undertaking legal review and his respect for the practical implications of reforms that can be proposed in particular circumstances. I also want to thank Mike Clegg for his sage advice, important additions and thorough review of this chapter that helped us to contextualize and enrich the discussion.

Chapter 3 strives to provide tools for designing and implementing effective complaints adjudication training programs. I must thank Steven Gray for providing this framework, buttressed by a solid training methodology. I also want to thank Linda Edgeworth for reviewing and adding to this chapter several elements that will help to focus training programs on the particularities associated with complaint adjudication systems.

Because of the importance and unique nature of training arbiters in the electoral complaints process, the fourth chapter uses case studies and comparative analysis to give practitioners the information they need to

consider when designing and implementing arbiter training programs. I specifically want to thank our writers from the Mexican Tribunal Electoral del Poder Judicial de la Federación (TEPJF) for discussing their unique and extensive international experience in this chapter. I also want to thank Luie Guia and Vincent Yambao for documenting the process in the Philippines. Both examples provide those working in this arena with case studies to inform, compare and contrast with their own experience.

Chapter 5 focuses on civic and voter education, a topic that is largely overlooked by donors, practitioners, tribunals and election management bodies, but is as important as any other element that is typically discussed in relation to effective complaint adjudication systems. I want to thank the authors of this chapter, Catherine Barnes and Grant Kippen, for successfully combining several years of international development experience with a deep understanding of effective civic education programming and firsthand knowledge of the challenges faced by those sitting on electoral complaints adjudication bodies. I also want to thank Catherine for developing the practitioner checklist at the end of this section, which served as a model that we applied to all of our other chapters.

The final chapter, focusing on alternative approaches to electoral complaints adjudication, was in many ways a maiden voyage and we were not sure where it would take us. With that in mind, I owe much gratitude to John Hardin Young for guiding this discussion with his in-depth knowledge of alternative dispute resolution, administrative law and electoral law; David Kovick for contributing his extensive international experience in alternative dispute resolution; and Vincent Tohbi for tying our theoretical approaches to real world examples.

In the last stage of this effort, we assembled a panel of experts to conduct a thorough final review of GUARDE: Barry Weinberg, Linda Edgeworth, and Ms. María del Carmen Alanis Figueroa, Magistrate-President of TEPJF. These three reviewers provided a great deal of insight and advice, based on their extensive experience in this field, which helped us clarify contentious issues. Their reviews also provided an invaluable check on the quality of our work.

I also want to thank Mary Kelly, Michael Svetlik and Bill Sweeney for their steadfast support of this project through very long process and Laura Osio for helping shape a manuscript into a document ready to publish as a text.

Finally, although already mentioned above, I would like to once again express my gratitude to Erica Shein, Jeremy Hunt, and Typhaine Roblot. They have contributed to this process in many ways, by helping me form abstract ideas into a concrete framework, drafting sections, researching obscure points of law, supporting our authors' work, editing numerous draft documents and finalizing our manuscript for publication. I can confidently say that GUARDE would not have been published without the input from their creative and astute minds, their tenacity in pushing this process along and their patience in working with a very busy, and sometimes distracted, editor.

I hope our work - as presented in this guide - will positively contribute to the debate surrounding the standards that apply to electoral complaint adjudication systems and will help practitioners develop and implement effective and sustainable electoral justice programs.

Chad Vickery
IFES Director, Europe & Asia

About the Contributors

Editor

Chad Vickery is a legal and international election administration expert with 17 years of experience in projects that worked to strengthen democracy and governance in transitioning societies. He has extensive experience in designing and managing election complaint adjudication programs, providing comparative legal analysis, and working on elections and rule of law programs throughout South Asia, Southeast Asia, Eurasia and the Middle East. He holds a Master's degree in International Relations from Georgetown University, a Juris Doctorate from the Catholic University of America with a concentration in comparative and international law, and a Bachelor's degree in Political Science from the University of Washington. He is a member of the Washington State Bar.

Chapter 2

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Michael Clegg is an expert in legal review and drafting of legislation. He has been involved with the process for more than three decades, having spent much of his career working with the Canadian House of Commons and Senate as both Parliamentary Counsel and as a private attorney. He has worked as an election administrator and monitor since the late 1980s, and has been a consultant for IFES in both Iraq and Afghanistan since 2005.

Chapter 3

Steven Gray has over 20 years of experience in training and 30 years of experience in monitoring and evaluating elections. He has developed and implemented election monitoring and training programs on four conti-

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Linda Edgeworth has nearly 30 years of experience with all aspects of the electoral process, including planning, executing, and managing technical requirements; developing and implementing procedural changes; and coordinating outreach and training with government agencies and the general public. She has been involved with domestic elections in the United States, as well as in three dozen countries around the world in more than a decade as an IFES election administration specialist.

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Chapter 5

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Grant Kippen has worked in the elections and democratic development field over the past 30 years. Mr. Kippen was first appointed by the United Nations to the Electoral Complaints Commission of Afghanistan in 2005 and subsequently re-appointed in 2009; both times being elected as its chairman by the consensus of its members. He has worked with governments, corporations and NGOs throughout North America, Europe, Asia, and the Middle East. Since 2003 he has been heavily involved with electoral reform and the establishment of civil society in Afghanistan. He has also worked with IFES in Pakistan, Egypt, Moldova, Georgia, Kosovo and Timor-Leste. Mr. Kippen is based in Ottawa, Ontario.

Chapter 6

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John Hardin Young has worked in election law since the 1970s, when he served as Counsel for the Virginia State Board of Elections. He has been actively involved in several prominent recounts, including the 1989 Virginia gubernatorial race between Douglas Wilder and Marshall Coleman and the 2000 Florida presidential recount. Mr. Young sits on the Advisory Committee for the Election Law Program at William & Mary School of law, where he also serves as an adjunct faculty member. He is currently counsel to Sandler, Rieff & Young, P.C. in Washington, D.C.

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Linda Edgeworth has nearly 30 years of experience with all aspects of the electoral process, including planning, executing, and managing technical requirements; developing and implementing procedural changes; and coordinating outreach and training with government agencies and the general public. She has been involved with domestic elections in the United States, as well as in three dozen countries around the world in more than a decade as an IFES election administration specialist.

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About IFES

The International Foundation for Electoral Systems (IFES) is the leading election assistance and democracy promotion non-governmental organization.

IFES promotes democratic stability by providing technical assistance and applying field-based research to the electoral cycle in countries around the world to enhance citizen participation and strengthen civil societies, governance and transparency.

Every IFES project is staffed by national and international personnel while partnering with local election management bodies and civil society organizations. This homegrown approach ensures that the expertise offered by IFES fits the needs of the country or client and the benefit of assistance outlasts the life of the project. Our work is nonpartisan and includes projects that:

- Help citizens participate in their democracies
- Increase politicians' accountability to the electorate
- Strengthen government institutions

Since its founding in 1987, IFES has worked in more than 100 countries — from developing to mature democracies.

IFES is registered in the United States as a 501(c)(3) organization.

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Foreword

"In a democracy, it is not the voting that matters, it is the counting."

Tom Stoppard, Jumpers (1972) (Act I)

Worldwide, the cry for reform and the establishment of democratic governments continued unabated as we passed through the first decade of the 21st Century. As we enter the second decade, these demands have become a full-throated, if not a thunderous, roar. Several reform movements have succeeded in removing long-term, well-established regimes that were unquestionably undemocratic. But an inevitable dilemma faces the people leading these reform movements — what comes next? The reality is that what comes next is often difficult — the establishment of a democratic form of government. An analogy from family life may be helpful in making my point. It is often much easier for family members to agree to tear down their old house than it is for them to agree upon the design for their new house. The challenge facing every successful reform movement is how to design a democratic government that actually works. Oftentimes the debate is as basic as the definition of a democracy. This debate, if not resolved quickly, can result in failure.

Democratic government is: "Government by the people, either directly or through representatives elected by the people." *Black's Law Dictionary*, 497 (9th ed. 2009). In essence, it is a government of, by, and for the people. Certain general principles are essential to a democracy. These principles include that all people are created equal and that all people are endowed with certain unalienable rights or freedoms. One of the most fundamental freedoms is the right to choose those in whom the people vest sovereign power. People want to live in a civil, orderly, democratic society with just laws that are uniformly enforced. To achieve this goal in a democracy, the people are willing to relinquish some individual freedoms. They are willing to cede some individual rights to persons they choose to put in a position of having sovereign power (e.g., public officeholders).

This willingness to grant sovereign power to those who hold public office is a key aspect of all representative democracies. But, as Lord Acton said more than a century ago, "Power tends to corrupt and absolute power corrupts absolutely."[1] Thus, for a democracy to succeed, it must not only have an institutionalized system to vest sovereign power in public officials, but just as importantly, it must have a means to peacefully revoke that limited grant of power. Such a system will hopefully avoid the corruption that Lord Acton feared.

The question then becomes how a democratic society establishes a system that allows for a peaceful implementation of change or, in essence, how a society can institutionalize the ability to have periodic, peaceful revolutions. The answer is the establishment of a system of regular, free, and fair elections where the people can vote for those in whom they want to vest sovereign power. The right to vote guarantees the people the right to participate in their government. Honest elections not only guarantee the right of the people to speak, but more importantly, they guarantee the people's right to be heard. A system of free and fair elections anticipates the need for change. Elections permit adjustments in the allocation of power and provide a method for a society to correct its mistakes. Thus, for a democracy to thrive there must be a valid means to vindicate each citizen's most important individual right — the right to vote.

It has long been recognized in the United States that "the right to vote freely for the candidate of one's choice, is the essence of a democratic society and any restriction on that right strikes at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 555, 84 S.Ct. 1362, 12 L.Ed.2d 500 (1964). This right to vote is precious. Palm Beach Circuit Court Judge Jorge Labarga, one of the judges involved in the 2000 Bush v. Gore presidential election dispute, said it well in one of his opinions rendered during the early stages of that election contest. Judge Labarga wrote:

[1] Letter to Bishop Mandell Creighton, 3 April 1887, in Louise Creighton, Life and Letters of Mandell Creighton (1904) vol. 1, ch. 13; cf. Pitt 576; 22.

> ". . . the right to vote is as precious as life itself to those who have been victimized by the horrors of war, to those whose not-too-distant relatives were prohibited from exercising the right to vote simply because of their race or gender, and to those who have risked it all . . . in order to one day exercise the right to vote."
>
> Charles L. Zeldon, Bush v. Gore: Exposing the Hidden Crisis in American Democracy, 76 (2010)

Any society that wishes to have a system of regular, free, and fair elections must acknowledge that such elections cannot exist without a commitment to the concept of the rule of law. Democratic governments exist and thrive in many different forms, forms that are frequently adjusted to the specific societal norms, cultural needs, and traditions of the people who compose that society. But, whatever form it takes, a democracy cannot exist unless there is a commitment to the rule of law. A government of, by, and for the people cannot flourish when some people are above the law.

Under a system governed by the rule of law, systems and procedures can be put in place before an election that will guarantee that the intent of the voters is accurately reflected in the outcome of the election. Laws, rules and regulations put in place before an election provide a template for these systems and procedures. The voters can be educated on how to properly cast their votes. Poll workers can be trained on the use of best practices to ensure that votes are properly cast and counted. Proper security measures can be put in place to secure the ballots once they are cast. Accountability by election officials can be enhanced by having systems that promote transparency. Experience has taught me that an essential component for accountability in an election is a written ballot. With a written ballot, the intent of the voter is verifiable. If the voters' intent is independently verifiable, when and if there is a recount or review of election procedures, accountability by election officials is enhanced and the possibility of fraud is decreased.

Despite all the laws, rules, regulations, and procedures put in place to promote regular, free and fair elections, there is no such thing as a perfect election. Things will go wrong. The unexpected will happen. Voting machines will malfunction, power outages will occur, people will make mistakes, and when the election is close, election challenges will be made. But, the fact that an election is not perfect does not mean it cannot be fair. When there is adequate preparation, education, and when clear standards are in place before the election, there can be transparency and accountability. If a culture is established where good people are empowered to do the right thing, most election problems can be resolved in a manner that gives each voter confidence that he or she had the opportunity to speak by casting a vote and that the vote was properly counted.

This leads to my final point about elections in a participating democracy. Not only must a citizen be able to speak (by casting a vote), but that citizen also must be heard (to have the vote properly counted). In a democracy, the right to have one's validly cast vote counted is as important as the act of voting itself. The right of suffrage can just as easily be denied, debased, or diluted by the failure to properly count the votes. As the playwright Tom Stoppard wrote, "In a democracy, it is not the voting that matters; it is the counting."

In essence, guaranteeing that a voter can both speak and be heard is what this book, *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections*, is about. It will help to provide the education, procedures, and skills necessary to enable good people to do the right thing — to ensure that not only will the people be able to speak by casting a valid vote, but they will be heard by having their intent properly recorded when their vote is counted. With this guarantee, a democratic society cannot only survive, it can thrive.

Paul H. Anderson
Associate Justice, Minnesota Supreme Court

When the fairness of elections is called into question, we need an effective process of complaints adjudication to sift the facts and determine whether proper election procedures were followed as prescribed in laws and regulations. If they were, then the election results reflected the will of the people. If not, then appropriate remedies are invoked to assure that the will of the people will be followed.

IFES has provided technical and logistical support in conducting democratic elections to countries worldwide. An important part of this work has been training commission members, lawyers, judges, civil society group members and members of the media in the legal and practical aspects of resolving election disputes under the rule of law.

IFES works one-on-one with representatives of countries' administrative, legislative and judicial branches and presents information by panels consisting of experts on international election law, and leaders of a country's interest and professional groups, to give stakeholders considered evaluations of the interaction between international standards and the country's own legal and administrative complaints adjudication mechanisms. Those presentations, and the discussions that follow them, provide stakeholders with a clear understanding of how to anticipate the issues that are likely to arise in an upcoming election, and how to handle them when they occur.

Beginning in 1965, my work with elections involved enforcing the U.S. Voting Rights Act and other U.S. voting rights laws. Since 1995, I have worked as an international election observer, and I have been a part of presentations and trainings on voting rights, legal procedures and election complaints adjudication in many countries on four continents. Those efforts resulted in the IFES publication of my book, *The Resolution of Election Disputes* in 2006, with a second edition in 2008.

It is with this background that I am so pleased to welcome IFES's new *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections* (GUARDE). The GUARDE manual provides read-

ers with the kind of understanding of election dispute resolution that you can otherwise only get from first-hand experience.

The goals, issues, problems, and techniques of election complaints adjudication are expertly set out and explained. From broad overviews of each topic to cogent illustrations of specific practices and procedures, GUARDE applies international standards to practical matters. In doing so, GUARDE highlights the most relevant topics involved in election complaints adjudication, and provides answers to the questions that election administrators, arbitrators and judges should be asking.

In short, I find that GUARDE provides an excellent compilation of the essential tools for creating systems in which to apply the principles of election complaints adjudication that are at the heart of my book.

Barry H. Weinberg
Former Acting Chief, Voting Section of the Civil Rights Division,
United States Department of Justice

INTRODUCTION

Ballot boxes containing ballots cast during the May 2010 elections in the Philippines, now subject of an election protest case, are sealed and retrieved to be brought to Manila for review by the House of Representatives Electoral Tribunal.

Introduction

Building upon 22 years of experience in elections, the International Foundation for Electoral Systems (IFES) gathered resources, experts, and data to compile a guide to election complaints adjudication. This guide seeks to advance United States Agency for International Development (USAID) and the Consortium for Elections and Political Processes Support (CEPPS) technical leadership in this area. It can be used to educate election administrators, the judiciary and the legal community, donors, and election stakeholders regarding effective mechanisms for resolving election disputes and complaints through both formal and alternative resolution mechanisms.

Because there is a great variety of election complaints adjudication processes in place throughout the world, any examination of a specific mechanism must begin with a look at how that country's system is organized, and how it relates to the entire electoral process. An adjudicatory body could be judicial, legislative or administrative in nature, or some hybrid. The body could be a permanent standing entity, or formed in anticipation of or as a response to each election as it takes place. It can be independent of other branches of the government, or it can be a special court or administrative agency within the government. Each of these considerations can color how the adjudicatory body will interact with the election laws and the system as a whole. There is sometimes a need for flexibility and creativity in the electoral complaints adjudication process to address the different types of electoral claims that exist. International standards in the adjudication of electoral complaints are of crucial importance; however, exceptional circumstances sometimes require great flexibility in their implementation as long as they remain within the minimum bounds of international standards.

There are some electoral irregularities in every major election, but they do not necessarily threaten the outcome of the elections. However, if such flaws rise to a level where the credibility and the legitimacy of the election are jeopardized, remedial measures should be taken in a timely and effective manner. Therefore, this guide will also help draw attention to the need to address election adjudication issues to enhance election credibility.

Readers of this guide should bear in mind two distinctions that affect election complaint adjudication: the nature and the seriousness of the complaint. Whether a complaint relates to large-scale concerns such as election outcomes, an allegation of criminal misconduct, widespread fraud or minor irregularities, or to smaller offenses like campaign rules, candidate certification, voter registration, or the placement of posters, the electoral complaints adjudication process will vary. Specifically, considerations about the nature and seriousness of a claim will affect the degree to which balance is maintained between the need for due process and for a speedy resolution. These distinctions can also require an adjudicatory body to accelerate or prioritize the claim, and they can affect the nature of the body which has jurisdiction to handle it.

Not only does an effective complaints adjudication system lend legitimacy and credibility to an election, it also serves as a peaceful alternative to the violent post-election responses all too common in emerging democracies. A strong mechanism proved indispensible in averting political catastrophe in the 2007 elections in Nigeria, as well as in the 2009 elections in Afghanistan.[1] Timor-Leste also provides a salient example of how a transparent and effective election complaints system can be used as a means to avoid electoral violence. One year before the national elections, poorly addressed grievances within the country's national defense forces triggered a crisis that severely shook public confidence in Timor-Leste's young democracy. Given the tense political atmosphere preceding the 2007 presidential and parliamentary elections, there was a crucial need to address legitimate election grievances and to communicate decisions to complainants.[2] Responding to the absence of a formal complaints process, IFES assisted the National Elections Commission (CNE) to design and implement an effective complaints processing system. This effort to strengthen the performance of the complaints process was an important

[1] Grant Kippen, Electoral Complaints Adjudication: An Object Lesson from Afghanistan, Monday Developments, Mar. 2010, at 17. The importance of avolding violence in emerging democracies is also underscored by the situation in Iraq: "'In the West, when your right is robbed, you go to the courts. But in Iraq, it's different — when your right is robbed, (you) resort to violence.'" Lara Jakes, Iraq's Sunnis Bracing for Chaos After Election, Associated Press, Mar. 2, 2010 (quoting Anbar Province First Deputy Governor Hikmat Jasim Zaldan commenting on impending parliamentary elections, scheduled for Mar. 7, 2010), *available at* http://www.heraldsun.com/printer_friendly/6548536.

[2] Mary Lou Schramm et al., IFES, Timor-Leste: Conflict Resolution and Electoral Assistance 11-13 (2008).

measure to prevent election grievances from becoming a catalyst for violence and disorder.

In contrast, the violence in Kenya following the 2007 presidential elections demonstrated the insufficiency of the electoral complaint mechanism.[3] The Kenyan constitution and the electoral law on presidential and parliamentary elections provided for the determination of challenges, but only after the results were announced. Moreover, as in many Commonwealth countries, the Kenyan courts had jurisdiction to adjudicate electoral complaints, but delays in ruling, corruption and an overall lack of competence undermined public trust in the judiciary. Much of the violence would probably have been avoided if principles and procedures to receive and hear the allegations of irregularities and fraud had been in place.[4]

Despite the universal importance of legal structure to deal with election complaints, the origination of these systems varies from country to country. Some countries, such as Ethiopia, respond quickly with ad hoc attempts to maintain electoral integrity after unexpected conflict arises. The 2005 Ethiopian elections were mired in alleged irregularities, and the election authority responded by creating committees to review complaints and investigate potentially meritorious allegations. The near-disaster in the 1994 Dominican Republican elections resulted in the quick implementation of an electoral complaints system that created a more stable election in 1996.[5] Other democracies, such as Uruguay and Brazil, have taken a longer-term approach, recognizing concerns of electoral corruption in their early history and thus making use of major

[3] Independent Review Commission on the General Elections, Kenya National Dialogue and Reconciliation ("Kriegler Commission"), Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 141 (2008) [hereinafter Kriegler Commission Report] ("[A] material contributor to the tension at KICC, broadcast live to the country, was the absence of an effective electoral dispute resolution mechanism to resolve the mounting challenges to the integrity of the results from Kibaki strongholds."), *available at* http://www.dialoguekenya.org/docs/FinalReport_consolldated.pdf; see also Christopher Fomunyoh, Center for Humanitarian Dialogue, Mediation des Conflits Electoraux [Mediation of Electoral Conflicts] 13-14 (2009) (discussing 2006 presIdential elections in the Democratic Republic of the Congo), *available at* https://www.ndi.org/files/Mediation_des_Conflits_Electoraux_FRE.pdf.

[4] Kriegler Commission Report, *supra* note 3, at 139.

[5] National Democratic Institute for International Affairs (NDI) & The Carter Center, The 1996 PresIdential Election in the Dominican Republic 45-46 (1998), *available at* http://aceproject.org/regions-en/countries-and-territories/DO/reports/Final percent20Report percent20Dominican percent20Republic percent201996.pdf/view.

constitutional or legislative junctures to codify more long-term electoral complaints mechanisms.[6]

This guide explores seven standards of election complaint adjudication that strengthen the fair handling of grievances, which in turn preserves the public's right to political participation and democratic representation. After establishing these seven standards, the guide moves from a theoretical framework to practical fieldwork, turning to experts in the field of international election complaint adjudication to discuss programmatic issues for implementing these standards. It is hoped that this exploration of principles and practice will serve as an important resource to law makers and election administrators as they consider their own election complaint adjudication processes and design new initiatives to strengthen this critical pillar of the election system.

A Note on Terminology

Throughout this book the authors use several phrases to describe the institutions and procedures employed within democracies to adjudicate election-related disputes, complaints, objections and alleged violations of election laws. The expression *election dispute resolution* (EDR) has gained some favor internationally for describing this topic. However, the word *dispute* suggests disagreements and competing claims that may only require an arbitrator or mediator to settle. Disputes of that nature are only one portion of election-related grievances, although an important part.

Disputes within EDR can also be interpreted as *challenges to election outcomes*, when the official election results are contested. These can be significant challenges for any EDR system. Often, a high court (Supreme

[6] In Uruguay, for example, electoral law provIding for an autonomous electoral body was drafted in 1924 and included in the 1932 Constitution, making it the oldest system in Latin America. Sara Staino, Uruguay: The Electoral Court — A Fourth Branch of Government? 1-2 (2006), *available at* http://aceproject.org/ero-en/regions/americas/UY/Uruguay_percent20The percent20Electoral percent20Court percent20- percent20A percent20Fourth percent20Branch percent20of percent20Government.pdf. In Brazil, the Superior Electoral Court, the highest institution of Electoral Justice, was created on February 24, 1932, but the Constitution of the New State, established by Getúlio Vargas in 1937, extinguished the Electoral Justice. And on May 28, 1945, the Decree Law 7586/1945 reestablished the Superior Electoral Court. History of the Superior Electoral Court, Superior Electoral Court, http://www.tse.gov.br/internet/ingles/institucional/o_tse.html (last visited Jan. 6, 2011) [hereinafter Brazil Superior Electoral Court].

Court, Constitutional Court or special electoral court) is the forum for resolving such claims, although in some countries an administrative body separate from the judiciary is assigned the task. In still other countries, directly challenging an election's outcome might not be permitted, with all election challenges and complaints handled by the regular criminal court system.

Other election disputes are often much less significant, such as determining which political party is permitted to campaign on a certain day or in a particular location according to electoral regulations. These less serious disputes may be decided by election commissions at a subordinate or local level.

The phrase *complaint adjudication* is another term used to describe the process for handling grievances raised by political parties, candidates, voters and other electoral participants. Complaints arising within the initial phases of an election, in the pre-election campaign period, or on polling day are generally objections to an alleged denial of rights (perhaps voter registration or candidate certification) or allegations of improper conduct (breaches of the election law, regulations or procedures) rather than merely disagreements or competing claims. These types of complaints often pose overwhelming problems for the election authorities, courts or other bodies that comprise the EDR system because of the substantial quantity and urgency of complaints arising during the compressed election timeframe. For the most part, "election complaints adjudication" can be seen as largely synonymous with EDR, but covering a wider range of situations and focused on the formal judicial or administrative process for resolving them.

Complaints of serious misconduct that constitute criminal violations of the election law (or related laws) may deserve consideration for *criminal prosecution.* Allegations of criminal misconduct are almost always directed to police, prosecutors and courts for investigation and potential prosecution — outside of an administrative system for EDR — although special electoral complaint bodies or judicial tribunals may be established that include criminal violations of the law within their jurisdiction.

The following chapters frequently refer to Electoral Management Bodies (EMBs), a catch-all term for the government agency or division responsible for organizing, coordinating, and overseeing the election process. The ex-

act nature of an EMB varies from country to country — it can be an independent agency, or part of a larger ministry or department. There may be one EMB overseeing all elections in the country, or every province, state or prefecture might have its own management body. The EMB may be responsible solely for election administration, or also tasked with tallying results and adjudicating complaints. In general, when the authors refer to EMBs, they are speaking of the agency that administers elections, which is generally presumed to be distinct from the election complaints adjudicatory body (due to the different functions that will be explored in this book).

1

INTERNATIONAL STANDARDS

Polling staff in Banda Aceh count votes in the presence of election observers during the 2009 Indonesian legislative elections.

International Standards in Electoral Dispute Resolution

> *An important safeguard of election integrity lies in an effective resolution of complaints . . . the Electoral Process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results, and so on.*[7]
>
> *- Lady Justice Georgina T. Wood, Chief Justice of the Supreme Court of Ghana*

Throughout the past two decades, IFES has been dedicated to providing technical elections assistance to countries throughout the world. During this time, it has become clear that Lady Justice Wood is correct in her assertion: an effective resolution of complaints is integral to guaranteeing the integrity and legitimacy of an electoral system.

In an effort to guide election administrators, implementers, donors, and election stakeholders to effectively resolve election complaints, IFES has identified seven principle standards in electoral complaint adjudication, based on international global practices. These standards stem from the widely recognized fundamental right to participate in government, and in return these standards serve as a method to protect and enforce this overarching right of participation. The human rights community identifies several human rights as inalienable rights, including the right to life, liberty and security and, most relevant for our purposes, the right to take part in government through fairly chosen representation. As the Inter-

[7] Lady Justice Georgina T. Wood, Chief Justice, Supreme Court of the Republic of Ghana, Foreword to Supreme Court of Ghana, Manual and Statutes on Elections Adjudicating in Ghana (2008) [hereinafter Ghana Manual], *available at* http://www.judicial.gov.gh/c.i/content/forward.htm.

American Commission on Human Rights has stated, "political rights are human rights of such importance that it prohibits their suspension."[8] These fundamental political rights provide the foundation for legitimate governance, which can be achieved by the organization of elections. Indeed, elections are human rights events;[9] because elections are the means by which the people express their political will, they are the most important and most common mechanism for the implementation of the right to participate in government.

The right to participate in government is also enshrined in every major international human rights convention. These conventions, which recognize international standards in the area of human rights, specifically highlight and discuss the importance of political participation and elections. Article 21, §1 of the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to take part in the government of his country, directly or through freely chosen representatives."[10] Additionally, the International Covenant on Civil and Political Rights (ICCPR) provides that:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (a) to take part in the conduct of public affairs, directly or through freely chosen representatives, (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[11]

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[8] Castañeda Gutman v. Mexico, Case 12.535, Inter-Am. Comm'n H.R., Report No. 113/06, ¶¶ 92, 140 (2008).

[9] U.N. Centre for Human Rights, Professional Training Series No. 2, Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections, at v (1994) [hereinafter Human Rights and Elections Handbook], *available at* http://www.ohchr.org/Documents/Publications/training2en.pdf.

[10] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR], *available at* http://www.un.org/en/documents/udhr/.

[11] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 25, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], *available at* http://www2.ohchr.org/english/law/ccpr.htm; ICCPR, supra, art. 2, ¶ 1; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, art. 2, ¶ 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR], *available at* http://www2.ohchr.org/English/law/cescr.htm.

This principle enforces the notion of democratic elections and ensures the freedoms of opinion, assembly, movement and expression. Additionally, implicit in and intertwined with these rights are widely recognized prohibitions on discrimination.[12]

The recognition of political rights found in international treaties — both for participatory governance and against unreasonable discrimination — is further buttressed by similar support in almost every major regional human rights treaty.[13] The Inter-American and the African Human Rights systems both provide citizens with the right to participate in government.[14] The European Convention for the Protection of Human Rights and Fundamental Freedoms states that the "High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the opinion of the people in the choice of the legislature."[15]

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[12] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5(c), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD] (prohibiting discrimination in the enjoyment of political rights), *available at* http://www2.ohchr.org/english/law/cerd.htm; U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 7, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979) [hereinafter CEDAW], *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm; ICCPR, supra note 11, art. 22; UDHR, supra note 10, art. 20.

[13] It is important to note that the new Association of Southeast Asian Nations (ASEAN) Human Rights Commission disappoints in this regard. The ASEAN Declaration does not make any reference to human rights or to the right to participate in government. ASEAN, Bangkok Declaration (Aug. 8, 1967), *available at* http://www.aseansec.org/1212.htm. However, in the Draft of Agreement on the Establishment of the ASEAN Human Rights Commission, Article 2 states that "inspiration shall be drawn from international law on human rights . . . . The relevant instruments of international law include the 1948 Universal Declaration on Human Rights, the 1986 United Nations Declaration on the Right to Development, the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights, and the treaties to which the Contracting States have acceded." ASEAN, Draft of Agreement on the Establishment of the ASEAN Human Rights Commission, art. 2, *available at* http://www.aseanhrmech.org/downloads/draft-agreement.pdf

[14] Article 23 of the American Convention provIdes "every citizen the right to participate in Government." Inter-American Convention on Human Rights, art.23, Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter American Convention], *available at* http://www.oas.org/jurIdico/English/treaties/b-32.html. The African Charter ensures each citizen "the right to participate freely in the government of his country." African Charter on Human and Peoples' Rights, art.13, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter], *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm.

[15] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, C.E.T.S. No. 9 (entered into force May 18, 1954), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

Nonetheless, there is no requirement that sovereign nations implement a specific form of election process.[16] Instead, enforcement of the treaty is usually through domestic and international courts, which use the international standards to interpret the treaty obligations and ensure that a specific election process functions in compliance with the basic human right of political participation.[17] For example, the European Court of Human Rights (ECtHR) has been particularly proactive in its interpretation of the expansiveness of political rights, construing the above-stated provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms to enshrine a fundamental principle for effective political democracy.[18] The European Convention is accordingly of prime importance in the convention system. Generally, these international and regional systems help maintain these principles in a wide range of electoral systems. Universal principles are used to interpret the obligations that the system must meet, but they do not dictate the design of the system.

Thus, while states enjoy a wide margin of choice in the implementation of electoral rights, the European Convention for the Protection of Human

The European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol 1, Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

[16] See also Yumak v. Turkey, Eur. Ct. H.R., App. No. 10226/03, Judgment of 8 July 2008, ¶ 110-11.

[17] The Georgian Labour Party v. Georgia, Eur. Ct. H.R., App. No. 9103/04, Judgment of 8 Oct. 2008, ¶ 104 ("[W]hilst recognizing the respondent State's latitude in organizing its electoral administration, the Court must establish whether there were any specific acts of the electoral commissions which marred the applicant party's right to stand in the repeat parliamentary election of 28 March 2004.").

[18] Mathieu-Mohin v. Belgium, Eur. Ct. H.R., Series A no. 113, Judgment of 2 March 1987, ¶ 47. The Court went far beyond the case and recognized that the "free elections" article protects the citizen's right to vote and stand for election and also that an indivIdual has the right to complaint. Jurij Toplak, European Parliament Elections and the Uniform Election Procedure 6 (International Association of Constitutional Law, Paper for VIIth World Congress, June 11-15, 2007), *available at* http://www.enelsyn.gr/papers/w3/Paper percent20by percent20Jurij percent20Toplak.pdf. In Krasnov v. Russia, the Court reaffirmed that Article 3 of Protocol No. 1 implicitly embraces the right to stand for election. Krasnov v. Russia, Eur. Ct. H.R., App. Nos. 17864/04 and 21396/04, Judgment of 19 July 2007, ¶ 40.

Rights and Fundamental Freedoms recognized, for instance, that when enforcing the relevant provision ensuring free and fair elections, it is "for the Court to determine in the last resort whether [the state has complied with] the requirements of Article 3 of Protocol No. 1."[19] Thus, states may establish their own electoral complaint adjudication system as long as in the final analysis they remain within the bounds of these minimum standards.[20] Whether electoral complaints are solved by a constitutional court, an independent tribunal, a legislative body or an electoral complaints commission, the international standards apply in a similar way to these different entities.[21] Electoral complaint adjudication bodies should take these standards into account to best ensure that those provisions do not remain theoretical or illusory but instead serve to be practical and effective. [22]

Political rights are defined through conventions, statutes and case law and are further interpreted through guidelines, codes of conduct and reports drafted by inter-governmental or non-governmental entities. Although these latter documents are not binding, they shed some light on the seven international standards that will be discussed throughout this publication. Any guide that seeks to cover the range of permutations

[19] Yumak v. Turkey, Eur. Ct. H.R., App. No. 10226/03, Judgment of 8 July 2008, ¶¶ 74, 110-115, 147-148 ("'[T]he 4 percent threshold required for the election of the remaining 25 percent of the members of the Chamber of Deputies' and even 'a system which fixe[d] a relatively high threshold' fell within the wide margin of appreciation . . . the threshold concerned could not be held to be contrary to the requirements of Article 3 of Protocol No. 1 in that it encouraged sufficiently representative currents of thought and made it possible to avold an excessive fragmentation of parliament." (quoting Magnago v. Italy, App. No. 25035/94, Eur. Comm'n H.R., Dec. of 15 Apr. 1996, DR 85-A, p. 116) (citing Partija "Jaunie Demokrāti" v. Latvia, Eur. Ct. H.R., App. Nos. 10547/07 and 34049/07, Judgment of 29 Nov. 2007)); see also Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 115; Mathieu-Mohin v. Belgium, Eur. Ct. H.R., Series A no. 113, Judgment of 2 March 1987, ¶ 54.

[20] Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 115 ("[It is] for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with.").

[21] Constitución Política de la República Oriental del Uruguay [Political Constitution of the Eastern Republic of Uruguay] Feb. 15, 1967, art. 322(c) (creating autonomous and independent Electoral Corte "to decIde the final determination on all appeals and claims that arise, and judge of all praise elective office of the acts of plebiscite and referendum"); see also Constitution of the Hashemite Kingdom of Jordan Jan. 1, 1952, pt. II, art. 71 ("Any voter shall have the right to present a petition to the Secretariat of the Chamber [of Deputies] within fifteen days of the announcement of the results of the election in his constituency setting out the legal grounds for invalIdating the election of any deputy. No election may be consIdered invalid unless it has been declared as such by a majority of two-thirds of the members of the Chamber.").

[22] See Krasnov v. Russia, Eur. Ct. H.R., App. Nos. 17864/04 and 21396/04, ¶ 42; see also United Communist Party of Turkey v. Turkey, Eur. Ct. H.R, App. No. 133/1996/752/951, Judgment of 30 Jan. 1998, ¶ 33.

that result from varying implementation standards must also analyze a number of election processes and country practices. While there are practical limitations to this effort, such as the failure of countries to publish or translate domestic decisions for wider consumption,[23] this guide attempts to canvass all available resources to best present support for the implementing principles enumerated below.

There is much agreement on the fundamental rights of participation in governance, which include the right to vote and stand in elections. There is also a body of standards that deals with individual rights within the judicial process, as well as with individuals' and entities' rights under the election complaint process, and with bodies that adjudicate such disputes. In the following sections we will describe the intersection of these standards and how they apply to election complaint adjudication, and what guidelines they present for the design and administration of complaint adjudication systems.

The seven international standards, to which this book will refer frequently, are:

1. A right of redress for election complaints and disputes
2. A clearly defined regimen of election standards and procedures
3. An impartial and informed arbiter
4. A system that judicially expedites decisions
5. Established burdens of proof and standards of evidence
6. Availability of meaningful and effective remedies
7. Effective education of stakeholders

1. Right of Redress for Election Complaints and Disputes

The public provision of a clear means to remedy election irregularities is crucial to maintaining an election complaint adjudication system that adequately supports public participation in government. Because public confidence will give the victor the necessary legitimacy to govern, trust in the

[23] Specifically, "case outcomes are usually not published or available on the internet, and rarely translated from the original language." Robert A. Dahl, Legal Policy Advisor, IFES, Address Before the 2008 General Assembly of the Association of Asian Election Authorities: Electoral Complaint Adjudication and Dispute Resolution (July 22, 2008), *available at* http://210.69.23.129/d_6.html (follow link for full text of keynote speech).

process is essential to building, restoring or maintaining a democracy.[24] This trust, in turn, requires a transparent means by which to bring a claim and seek redress.

A. Purpose

The core function of an electoral complaints body is to maintain credibility and reliability through the availability of a clear legal right of action for individuals and relevant actors.[25] This mechanism must encompass the fundamental right to judicial review with the prospect of an effective remedy — a baseline standard recognized by a plethora of international and domestic treaties and codes.[26] The guarantee of a right to redress must be clearly established by the law and known to the general public; when dealing with election irregularities in a failed election, "the public must be able both to understand why the election failed and to accept how it will be fixed."[27] This is particularly important when an election's true outcome is at stake. Specifically, civil society, political parties and individuals need to know: 1) which entity will be in charge of their claim; 2) the chronological process of bringing such a claim; and 3) which procedural and substantive rules will govern the complaint.[28]

B. Process

A right to redress requires adequate processes to pursue the claim. This requirement necessarily calls upon states to provide clear guidelines on the processes available to bring a claim within the electoral complaint system, as a lack of such basic transparency can, and often does, lead to the dismissal of legitimate claims of irregularities. Providing this process can often be challenging in nascent democracies.

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[24] Grant Kippen, Afghanistan Research and Evaluation Unit, Elections in 2009 and 2010: Technical and Contextual Challenges to Building Democracy in Afghanistan 3, 19 (2008), *available at* http://www.unhcr.org/refworld/docId/492c0e5b2.html.

[25] Steven H. Huefner, Remedying Election Wrongs, 44 Harv. J. on Legis. 265, 291 (2007).

[26] UDHR, supra note 10, art.8; ICCPR, supra note 11, art. 2, § 3(a),(c); African Charter, supra note 14, art. 7, § 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, C.E.T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention], *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[27] Huefner, *supra* note 25, at 291-92.

[28] Constitutional Court of the Republic of Indonesia, Handbook on Election Result Dispute Settlement 1, 9 (2004), *available at* http://aceproject.org/ero-en/topics/electoral-dispute-resolution/Handbook_Election_Result_Dispute_Settlement.pdf/view; Law No. 24/2003, art. 74(1) (Indon.), Regulation No. 04/PMK/2004 (Indon.).

The 2005 parliamentary and provincial council elections in Afghanistan provide us with an example of electoral complaint processes in a post-conflict country. The Election Complaints Commission (ECC) dismissed many claims on the grounds that they did not fall into the category of electoral offenses or were not well-documented. These dismissals indicate a lack of information provided to the general public concerning the complaints process. Consequently, the International Crisis Group recommended that the ECC should "create a more open complaints process by conducting a high-profile public awareness campaign and carrying out training for civil society organizations to aid understanding of the grounds for submissions and the required standards of proof."[29] The ECC responded before the 2009 presidential elections by: releasing a document describing the complaints management system; making available its rules of procedure, the code of conduct adopted by the commissioners, and the complaints application form on its website; and explaining to Afghan citizens where they should file their claims and the process through which the claim goes once it is filed.[30] However, in cases such as Afghanistan the severe nature and high volume of complaints can make it difficult to provide timely information on the status of a complaint. Moreover, ensuring that the public has access to the information necessary to understand the complaint adjudication process requires resources that are not always available to electoral authorities.[31]

C. Transparency

Transparency in the electoral complaint adjudication system and process will build public confidence and thus will legitimize the outcomes of the complaints. To ensure the effectiveness of the right to remedy, voters, political parties, candidates and the media must know which body has jurisdiction to handle electoral challenges and complaints, how it is consti-

[29] International Crisis Group, Asia Report No. 171, Afghanistan's Election Challenges, at ii (2009) [hereinafter Afghanistan Challenges], *available at* http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/171-afghanistans-election-challenges.aspx.

[30] Electoral Complaints Commission, Narrative Description of the Complaints Management System 1 (2009) ("Developing and implementing an effective and transparent complaints management system may be one of the single most important [steps] in determining whether a country's election is seen as free, fair and legitimate by a country's electorate.").

[31] Id. at 3-5. Indeed, after the Afghan elections, NDI stressed the "lack of timely information about the status of complaints fed a general dissatisfaction and mistrust about the process and its effectiveness." NDI, Preliminary Statement of the NDI Election Observer Delegation to Afghanistan's 2009 PresIdential and Provincial Council Elections 9 (Aug. 22, 2009), *available at* http://www.ndi.org/files/Afghanistan_EOM_Preliminary_Statement.pdf.

tuted, which authority appoints or nominates its members, and how to file a claim. Because there are a wide variety of mechanisms to adjudicate electoral complaints in place around the world, each country should provide its citizens with the necessary information to understand and access its unique adjudication system.

Moreover, transparency requires that electoral complaint bodies update plaintiffs about the status of a claim, including providing notice for upcoming hearings or decisions.[32] A right to redress encompasses a right to due process, and basic information such as notice is essential to that process. Unfortunately this is not always easily applicable, but when there are serious irregularities, the adjudication body should schedule a hearing and enable the claimants to be fully informed of the status of their complaints.

A transparent right of redress calls for active participation on the part of the state to ensure that plaintiffs are successful when their claims have merits. This requires that states make available any relevant documents or materials needed to support petitions to electoral tribunals.[33] In practical terms, such documents may include election laws, voter rolls, precinct canvasses, filing procedures, the status of the claim, or procedural guidelines utilized by election officials. For example, in Pakistan, the Election Commission (ECP) distributed an Election Dispute Resolution Handbook to Provincial Assembly resource centers and directly to members of the National Assembly and Senate.[34] Moreover, the ECP published on its website downloadable forms and daily report updates on complaints adjudication, including lists of the total number of complaints received at the Federal Secretariat, broken out by province and complaint nature, and

[32] International Crisis Group, Asia Report No. 101, Afghanistan Elections: Endgame or New Beginning?, at iii (2005) (recommending "publicising electoral offenses and candidate eligibility criteria along with the standard of evIdence needed for such complaints to succeed, and issuing regular updates on the status of such complaints"), *available at* http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/101_afghanistan_elections_endgame_or_new_beginning.ashx. The National Electoral Commission (Liberia) provIdes in its regulation on complaints and appeals that it shall inform the complaint and the affected parties if a hearing on the evIdence is required. National Electoral Commission, Regulation on Complaints and Appeals 9 (2005), *available at* http://www.aceproject.org/ero-en/topics/vote-counting/Liberia_Regulations percent20on percent20Complaints percent20and percent20Appeals percent202005.pdf.

[33] Afghanistan Challenges, *supra* note 29, at 25.

[34] Chad Vickery, IFES, Pakistan: Post-Election Community-Based Mediation and Adjudication Program 9, 13, 16 (2009), *available at* http://www.ifes.org/publication/bf80e511e7130f75f-4cfcc90d6eb87e3/IFES_PakistanFinalReportNarrative.pdf.

complaint forms and instructions.[35] Such efforts provided greater transparency of the complaints process and built stakeholders' confidence.[36]

Transparency requires that adjudicatory bodies publish their decisions. Publication increases public trust, eases the burden on future plaintiffs, and clarifies any future action that a plaintiff could bring.[37] The European Commission, in its report on the 2006 elections in Nicaragua, stated that the lack of publication of decisions was "not in line with any acceptable international standards and illustrates a lack of transparency, a lack of acceptable judicial formalities, and also a thoroughly inadequate degree of reasoning in terms of electoral justice."[38] Some states go further. For example, Armenia, Moldova and Uzbekistan recognized in the *Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms* that "legal acts and decisions relating to the citizen's voting rights, freedoms and obligations cannot be applied if they are not officially communicated to the public."[39] During the 2009 Afghan elections, the ECC complied with its obligation to publish its decisions.[40] Indeed, the ECC released substantive information on its website throughout the investigation and adjudication process. Similarly, the Central Election Committee in Georgia created a searchable web-based election complaint database both in Georgian and English that

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[35] *Id.*

[36] See also Schramm et al., supra note 2, at 11-12 ("Transparency of the complaints process was increased by publishing more detailed information on complaints at an early stage. A summary of each campaign complaint was posted on the CNE website. In addition, a copy of complaints with Identification of the complainant blacked out was made available for examination by the public in the CNE complaints office.")

[37] The National Election Committee (Cambodia) drafted a set of rules of procedures for handling complaints relating to electoral matters. This manual clearly states the obligation to publish the National Election Committee decision at each stage of the complaint process. Whether it is the Commune/Sangkat Election Commission, the Regional Election Commission, or the National Election Commission, the date at which the complaint will be resolved or was resolved, the date and place of the hearing and the final decision or appeal should be published. National Election Committee, Manual: Procedures for Handling Complaints Relating to the Violations on the Law, Regulations and Procedures During the Electoral Campaign, Voting, Ballot Counting and Result Announcement Period, pts. I. B., II.B, II.D.2.5, II.D.2.6, *available at* http://www.necelect.org.kh/English/voterReg/Complaint_Manual.pdf.

[38] European Union (E.U.) Election Observation Mission, Final Report: PresIdential and Parliamentary Elections Nicaragua 23, 63-64 (2006) [hereinafter, E.U. Nicaragua Report], *available at* http://ec.europa.eu/external_relations/human_rights/election_observation/nicaragua/final__report_en.pdf.

[39] European Commission for Democracy Through Law ("Venice Commission"), Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States, art. 7, § 3, Opinion No. 399/2006 (Jan. 22, 2007) [hereinafter Commonwealth Convention], *available at* http://www.venice.coe.int/docs/2006/CDL-EL(2006)031rev-e.pdf.

[40] Exclusion decisions, fines issued, and complaints dismissed were listed on the ECC website during the 2009 election cycle, but had been removed by the end of 2010.

is linked to their website.[41] This sort of public availability of election complaints increases transparency and trust in the electoral process.

D. Standing

Finally, and perhaps most importantly, states must be clear about who has standing to bring claims. Election irregularities include a wide range of issues such as candidate eligibility, ballot recounts, or fraud, all of which may implicate the interests or involvement of candidates, political parties or individuals. Determining who holds a right to redress in those situations can, in practical terms, be the most important aspect of such a system. However, it seems that there is no general agreement on the standards to follow.

Theoretically, all relevant actors who assert knowledge of an electoral irregularity should have standing to bring complaints, regardless of injury. The intrinsic importance of maintaining a fair electoral system, which encourages applying broad standing requirements, should in some cases trump concerns for judicial efficiency that may lead to narrower standing statutes. However, a broad legal standing can lead to burdensome case loads and frivolous claims that will jeopardize the efficiency of the electoral complaint system. Thus, a more restricted legal standing to file a complaint may be preferred unless a particular type of grievance is at stake.[42] Generally, electoral laws state that claims should be limited to individuals who are directly impacted by a violation.[43] Indeed, the mere fact that voters, candidates, political parties and non-governmental organizations are all participants in the electoral process is not sufficient for filing a complaint.

In cases in which there is a clear need to represent a wider swath of society, broader legal standing could, however, be necessary. In its *Code of Good Practice in Electoral Matters*, the Venice Commission states in general terms that, "standing in electoral dispute matters must be granted as

[41] *Submitted Appeals/Statements/Complaints*, Central Election Commission of Georgia, http://sachivrebi.cec.gov.ge/eng/ (last visited Jan. 6, 2011).

[42] Carter Center, Electoral Dispute Resolution Experts' Meeting 2, 10 (2009), *available at* http://www.cartercenter.org/resources/pdfs/peace/democracy/des/electoral-dispute-resolution-meeting.pdf.

[43] Avery Davis-Roberts, International Obligations for Electoral Dispute Resolution 10-11 (Carter Center, Discussion Paper for Experts' Meeting, Feb. 24-25, 2009), *available at* http://www.cartercenter.org/resources/pdfs/peace/democracy/des/edr-approach-paper.pdf.

widely as possible."[44] But these guidelines also specify that even if every elector in the constituency and every candidate should have standing to lodge an appeal, "a reasonable quorum may, however, be imposed for appeals by voters on the results of elections. [45]

Venice Commission
Code of Good Practice in Electoral Matters
Article 3.3, Paragraph 92

If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

Even if near-universal access to legal redress seems to be impossible to implement in practice, the question of broad legal standing was acknowledged in a recent Israeli Supreme Court case. During the campaign period for the January 2003 Sixteenth Knesset (Parliament) elections, the Central Elections Committee disqualified portions of the election campaign broadcasts of Ra'am and Balad, two political parties running for election, on the grounds that the Palestinian flag appeared in them. Although the two political parties did not initiate a claim for redress, the Association for Civil Rights in Israel did. The parties were added to the petition as respondents by the Court. The Attorney General first argued that the petitioner did not have legal standing. However, the Israeli Supreme Court held that, in electoral matters, a public petitioner has legal standing even if the individuals petitioning have not been *specifically in-*

[44] Venice Commission, Code of Good Practice in Electoral Matters: Guldelines and Explanatory Report 31 (2002) [hereinafter Venice Commission Code] ("Standing in such appeals must be granted as wIdely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections."), *available at* http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp.

[45] *Id.*

jured.[46] By that view, the integrity of the election process is the concern of all citizens; courts should recognize a broad definition of injury that gives rise to standing to a wide swath of interested parties. By so doing, individuals, political parties and candidates will have the opportunity to seek adjudication of election irregularities, increasing the odds that irregularities will be adequately challenged.

Indeed, many electoral complaints systems do not recognize standing to the extent recognized by the Israeli Supreme Court, and some states may go so far as to only allow candidates or political parties to file a complaint challenging elections results. In the United States, general standing principles require that a party bringing suit have a genuine injury in fact that is both fairly traceable to the harm alleged and that can be redressed by the court hearing the case. However, because United States elections are governed by state statute, states often specifically limit standing to electors or candidates in cases that seek to void elections due to vote-counting irregularities.[47] Moreover, citizens of one jurisdiction are barred from bringing suits over election laws in another jurisdiction.[48] Similarly, absent a public interest citizen suit statute, citizens may lack standing to challenge election law provisions such as felon voting restrictions, on the theory that these provisions affect citizens equally and thus do not cause particularized harm to any

[46] The Israeli Supreme Court "held that the petitioner had standing as a public petitioner. In general, however, the standing of a public petitioner has not been recognized where there is a specific indivIdual who has been injured and has ordinary standing.
The Court held that in the context of election law, the standing of a public petitioner should be recognised,[sic] despite the existence of specific indivIduals who have standing. The Court asserted that the extended right of standing should be recognised [sic] due to the importance of regular and proper elections to the democratic process. According to the Court, the regularity of the election process is the concern of the entire public and goes beyond the direct concern of the indivIdual injured by government action. . . . The voters' rights, therefore, are connected to those of the candidates running for elections." Venice Commission, Supreme Court of Israel: Working Document for the Circle of PresIdents of the Conference of European Constitutional Courts 19-20 (2006) (discussing HCJ 651/03 Association for Civil Rights in Israel v. Chairman of the Central Election Committee 57(2) PD 62 [2003] (Isr.)), *available at* http://www.venice.coe.int/docs/2006/CDL-JU(2006)036-e.pdf. The Iraqi electoral commission, named the Independent High Electoral Commission, also provIdes a broad legal standing. It recognizes that any voter or organization, other than referendum and election observers, who has a complaint or dispute related to the electoral and referendum process has the right to file a complaint. Electoral Complaints and Disputes (Regulation No. 2 of 2008), § 3(1) (Iraq); see also Independent High Electoral Commission (Law No. 11 of 2007), art. 4, § 8 (Iraq).

[47] See, e.g., Potts v. Fitzgerald, 784 N.E.2d 420, 423 (Ill. App. Ct. 2003); Morse v. Dade Cnty. Canvassing Bd., 456 So. 2d 1314, 1315 (Fla. Dist. Ct. App. 1984); Rogers v. Shanahan, 565 P.2d 1384, 1387 (Kan. 1976).

[48] Antosh v. Fed. Election Comm'n, 664 F. Supp. 5, 8-9 (D.D.C. 1987).

one voter.[49] Standing requirements have not been so restrictive with regard to campaign finance laws enabling access to information about political speech.[50]

2. A Clearly Defined Regimen of Election Standards and Procedures

Appropriate legislative measures must be taken in order to define a legal right to redress and to adequately implement periodic, free and fair elections.[51] These measures must be clearly written and accessible in order to provide adequate notice and process to individuals, political parties, and civil society. This substantive body of law must be augmented by codified procedural mechanisms to adjudicate conflicts that arise. However, an overly complex codification of standards and procedures creates barriers to addressing election remedies that in turn directly conflict with the basic principle of universal political participation. In contrast, a system that does not codify standards and procedures at all allows for arbitrary implementation of complaint mechanisms. Developing clear standards and procedures governing elections may minimize the likelihood of post-election litigation.[52]

A defined regime is also the key to avoiding harmful forum shopping. An applicant who wants to allege an irregularity, depending on its nature, will have to lodge its claim only before a specific entity. This can avoid the scenario in which claimants bring the same complaint before several forums to try to obtain the most favorable ruling. Moreover, if several entities have authority over electoral complaints, clear rules regarding the specific subject matter jurisdiction of each entity can provide consistency in the interpretation of the law. For example, the Lebanese complaints adjudication process involves several entities that share jurisdiction over specific issues. Indeed, three

[49] Wesley v. Collins, 791 F.2d 1255, 1257—58 (6th Cir. 1986).

[50] See, e.g., Fed. Election Comm'n v. Akins, 524 U.S. 11, 18-26 (1998).

[51] Violaine Autheman, The Resolution of Disputes Related to Election Results: A Snapshot of Court Practice in Selected Countries Around the World 6 (IFES Rule of Law Conference Series, Indonesian Constitutional Court Workshop Paper, February 2004) ("For election disputes to be adequately and effectively resolved, the proper formal court rules, regulations and procedures must be in place."), *available at* http://www.ifes.org/publication/3555a974ddaed52619f7772358e930af/ConfPaper_Indonesia_FINAL.pdf.

[52] Huefner, *supra* note 25, at 288.

kinds of bodies in the electoral administration have authority to receive and process complaints: the Ministry of Interior and Municipalities, the Supervisory Commission on the Electoral Campaign, and the Registration Committees and Higher Registration Committees. Moreover, the Electoral Courts also handle electoral matters and follow their usual process to determine their subject matter jurisdiction (State Council, Court of Publication, Constitutional Council and Military Court).[53] This creates obvious confusion for the challengers. There is a clear need for uniformity and clarity in the law when dealing with electoral complaint adjudication.

A. Codification

An effective electoral complaint mechanism will codify both the structural framework for adjudicating conflicts, as well as the specific procedural guidelines for stakeholders operating within that framework. Codification of substantive election law is essential for actors to bring claims in the event of irregularities. Thus, a complaint adjudication system can only function properly if it works in tandem with a clearly defined body of electoral laws, regulations and rules of procedures. International bodies have recognized the importance of starting the complaint process from a clear, accessible body of law. In the 1994 *Declaration on Criteria for Free and Fair Elections*, the Inter-Parliamentary Council of the International Organization of Parliaments set out a comprehensive list of legislative and administrative guidelines in order to best ensure fair conflict resolution.[54] The Council held that states should "establish an effective, impartial and non-discriminatory procedure for the registration of voters . . . clear criteria for the registration of voters, such as age, citizenship and residence," and "provide for the formation and free functioning of political parties . . . ." The states and electoral management bodies should enumerate all the elements of the electoral process and then set clear rules for each.

[53] Gaelle Deriaz, The 2009 Mechanisms for Handling Electoral Complaints and Appeals in Lebanon 16 (2009) ("As of July 2009, 142 complaints have been lodged to the SCEC; two court decisions have been given by the State Council in the 2009 parliamentary elections matters, including one challenge to a SCEC decision; six cases have been ruled under PEL and few others under ordinary procedures by the Court of Publications; and two cases are investigated respectively by the criminal and military prosecutions. Nineteen challenges have been filed to the Constitutional Council.").

[54] Inter-Parliamentary Council (now called Governing Council), Declaration on Criteria for Free and Fair Elections, 54th Sess., art. 4, § 1, C.P. 330 (March 26, 1994) [hereinafter Declaration on Elections], *available at* http://www.ipu.org/cnl-e/154-free.htm; see also International Organization of Parliaments, http://www.ipu.org/english/whatipu.htm (last visited Jan. 6, 2011).

Similarly, the Inter-American Court on Human Rights in *Castañeda Gutman v. Mexico* tied the fulfillment of states' positive obligations under international law to "the establishment of the organizational and institutional aspects of the electoral processes" and the "enactment of norms and the adoption of different types of measures."[55] The Court went further, recognizing that "if there were no electoral codes or law, electors lists, political parties, propaganda media and mobilization, polling stations, electoral boards, dates and times for exercising the vote, the rights could simply not be exercised." Again, states are not required to adopt specific electoral rules; instead, the Court "required Mexico to take in a reasonable time the appropriate measures to adapt its domestic law to the Convention."[56] There is no perfect model of electoral complaint adjudication that states are bound to establish; they are free to set up a system that corresponds to their legal traditions and customs. Indeed, "an election is defined not only by the electoral rules but by the social values, politics, religion, history and culture of the people."[57] However, when states ratify international human rights conventions, they are bound to respect the electoral standards enumerated therein, including the responsibility to provide an effective remedy.[58]

Clearly, both treaties and their implementing courts have recognized that accessible substantive and procedural guidelines for election complaints are critical to the enforcement of basic political rights. However, the act of creating a clear set of guidelines and endowing them with the force of law is only the first step. States must also codify the procedural steps necessary to implement those substantive guidelines in a consistent manner. These procedures must adequately address both the mechanisms through which complaints will be adjudicated and the timeline for enacting the new substantive law or structural shifts. Additionally, the adjudicatory body should be empowered, explicitly or implicitly, to adopt whatever rules and regulations are required and appropriate to implement the system. The main example of this is a situation in

[55] Castañeda Gutman v. Mexico, Case 12.535, Inter-Am. Comm'n H.R., Report No. 113/06, ¶159 (2008).

[56] *Id.* ¶ 231.

[57] Electoral Institute of Southern Africa, Preventing and Managing Violent Election Related Conflicts in Africa 31 (2009), *available at* http://eisa.org.za/PDF/symp09cp.pdf.

[58] *Id.*

which the electoral law grants the regular court system jurisdiction over election complaints but remains silent on procedure. In this case, the judges should be involved in drafting the procedural rules for election complaints. Judges are generally experts in court procedure, and are the most qualified stakeholders who can determine what system will work best for elections, without departing radically from the country's normal process. For instance, the general appellate procedure might create delays that are acceptable in contract or tort actions, but inappropriate for the time-sensitive nature of election complaints. In general, adjudicative bodies should be allowed to decide on their own procedural rules unless they request that they be set in the law. An exercise of power by the judges would also serve to make them appear more independent in the eyes of the public.

Following the 2009 Afghan elections, the Electoral Complaints Commission, which is empowered to adopt its own rules of procedure,[59] implemented the "clear and convincing" standard of evidence but did not clarify the exact meaning of the requirements for meeting the standard. Moreover, regarding its audit and recount process, the ECC ordered the Independent Electoral Commission (IEC) to invalidate a certain percentage of each candidate's votes in six separate categories. The statistical audit methodology was to undertake an audit and recount of all polling stations meeting two criteria: where the numbers of ballots cast in a polling station were 600 or greater or where any one candidate received more than 95 percent of the vote in polling stations where 100 ballots or more were cast. The ECC and the IEC determined the size of the sample and the margin of error that were deemed sufficient to accurately reflect the behavior of the larger ballot boxes. However, this sampling statistical method did not state how the results of the sampling would turn into an adjudicative answer and it would probably have required more time and evaluation to be an efficient audit methodology. In this particular example of massive fraud in Afghanistan, the ECC implemented this sampling method as a practical solution in response to an unprecedented and complex situation. In less exceptional circumstances, it is essential that the conditions necessary for a recount of the votes, a runoff elec-

[59] Electoral Law, art. 56 (2005) (Afg.) ("The Commission may issue Regulations, Procedures, and separate Guldelines to better implement the provisions of this Law.").

tion, or an invalidation of particular ballots are clear, transparent and easily understandable before the election takes place.[60]

Indonesia provides an illustration of the consequences of dangerous ambiguities in election law and the failure to rectify these before elections.[61] Irregularities in the election law for the 2009 legislative elections left the seat allocation process open to interpretation and legal challenge. Despite identification of problems before the election, the National Election Committee (Komisi Pemilihan Umum [KPU]) and other actors failed to sufficiently remove the ambiguity through regulation or preemptive clarification.[62] Following the KPU's 24 May 2009 announcement of the seat allocation, different legal challenges were brought before both the Constitutional Court and the Supreme Court.[63] These two courts released decisions resulting in mutually exclusive seat allocations and on 1 September 2009, the Constitutional Court, which has the final authority for resolving election challenges, settled the dispute. Disappointed candidates filed a case requesting judicial review of the laws regulating the judicial powers of the Constitutional Court and the Supreme Court, claiming that Indonesia's laws gave the Courts the same authority and created legal uncertainty. The Constitutional Court rejected the request in early 2010,

[60] E.U. Election Observation Mission, Mexico Presidential and Parliamentary Elections Final Report 50 (2006) [hereinafter E.U. Mexico Report], *available at* http://aceproject.org/regions-en/countries-and-territories/MX/reports/mexico-presidential-and-parliamentary-elections/view; see also John Hardin Young, Recounts, in International Election Principles: Democracy and the Rule of Law 301 (John Hardin Young ed., 2009).

[61] IFES, A Free, Fair and Credible 2009 Election in Indonesia Through Targeted Election Management Assistance 5, 19 (2009); Law on Legislative Elections (2008) (Indon.).

[62] IFES produced and disseminated a brief for policy makers and stakeholders prior to the election that outlined the inconsistency and recommended preemptive clarification. IFES, A Free, Fair and Credible 2009 Election in Indonesia Through Targeted Election Management Assistance 6 (Feb. 24, 2010).

[63] *Id.* at 20-21. The dispute arose from the omission of the word "remainder" in the election law that opened up legal uncertainty. KPU did not directly address this issue before the elections and thus, those standing to benefit from literally interpreting the flawed language challenged the KPU's Regulation No. 15 arguing that it did not correctly construe the law. From an election administrative perspective, the KPU's approach in Regulation No. 15 was the more sound interpretation of the law. Complainants were asking the Supreme Court to interpret the law in a way that would go against the one person-one vote rule. The Supreme Court went along with this literal interpretation of the law even though it was a mistake from a technical point of view. The Constitutional Court later reversed the Supreme Court's ruling. *Id.*

stating that this was an issue for legislators to decide.[64] The ambiguity in the electoral law and the conflicting court decisions led to delays in determining the composition of the legislature, and damaged public confidence in the electoral system.[65] The failure of election stakeholders to address these issues before the election put the KPU and the adjudicatory bodies in a difficult position after the elections. Summing up popular frustration, Indonesian election expert Hadar Gumay observed "the regulations cannot be changed just like that after the general election is over and the results are counted. In the end, this is becoming some sort of a political lust, not an arena whereby to seek justice."[66] This example highlights the need to properly codify election laws relating to election process and to complaints adjudication sufficiently in advance of the election.

Codification of electoral processes and election complaint mechanisms need not be elaborate. In Nigeria, the Electoral Tribunals are mandated under the Constitution,[67] and the 2006 Electoral Act No.2 provides for the electoral complaint adjudication mechanisms. The Act states that election petitions arising from the conduct of a presidential election are handled by the Court of Appeal and in any other election petition they are handled by the Election Petition Tribunal.[68] The Court of Appeal and the Supreme Court can also have appellate jurisdiction.[69] The recourse to the judiciary ensures that the Independent National Electoral Commission (INEC) does

[64] Arghea D. Hapsari, Court Rejects Judicial Review Request Of Election Law, The Jakarta Post, Feb. 9, 2010, *available at* http://www.thejakartapost.com/news/2010/02/09/court-rejects-judicial-review-request-election-law.html; Arghea D. Hapsari, Court Annuls Judicial Review Filed Against Own Power, The Jakarta Post, Feb. 2, 2010 ("'If the court reviews the requested articles, then it will have to review [several articles] in [the Constitution] . . . the articles in the Constitutions are made by choice of the lawmakers and the court does not have the authority to judge their choices,' presIding judge Mahfud MD told [a Constitutional Court] hearing.").

[65] Candidates Anxious, Frustrated Over Legal, Political Uncertainty, The Jakarta Post, Aug. 26, 2009.

[66] Yandi M.R. & Iqbal Muhtarom, *Fighting for Seats*, Tempo Magazine, August 4-10, 2009.

[67] Constitution of the Federal Republic of Nigeria (1999), § 285(1) ("There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any or tribunal, have original jurisdiction to hear and determine petitions . . . ."), *available at* http://www.nigeria-law.org/Constitution-OfTheFederalRepublicOfNigeria.htm#ElectionTribunals/; Political Constitution of the Republic of Costa Rica Nov. 8, 1949, arts. 99-104 ("The organization, direction, and supervision of acts pertaining to suffrage are the exclusive function of the Supreme Electoral Tribunal, which does enjoy independence in the performance of its duties. All other electoral organs are subordinate to the Tribunal.").

[68] Electoral Act 2010, § 133 (Nigeria), *available at* http://placng.org/Electoral percent20Act percent202010- percent20as percent20Gazetted.pdf.

[69] *Id.* § 75(1).

not sit over its own case and that both the electorate and the political parties get sufficient compensation in the case of default by the Commission in the performance of its duties."[70]

In Brazil, the Constitution also provides for the establishment of the electoral complaints adjudication mechanism.[71] There is a Superior Electoral Court, a Regional Electoral Court in the capital of each state and one in the Federal District, municipal election judges in large cities, and local election boards in small towns. The Brazilian Constitution details the composition of the Electoral Courts and states that a supplementary law should be adopted to define the "organization and competence of the electoral courts, judges and boards."[72] Constitutional provisions and Parliamentary acts that establish election complaint institutions help to protect the right to judicial review in electoral matters.[73] Indeed, the constitution and legislative acts are usually not easy to amend and thus they are stronger gatekeepers to the right of redress than an administrative regulation and provide stability in the electoral law and, more specifically, in the electoral complaints adjudication system.

Clearly, not all states use the same model for the formal judicial system. Some states incorporate tribal and religious traditions into government processes.[74] Codification of substantive and procedural election complaint law should account for legal traditions and customs, including traditional practices related to complaint settlement, such as the use of mediation or arbitration (as opposed to adversarial adjudication). For example, in Afghanistan, community elders have great authority within their community and are endowed with respect. If the elders understand the electoral complaints process and are able to participate in it, the decisions will be

[70] *Id.* Supplemental Transitional Provisions 3, 4.

[71] Constituição Federal [C.F.] [Constitution] arts. 118-121 (Braz.).

[72] *Id.* art. 121.

[73] See, e.g., Constitution of the Republic of Liberia Jan. 6, 1986, art. 83(c) ("Any party or candidate who complains about the manner in which the elections were conducted or who challenges the results thereof shall have the right to file a complaint with the Elections Commission.") , *available at* http://www.necliberia.org/content/legaldocs/laws/theconstitution.pdf. The Liberian Constitution also provIdes for a mechanism of appeal: "The Electoral Commission shall within seven days of receipt of a notice of appeal, forward all the records in the case to the Supreme Court." Id.

[74] Thomas Barfield et al., United States Institute of Peace, The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan 2 (2006), *available at* http://www.usip.org/files/file/clash_two_goods.pdf.

more easily accepted by the general public. Utilizing these kinds of traditions could "offer benefits in the short and long terms, and could enhance efforts to reestablish the rule of law."[75] Cooperation between the formal judicial system and traditional dispute settlement actors could bring more credibility and legitimacy to the adjudicatory body; if the rules sound familiar and culturally acceptable, the public and the political parties will be more likely to understand them.[76]

One last element to take into consideration for codification purposes is the distinction between criminal and administrative (or non-criminal) claims. It is crucial to establish the difference between these two types of claims. Indeed, whether an electoral claim is administrative or criminal has important consequences on determining which authority has jurisdiction, the burden and standard of proof, and the sanctions and penalties. For instance, if administrative claims regarding pre-poll and polling day are clearly defined by law, it could be possible for these claims to be handled by an administrative body with quasi-judicial authority. Assuming that its staff is trustworthy, unbiased and not corrupted, this entity could act as a filter to dismiss the claims that are incomplete, frivolous and not supported by evidence. It will enable the complaint adjudication body to deal only with the serious claims and in a timely manner. Pakistan provides a good example for this discussion: the Pakistani system characterizes all electoral complaints (including pre-election violations) as criminal in nature, leading to numerous criminal proceedings even when dealing with small electoral irregularities during the campaign period or on polling day.[77] It is crucial that legislative authorities understand what is meant by "complaints," "adjudication," and "resolution" outside the criminal law arena, such that overly harsh penalties through the criminal process do not make the system unworkable and unjust.

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[75] *Id.* at 23.

[76] *Id.* In Afghanistan, the non-recognition and non-cooperation between the formal judiciary and the non-state practices led to defects in the enforcement of decisions. "Since the formal system does not, in effect, recognize customary practices, it is not in a position to oversee them. As a result, customary law seeks to shield disputes and their outcome from state authorities as a way to insulate their communities from state control or exploitation." *Id.*

[77] Farrah Naz, *Improving Pakistan's Election Complaints System*, IFES (May 13, 2009), http://www.ifes.org/Content/Publications/Opinions/2009/May/Improving-Pakistans-Election-Complaints-System.aspx (discussing IFES-sponsored conference, Evolving Principles and Practices for Resolving Election Complaints: Pre-poll and Polling Day (Apr. 5-6, 2009)).

B. Reform

A crucial element for ensuring legal certainty in nascent democracies is for states to define the ways in which international standards can inform and guide reform efforts. Legal reforms are to be encouraged if the goal is to improve the electoral system; however, frequent or erratic changes confuse both the electors and the officials charged with conducting free and fair elections.

Timing is of the essence in the codification or reform of the electoral framework. The public, candidates and staff of electoral management bodies should have sufficient time to become familiar with the law before an election takes place. After each election, states should conduct an assessment analysis to identify the gaps and challenges that exist in the electoral law and in the performance of the electoral complaint adjudication entity. Post-election audits and evaluation will provide stakeholders with an opportunity to remedy the mistakes that were made during an election[78] and allow for the time needed to correct defects and make legal reforms before the next election. In 2002, the Venice Commission adopted a *Code of Good Practice in Electoral Matters*, affirming that "stability of the law is crucial to credibility of the electoral process," and stating that in the event of election law reforms, "the old system will apply to the next election — at least if it takes place within the coming year — and the new one will take effect after that."[79] Perhaps more importantly, states should codify language that safeguards fundamental principles of their legal framework.[80]

The 2010 presidential elections in Ukraine provide an example of the importance of timing when adopting a new electoral law. In July 2009, six months before the elections, a new electoral law was adopted by the Ukrainian Parliament. Many provisions contradicted international standards; for example, measures for lodging complaints and challenges were restrictive and limited. The Constitutional Court struck down the most egregious provisions of the law, but left many provisions intact. International experts called for new changes before the first round of the presi-

[78] Kriegler Commission Report, supra note 3, at 139 ("Audits are an effective tool for building public confIdence in election outcomes because they can detect human errors and help correct them.").

[79] Venice Commission Code, *supra* note 44, at 26.

[80] *Id.*

dential elections on 17 January. However, the Parliament — and allies of the challenger — adopted new changes to the electoral law on 4 February, between the first round of elections and the run-off.[81] The incumbent called for "international support to block last-minute electoral law changes that [will] pave the way for vote-rigging."[82] Electoral experts stressed that the new provisions only modified minor procedural elements of the law and that it would not affect the outcome of the elections. The challenger won the election, and western leaders acknowledged his victory and the free and fair electoral process, despite the fact that reforms were implemented mid-election. While many would consider this election a success, the potential political chaos that could have ensued due to these changes emphasizes the importance of timing of reforms.

Appropriate timing is essential when adopting or reforming electoral law, and it is also crucial when challenges stand to significantly change the electoral system. Sometimes the courts, rather than the legislature, are the major drivers of reform. Indonesia provides an example of the negative impact that a reform can have when implemented too late in the electoral process. In late December 2008 (four months before the legislative election), the Indonesian Constitutional Court invalidated the country's semi-closed list voting system in favor of open list voting.[83] Many observers argued that this was a progressive ruling, but it also created huge challenges for an already struggling election management body and for political parties and women's groups that had built their electoral strategies and civic education around the defunct system. Thus, the need to improve the laws or rules of procedure regulating elections that encompass the electoral complaint adjudication process must be balanced with the need to have established and definite rules in place in the time remaining before the next election.

As previously noted, states are not required to follow specific, detailed rules of procedure; international standards permit a wide array of election processes. In some cases, however, international and domestic courts and monitoring bodies provide guidance on the best interpretation of a

[81] Roman Olearchyk, Ukraine Premier Attacks Poll Law Changes, Financial Times, Feb. 4, 2010, *available at* http://www.ft.com/cms/s/0/7fea275e-1146-11df-a6d6-00144feab49a.html.

[82] *Id.*

[83] USAId, IFES, A Free, Fair And Credible 2009 Elections In Indonesia Through Targeted Election Management Assistance: Final Report 6, 19 (2009).

standard that is helpful in ensuring that accepted interpretations are applied as much as possible. For example, the United Nations Human Rights Committee in *General Comment no. 25* affirmed that "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties." [84]

Regional courts have established tests to ensure that states are meeting minimum standards in protecting the right of political participation. For instance, the European Court of Human Rights (ECtHR) has construed the right to stand for an election as a principle that is implicitly included in the right to participate in government. The ECtHR has focused mainly on two criteria to determine whether a state has upheld this right: arbitrariness or lack of proportionality; and, whether there is interference with the free expression of the opinion of the people. In its ruling in *Zdanoka v. Latvia*, a case brought by an applicant who was excluded from standing as a candidate for election to the Latvian parliament, the Court detailed the test used to verify compliance with the right to stand for an election. She had been disqualified, pursuant to the Latvian Parliamentary Elections Act 1995, on the ground that she had "actively participated" in the activities of the Communist Party of Latvia (CPL) after 13 January 1991.[85] In its ruling, the Court first specified that the standards derived from Article 3 of Protocol No. 1 of the European Convention are less stringent than those applied under Articles 8 to 11 of the Convention.[86] The Court held that states are not restrained to a specific list of "legitimate aims" to justify limitations

[84] UN Human Rights Comm., Covenant on Civil and Political Rights (CCPR) General Comment No. 25, Art. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶ 17, CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter CCPR General Comment No. 25] ("If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy."), *available at* http://www.unhcr.org/refworld/docId/453883fc22.html; Declaration on Elections, supra note 54, art. 4, § 9 ("States should ensure that violations of human rights and complaints relating to the electoral process are determined effectively by an independent and impartial authority, such as an electoral commission or the courts.").

[85] Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 155(b).

[86] European Convention, *supra* note 26, arts. 8-11 (establishing rights to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly; and freedom of association with others, and guaranteeing that for the freedoms of assembly and association,"[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others," although refusing to "prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State").

to the principle of free and fair elections.[87] Moreover, the traditional tests of "necessity" or "pressing social need" do not apply.[88] The Court also pointed out that electoral legislation should be construed in the light of the political evolution of the country concerned.

In this case, the Court stated that the requirements for the right to stand for an election may be stricter than for eligibility to vote.[89] The Court checked the compatibility of the restriction with the principle of the rule of law and the general objectives of the Convention (State's independence, democratic order and national security).[90] Then, the Court looked at whether the measure was proportional, arbitrary, and whether the category of persons affected by it was clearly defined.[91] The Court also stated that the restriction should be assessed in light of the very special historical and political context and should be under constant review with a view to terminating the restriction as soon as possible.[92] In this particular case, the applicant's former position in the CPL and her anti-democratic views during the period of Latvia's struggle for "democracy through independence" in 1991 warranted her exclusion.[93] Because of the threat that her views could have posed to the Latvian democratic order, the Court considered the judicial and legislative authorities to have adequately balanced the exclusion with the need to build confidence in new democratic institutions. Based on all of the aforementioned elements, the Court held that Latvia did not overstep its wide margin of appreciation[94] and that there was no violation of the right to stand for an

[87] Toplak, *supra* note 18, at 7.

[88] Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 112(c).

[89] *Id.* ¶ 115(e).

[90] *Id.* ¶ 118.

[91] *Id.* ¶¶ 120, 128.

[92] *Id.* ¶¶ 121, 135.

[93] *Id.* ¶ 132.

[94] "Margin of Appreciation" is a concept the European Court of Human Rights has developed when consIdering whether a member state of the European Convention on Human Rights has breached the convention. "Margin of appreciation refers to the power of a Contracting State in assessing the factual circumstances, and in applying the provisions envisaged in international human rights instruments. Margin of appreciation is based on the notion that each society is entitled to certain latitude in balancing indivIdual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions." Onder Bakircioglu, The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, 8 German L.J. 711, 711 (2007), *available at* http://www.germanlawjournal.com/pdfs/Vol08No07/PDF_Vol_08_No_07_711-734_Articles_Bakircioglu.pdf.

election. However, the Court highlighted the necessity for the Parliament to regularly review the statutory restrictions to the right to stand for an election, "with a view to bringing it to an early end."[95]

Similarly, in a recent case on repeat parliamentary elections irregularities, the ECtHR ruled that Georgia was in violation of Article 3, Protocol 1 of the European Convention. The Court made its decision on the legal basis of the Georgian Labour Party's right to stand for election.[96] The Court ruled that the Central Electoral Commission's decision of 2 April 2004 to annul the election results in the Khulo and Kobuleti electoral districts were not made in a transparent and consistent manner. The Commission had not adduced relevant and sufficient reasons for its decision, nor had it provided adequate procedural safeguards against an abuse of power. Through this decision and others, the ECtHR has outlined general standards that apply to electoral adjudication processes.

The International Covenant on Civil and Political Rights
Article 14.1

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Universal Declaration of Human Rights
Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

From these and other examples, it can be reasonably concluded that states should establish laws and regulations that define both the struc-

[95] Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 135.

[96] The applicant party in this case complained about the conduct of the repeat parliamentary election on March 28, 2004 where Khulo and Kobuleti voters had been deprived from their right to vote. Georgian Labour Party v. Georgia, Eur. Ct. H.R., App. No. 9103/04, Judgment of 8 Oct. 2008, ¶ 104.

tural framework of the electoral complaint process and the applicable rules of procedure for adjudicating such conflicts, and that they will conform to their international obligations. Although states do retain a considerable amount of freedom in the particular organization of their electoral complaints process, states must ensure that a clearly defined regime provides for the minimum guarantees. Moreover, when drafting new laws or reviewing existing ones, states should take into consideration the possibility of conflicting laws, the historical context of their country, their legal traditions, and try to meet international obligations that facilitate a fair, transparent and effective election complaint adjudication system.

3. An Impartial and Informed Arbiter[97]

The recognition of the universal importance of an impartial and informed arbiter is particularly relevant when it is applied to election complaints, which are generally both politically sensitive and controversial.[98] If the state interferes with the operation of an independent court or commission, it will decrease the independence and impartiality of the body and increase the likelihood that adjudication of election complaints will be biased. In addition to having effective independence, a judge or arbiter dealing with electoral complaints should be aware of the existing election-related law, and have sufficient capacity to assess, investigate and settle the complaints relating to this specific area of the law.

A. Impartial Arbiters

The essential role that impartial arbiters play in maintaining compliance with basic human rights is once again made explicit in treaty law. The ICCPR refers to the necessity for "a fair and public hearing by a competent, in-

[97] Though the language in this section often refers to "judges" and "courts" or "tribunals," the same standards apply to any official who exercises state power through a formal hearing or other procedure to determine the validity and outcome of an election complaint. This could be a committee member, an administrative officer, or a judge. Conversely, most of the same standards of impartiality will also apply to judges and other officials acting in contexts other than that of an election.

[98] ICCPR, supra note 11, art. 14, § 1. The language used in the ICCPR can be traced back to article 10 of the UDHR. See supra note 10, art. 10. The American Convention provIdes for the same guarantees stating that every person is entitled to a fair hearing by "a competent, independent, and impartial tribunal." American Convention, supra note 14, art. 8, § 1; see also European Convention, supra note 26, art. 6, § 1; Venice Commission Code, supra note 44, at 26.

dependent and impartial tribunal established by law,"[99] and the United Nation Human Rights Committee further explains that "administrative mechanisms are particularly required to give effect to the general obligation . . . through independent and impartial bodies." [100] The Committee affirmed that "an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant."[101] As a key component of the overall electoral process, any body dealing with electoral complaint adjudication should seek to address this standard. Many regional instruments also stress the importance of an autonomous and impartial judge in the judicial system.[102] These obligations can be extended to asserting the need for impartiality of an adjudicatory body.

One cannot discuss the impartiality of an election arbiter without acknowledging a major obstacle to fair adjudication: corruption. Corruption undermines the independence of arbiters and judges, the legitimacy of electoral law, and the right to an effective remedy. It represents a major threat to democracy and human rights, the rule of law, and endangers the stability of democratic institutions.[103] The fight to minimize and eradicate corruption in electoral complaint processes needs to be multi-disciplinary, including administrative matters, judicial appointments, salary levels, among other

[99] ICCPR, *supra* note 11, art. 14, § 1.

[100] UN Human Rights Comm., CCPR General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 15-16, CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter CCPR General Comment No. 31].

[101] CCPR General Comment No. 25, supra note 84, ¶¶ 17, 20, 25. A Uganda case illustrates the importance of the compliance with the right to a fair trial, when a court stated that "to operationalize this constitutional provision [Article 28 of the Constitution: Right to Fair Hearing] with regard to the resolution of electoral disputers among contestants, rule 4 of the Parliamentary Elections (Election Petitions) Rules, S.I 141-2 was made under S93 of the Parliamentary Elections Act." The Court then recalled that this right to a fair hearing is underogable and is "extremely important in the adjudication of matters between parties." The constitutional provision reflects international standards and is the legal basis used to implement such guarantees within the electoral dispute resolution process. Electoral Commission v. Bakireke, (2009) U.G.C.A. 12 (Ct. App.) (Uganda), *available at* http://lawviatheinternet.org/ug/cases/UGCA/2009/12.html.

[102] European Association of Judges, Judges' Charter in Europe, art. 1 (March 20, 1993); 6th Conference of Chief Justices of Asia and the Pacific Region, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (August 1995), *available at* http://lawasia.asn.au/objectlibrary/147?filename=Beijing percent20Statement.pdf; Ibero-American Summit of PresIdents of Supreme Justice Tribunals and Courts, Caracas Declaration (March 4-6, 1998); Conference on the Judiciary in the Arab Region and the Challenges of the 21st Century, Recommendations of the First Arab Conference on Justice ("Beirut Declaration") (June 14-16, 1999).

[103] Council of Eur., Conf. of European Ministers of Justice, Res. No. 1, 21st Conf. (June 10-11, 1997).

areas.[104] Corruptive activities such as bribe-taking can put in jeopardy equal access to justice, the fair and independent appointment of arbiters, or even the impartiality of the ruling on a case. There is a need to ensure that judges and arbiters who adjudicate electoral complaints are ethical, "especially in countries where the judiciary is plagued by incompetence, executive domination and systemic corruption."[105]

i. Tests for impartiality

Making determinations as to what constitutes "impartial" is not necessarily a clear-cut process. However, several courts have enumerated workable standards that can be adopted by countries around the world. For instance, the European Convention calls for a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law,[106] and the European Court has produced extensive case law on this right to a fair trial — including some decisions dealing with the resolution process of an electoral complaint. In *Salov v. Ukraine*, the Court found that the judge at issue did not meet the requirement of impartiality, because there were insufficient legislative and financial protections against outside pressure on the judge hearing the case.[107] The Court stated that "in order to establish whether a tribunal can be considered 'independent' . . . regard must be added to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."[108] The decision shows that protecting the impartiality of judges and arbiters requires numerous efforts. Indeed, states should examine all of the elements discussed in the paragraph below to frame a system that will deter corruption or bias in the adjudicatory bodies. It requires the relevant legislative body to design the complaint adjudication system in the light of all of these factors that can potentially undermine impartiality.

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[104] Council of Eur., European Comm. of Ministers, Res. No. (97) 24, 101st Sess., pmbl (Nov. 6, 1997).

[105] Keith Henderson & Violaine Autheman, IFES, Global Best Practices, Rule of Law White Paper Series, A Model State of the Judiciary Report: A Strategic Tool For Promoting, Monitoring and Reporting on Judicial Integrity Reforms at the Country, Regional and Global Levels 16 (2004); Dr. Marcin Walecki, IFES, Political Money and Political Corruption: ConsIderation for Nigeria 6, tbl. 1 (2003), *available at* http://www.ifes.org/publication/98dac604e5ef5ec603e632890259160d/Money_Corruption_Nigeria.pdf

[106] European Convention, *supra* note 26, art. 6, § 1.

[107] Salov v. Ukraine, Eur. Ct. H.R., App. No. 65518/01, Judgment of 6 Dec. 2005, ¶¶ 78-98.

[108] *Id.* ¶ 80.

This particular European Court decision also set up a two-part test for the question of impartiality. The Court first looked to the subjective "personal conviction and behavior of a particular judge in a given case."[109] The Court next reviewed the objective ascertainable facts that may have raised doubts as to impartiality of the adjudicator. This test is administered through an analysis of a range of elements: whether proceedings were impartial and independent; the appointment process for judges; and the influence over the lower courts by the court at issue. The test also evaluates the existence of "clear criteria and procedures for the promotion, disciplinary liability, appraisal and career development of judges; the limits to the discretionary powers vested in the presidents of the higher courts; and the financial and legislative guarantees for the functioning of the judicial bodies."[110] These elements provide a useful structure through which to analyze the impartiality of an adjudicating body.

ii. Appointment and removal

The process for appointing and removing a judge in charge of ruling on election complaints must also be determined by concerns for impartiality. A system of checks and balances should be in place to ensure impartiality of the decisions.[111] If judges and arbiters are appointed by national entities such as the executive, a review process should be established to monitor the appointment process. The nomination of judges or arbiters by the head of state should require confirmation by or consultation with the legislature. However, if the same political party controls these two branches, then imposing a two-thirds majority requirement could protect the interests of minorities in the recruitment or removal of electoral commissioners and judges.[112] A system

[109] *Id.* ¶ 81.

[110] *Id.* ¶¶ 82-86.

[111] Constitución Política de la República Oriental del Uruguay [Political Constitution of the Eastern Republic of Uruguay] Feb. 15, 1967, art. 324 ("Five incumbents and their alternates appointed by the General Assembly meeting both houses by two-thirds vote of its total components, must be citizens who, by their position in the political scene, are a guarantee of impartiality. The remaining four members, representatives of the Matches will be elected by the General Assembly by the system double simultaneous vote, accounting for two to the list Highest voted motto majority and two from the majority list of slogan next in number of votes.").

[112] Election Law No. 13, art. 19(a), (b) (2001) (Yemen) (codifying the Supreme Commission for Elections and Referendum (SCER), which is composed of 7 members appointed by a Presldential Decree from a list of 15 names nominated by the House of Representatives, which must pass the list by a majority of two-thirds of the members of the House); see also IFES, Election Law Reform In Yemen: Supplementary Report 9 (2005), *available at* http://www.ifes.org/publication/3545312a460b9359a9b16a35f027be3f/FINALSupplRoLReport percent20English.pdf

of checks and balances is crucial to addressing the potential corruption and influence that exists within the institutions in charge of the appointment.

In certain political cultures, providing an impartial arbiter may require more stringent measures to ensure independence. In Nicaragua, seven commissioners appointed by the National Assembly with a qualified majority of 60 percent head the Consejo Supremo Electoral (CSE), the adjudicative body for non-criminal electoral complaints. The President and the National Assembly both present nominations for the position of commissioners "in consultation with civil society."[113] Despite this checks and balances mechanism, the political parties generally put the independence of the CSE in jeopardy and elect commissioners with a very strong political profile.

In Brazil, the Superior Electoral Court (Tribunal Superior Eleitoral) uses another interesting appointment procedure.[114] The TSE has jurisdiction over all aspects of elections and regulates the functioning of political parties. The Constitution is very specific about the composition of the Superior Electoral Court.[115] There are seven judges: three judges are elected from among the members of the Federal Supreme Court (Supremo Tribunal Federal); two judges are elected from among the members of the Superior Court of Justice (Superior Tribunal de Justiça); and two judges are named by the President of the Republic, chosen among six attorneys of renowned legal knowledge and good moral reputation that are appointed by the Federal Supreme Court. To maintain the non-political character of the electoral courts, the judges serve for a two-year period and cannot hold office for more than two consecutive periods.[116]

The clear and transparent Brazilian system, which helps to ensure impartiality, can be contrasted with the processes in Jordan and Lebanon. The constitution of Jordan provides that the newly-elected Parliament is the entity

[113] Constitución Política de Nicaragua [Political Constitution of Nicaragua] Jan. 1, 1987, art. 138, § 7; art. 150, § 14; E.U. Nicaragua Report, *supra* note 38, at 23.

[114] Brazil Superior Electoral Court, *supra* note 6.

[115] Constituição Federal [C.F.] [Constitution] art. 119 (Braz.).

[116] Id. art. 121, § 1; see also, e.g., Ruben Hernandez Valle, Costa Rica: A Powerful Constitutional Body, Case Study 1 ("The TSE consists of three regular judges and six substitute judges . . . . Their appointment is made by two-thirds of the members of the Supreme Court of Justice."), *available at* http://www.Idea.int/publications/emd/upload/EMD_CS_Costa_Rica.pdf.

empowered to handle petitions that challenge the results of the Parliamentary elections.[117] In Lebanon, the electoral complaints adjudication process specifically, and the judiciary in general, lack independence from both the executive and the legislative bodies. This was most strikingly in evidence when, during the 1996 parliamentary elections, "the Ministry of Interior declined to provide the Constitutional Council, in charge of electoral supervision, with the minutes and other original documents to enable it to perform its mission, as some of these documents were burned."[118] Moreover, in August 2003, the mandates of five of the 10 members of the Constitutional Council expired without any new appointment, leading to the de facto paralysis of that institution until 2009.[119] The conflict of interest and the interference of politicians in the work of the adjudication bodies in these countries clearly fall short of the requirement for an impartial and independent arbiter.

The process for removal of judges and arbiters is also a key component in creating an impartial adjudicative system, and should balance the need to isolate adjudicators from short-term political influence while also providing for a means for removal for truly corrupt actions. For instance, in Brazil, the Constitution provides that the judges from the Electoral Supreme Court and the Regional Court while in office are non-removable.[120] This provision ensures that an arbiter or a judge will not be removed arbitrarily based on political manipulation or undue influence. However, the electoral law or rules of procedure should set up clear and transparent rules to discipline or dismiss members if they act improperly or if they fail in the performance of their duties.[121] Such rules should be an integral part of any

[117] Constitution of the Hashemite Kingdom of Jordan Jan. 1, 1952, art. 71; see also Democracy Reporting International, Al-Urdun Al-Jadid Research Center, Assessment of the Electoral Framework: The Hashemite Kingdom of Jordan 2, 26 (2007) [hereinafter Jordan Electoral Assessment], *available at* http://www.democracy-reporting.org/files/dri_report_jordan.pdf.

[118] Jordan Electoral Assessment, *supra* note 117, at 2, 26.

[119] *Id.* at 30.

[120] Constituição Federal [C.F.] [Constitution] art. 121, § 1 (Braz.).

[121] USAId Office of Democracy and Governance, Technical Publication Series, Guldance for Promoting Judicial Independence and Impartiality 20 (2002) [hereinafter USAId Guldance] ("When disciplinary processes work correctly, they protect the integrity of the judiciary and its independence. However, disciplinary proceedings may be brought for political reasons or to punish judges who render decisions contrary to the views of their superiors. Substantive differences that should be resolved by appealing cases to a higher court may instead form the basis for disciplinary actions. Not uncommonly, disciplinary processes are bypassed entirely in removing judges from office. A well-structured disciplinary procedure reduces the vulnerability to abuses that affects judicial independence."), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

reform agenda and could decrease the number of decisions made in an arbitrary manner or under political pressure.

These principles of impartiality are further complicated by the level of political stability of a country. The Electoral Complaints Commission in Afghanistan provides a strong post-conflict country example for maintaining the requirement of impartiality, while also showing the limitations of such mechanisms. For the 2009 elections, the Commission included three international commissioners appointed by the United Nations Special Representative of the Secretary-General (SRSG) for Afghanistan, one commissioner appointed by the Afghan Independent Human Rights Commission and one commissioner appointed by the Supreme Court of Afghanistan. Originally, the rationale for the composition of the ECC was to ensure support from the international community through the presence of international electoral experts and to ensure impartiality through the presence of Afghan nationals. There has certainly been substantial criticism of this balance of Afghans and foreigners. However, if the ECC were to be staffed exclusively with Afghan nationals, it could be difficult to ensure independence and impartiality due to the arguably high level of corruption that still exists within Afghan institutions. Moreover, the involvement of international experts at the ECC was important to try to overcome ethnic tensions that still exist in Afghanistan.

In preparation for the 2010 Parliamentary elections, the Afghan government adopted a new electoral law[122] that does not explicitly require that ECC commissioners be Afghans, but states that they should be appointed by the President after consultation with the speakers of both houses and the head of the Supreme Court. The President also appoints members of the Provincial Electoral Complaints Commissions (PECC). The law is silent on the qualifications or on the number of both PECC and ECC commissioners. These changes do little to address the risk of partiality in the nomination of judges or arbiters, or the lack of confidence in the composition of the ECC.

[122] Electoral Law, art. 61 (2004) (Afg.); PresIdent of Islamic Republic of Afghanistan, Decree on the Appointment of Election Complaints Commission Members, April 18, 2010, *available at* http://www.ecc.org.af/en/images/stories/pdf/16Apr10 percent20Pres percent20Decree percent20est percent20ECC.pdf.

While the impartiality of arbiters in the adjudication of electoral complaints is of crucial importance, exceptional circumstances require flexibility and pragmatic approaches in the implementation of international standards within a particular system.

iii. Remuneration, full-time, and permanent

Other factors can affect the establishment of an impartial electoral complaints mechanism, including remuneration levels, whether the position is full or part-time, and whether it is a permanent or temporary body. In a well-resourced electoral management body, judges or arbiters would ideally be prohibited from exercising other functions and would hold full-time positions in order to best maintain an independent and impartial adjudication system. In practice, however, judges who serve as electoral arbiters are often sitting judges operating in their regular capacity — perhaps under special administrative procedures, or temporarily assigned to perform an electoral function, or even retired judges brought in temporarily. Few countries have full-time, permanent election tribunals. Thus, while the well-resourced model stated above may not exist in practice, the importance of creating a body of arbiters that are at least well-versed in election law and electoral complaint adjudication is clear.

Remuneration, not commonly discussed or adequately addressed by international development assistance programs, is also an important element in the impartiality and independence of a judicial organ. Sufficient remuneration for electoral judges will help to prevent external, potentially corruptive financial pressure on judges or arbiters.[123] Certainly, when the culture of bribes is embedded in a country, an increase in remuneration may not eliminate corruption entirely. However, salaries and benefits may affect the attitude of employees and also attract the most qualified applicants.

Designing a fair adjudicative system also requires a determination as to whether to make electoral complaints tribunals and commissions per-

[123] USAId Guldance, supra note 121, at 52, 62 (noting that "[l]ow levels of remuneration usually attract attention as the main source of corrupt behavior" and that "[a] number of efforts have been made to minimize corruption among judges," including "the most often voiced suggestion . . . to increase judicial salaries"); Central Council of the International Association of Judges , Universal Charter of the Judge, art. 13 (Nov. 17, 1999) ("The judge must receive sufficient remuneration to secure true economic independence.").

manent or temporary organs. The permanency of an adjudicatory body can ensure continuity in the work of the arbiters and staff and enable it to assess mistakes, challenges and successes following an election. It can also maintain and further the knowledge of arbiters in election law. However, such a permanent structure requires extensive financial support and in the time between elections there is no crucial need for sitting judges or arbiters. For example, in Mexico, electoral complaints are adjudicated by permanent Electoral Tribunals (one federal and several regional) that benefit from consistent government funding in order to perform its adjudicative task. This tribunal has also engaged in extracurricular activities such as promoting the Mexican electoral model abroad or providing technical assistance to developing democracies. The Uruguayan Electoral Court (Corte Electoral) is also a permanent complaint adjudication body.[124] Although the Mexican model has proven very effective, in countries with fewer resources and different legal traditions, a temporary complaint adjudication body can be as efficient as a permanent one as long as its staff is nominated or appointed with sufficient time for preparation before the elections.

The exercise of a double function by an arbiter will raise the same arguments that were laid out in the permanency and the remuneration discussion. While prohibiting a judge or arbiter to hold another position may provide a higher degree of impartiality, in newly developed democracies the state often does not have the resources to offer sufficient remuneration to enable the arbiters to hold only one position. To ensure the impartiality of arbiters, some countries instead provide for restrictions on their support to a political party. For example, the Uruguayan constitution does not permit members of the Electoral Court "to serve as political party officials or engage in political election propaganda."[125]

Generally, the arbiters that adjudicate electoral complaints are either regular judges from the judiciary, or they work at the electoral commission and adjudication is one part of their job description. With that said, the

[124] Constitución Política de la República Oriental del Uruguay [Political Constitution of the Eastern Republic of Uruguay] Feb. 15, 1967, art. 322 (establishing autonomous and independent Electoral Corte "to decIde the final determination on all appeals and claims that arise, and judge of all praise elective office of the acts of plebiscite and referendum").

[125] *Id.* art. 77, § 5.

prohibition of the exercise of another function is highly recommended at a minimum during the election period.

iv. Challenges and obstacles in developing democracies

The limits of domestic systems and the restraints created by everyday practicalities in developing democracies should also be recognized. To provide for an impartial arbiter within the electoral complaints system, states should comply with standards regarding the appointment, the removal or the remuneration of judges and arbiters, as described above. However, developing countries often deal with additional internal issues such as a limited pool of skilled personnel or limited financial resources.

For example, difficulties arose in Armenia in 2006, when the Constitutional Court ruled on a conflict of interest claim pertaining to the election management body and the administration of justice.[126] The Armenian election code incorporates the Venice Commission guidelines of 2002, stating that the electoral commission should include at least one member from the judiciary.[127] However, the Constitutional Court pointed out that as a transitional country, Armenia suffers from a dearth of judges that can adjudicate even trivial matters. Thus, if some judges are appointed to administrative roles as members of the electoral commissions, they must also serve other judicial functions. The Court recognized that serving both functions would reduce the impartiality of such a commission, as the administrative and judicial roles could easily come into conflict. This case stressed the challenges that can arise for developing countries attempting to achieve compliance with international standards, and the unfortunate reality that more stringent guidelines that enforce the principle of impartiality may not always be possible to imple-

[126] Advisory Opinion on the Compliance of Article 35.1.3, Second Sentence, Article 35.1.4, and Article 36.1 of the Armenian Electoral Code with the Armenian Constitution, (2006) D.C.C. 664 (Const. Ct. Arm.) ("[T]he role of impartial and independent electoral commissions is vital, but [] in 'transitional countries' impartial judicial power is also of pivotal importance. This is why Article 98 of the Constitution prevents judges from holding any office which is not relevant to his official duties. Including judges in electoral commissions, as prescribed by the Electoral Code, is at odds with the administration of justice, with the independence of the judiciary, increases the possibility of conflicts of interest, and undermines the impartiality of judges and courts when resolving electoral disputes."), headnotes *available at* http://www.concourt.am/english/decisions/common/doc/english_codices/664.htm.

[127] The Armenian Electoral Code requires the appointment of one judge within the electoral commission. Electoral Code, arts. 35, 36 (2005) (Arm.), *available at* http://www.venice.coe.int/docs/2007/CDL-EL(2007)010-e.pdf.

ment. While this tension is important to note, limitations of the judicial system should not be used to excuse or allow adjudication that results in arbitrary or unfair decisions.[128]

During the design of a complaint adjudication system, framers should address these practical obstacles and seek alternative solutions. However, regardless of the scarcity of resources, both human and financial, impartial decision-making must still be employed so as to avoid arbitrary decisions, lack of proportionality, and restrictions that interfere with free expression.[129]

B. Adequately Informed Arbiters

Due to time restraints and the specialized subject knowledge required to rule on electoral contests and complaints, arbiters should be competent and informed in the specific area of electoral complaint adjudication. This standard requires that appointees have requisite qualifications upon their appointment, as well as continuing education requirements to maintain familiarity with changes in the legal regime.

i. A qualified judge or arbiter

Arbiters of any electoral adjudicatory entity should possess the necessary skills and resources to fully understand the electoral process. When reviewing the qualifications of a potential judge or a commissioner, the civic and institutional background of the candidate should be considered, not his or her political connections. The Venice Commission recognized the required level of technical expertise, stating that electoral commission members "should be legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues."[130] However, a good education and adequate experience in electoral matters are necessary but not sufficient characteristics to be deemed a qualified

[128] *Id.*

[129] Zdanoka v. Latvia, Eur. Ct. H.R., App. No. 58278/00, Judgment of 16 March 2006, ¶ 115 (b),(c),(e).

[130] Venice Commission Code, supra note 44, at 28. In another example, the Supreme Court in Ghana also acknowledged the need for competent judges in electoral matters. In November 2008, Justices drafted the Manual and Statutes on Elections Adjudicating in Ghana. On this occasion, Lady Justice Georgina T. Wood underlined that one of the goals of this initiative was "to ald judges in their work . . . on election dispute adjudication." Foreword to Ghana Manual, supra note 7.

judge or arbiter. In IFES' pre-election assessment report in Thailand, legal experts called on the Electoral Commission (ECT) to note that "in this time of increased political tension, it will be particularly important to ensure that the recruitment process is competitive and that candidates are properly screened."[131] The assessment stated that in order to serve as a member of an election or polling station committee, candidates should be qualified and known to be politically neutral.[132] Observers noted, for example, that some election workers in Thailand were police officers, which jeopardized the principle of impartiality. However, it should be acknowledged that the complaints adjudication system in Thailand differs from most countries, as it is the ECT that functions as the complaint adjudication entity.

ii. Entry-level and continued trainings

Election law is often complex and dynamic, and thus the maintenance of an informed and qualified body of administrators can be even more difficult than in other fields. As a result, the skill set requirement is simply a qualifying threshold; there should also be continuing education for all current members.[133] Staggered appointments of the electoral tribunal or commission could enable former electoral judges or arbiters to help with the training of newly appointed members. Continuing education is important for judges and arbiters. In Brazil, the complaints adjudication mechanism has taken into consideration the need for continuing education of arbiters. An Electoral Legal School is linked to the Court and aims to provide continuous or occasional education to judges that rule or will rule on election complaints.[134]

Furthermore, to ensure proper application of the law and compliance with the training given, judges and arbiters in electoral matters must be accountable for misconduct or malpractice. The efficiency of judges and arbiters relies on their skills and on their training, but the arbitration team also benefits from a qualified support staff. An IFES project in Timor-Leste focused

[131] Robert A. Dahl et al., IFES, Thailand: 2007 Pre-Election Technical Assessment, Report of Findings and Recommendations 37 (2007), *available at* http://aceproject.org/ero-en/regions/asia/TH/IFES percent20Preelection percent20Assessment.pdf/view.

[132] *Id.*

[133] USAId Office of Democracy and Governance, Technical Publication Series, Guldance for Promoting Judicial Independence and Impartiality 27 (2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

[134] Brazil Superior Electoral Court, *supra* note 6.

on the need for hiring and maintaining support staff with appropriate skill sets. IFES recommended that the National Elections Commission hire qualified staff and, more specifically, that the complaints team hire an in-

Islamic Republic of Afghanistan
Electoral Complaints Commission (ECC)
Code of Conduct for ECC Commissioners and Staff Members

ECC Commissioners and staff members shall:

- Comply with the Constitution, the Electoral Law, and applicable Decrees, Regulations and Procedures, and implement them in an impartial, non-partisan and politically neutral manner;
- Uphold the highest standards of efficiency, competence and integrity;
- To the best of their ability, ensure everyone's fundamental rights of freedom of opinion and expression, association, assembly, and movement are protected at all stages of the electoral process;
- Treat voters, candidates, agents, members of the press or media, and all other entities or individuals participating in the electoral process in a respectful, impartial, and politically neutral manner;
- Not communicate to any person or other source any information or documents known to them by reason of their functions that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Commission;
- Not keep such documents in their possession any longer than required to fulfill their duties. These obligations do not cease upon completion of their service with the ECC;
- Not indicate on clothing, possessions, or by action, attitude, or speech, support for any political party or candidate;
- Behave honestly and transparently with regard to their duties and decisions by cooperating to the extent allowed by law with Observers, Agents, Voters, Candidates, and members of the press or media;
- Not use or attempt to use their position for personal gain, and shall not seek or receive instructions from any government or non-government official or authority, except as permitted by law;
- Declare any private interests relating to and conflicting with their duties to the ECC and take all actions necessary to resolve those conflicts in a way compatible with their duties;
- Respect the secrecy of the ballot;
- Protect the privacy of any personal or otherwise confidential information;
- Familiarize themselves with all relevant electoral laws, regulations, rules, and ECC procedures; and Commissioners shall, whenever possible, attend all ECC sessions.

formation technology expert, lawyers and a clerk.[135] The adjudicatory body should regulate the conduct of its staff, and should adopt a code of conduct for its judges and commissioners (see text box on the previous page for a code of conduct developed by the Afghanistan Electoral Complaints Commission). Staff members should be sanctioned just as judges would be if they commit a comparable error. This will create a responsibility equivalent to a civil duty of care. The arbiters should be liable for their misconduct in processing a claim. They should be responsible to the parties and polity, requiring them to be more vigilant when reviewing a complaint.

A study on the Electoral Court in Uruguay has revealed that its members are nominated based on their professional skills and that the electoral staff is generally well-trained, but lack proper resources to run an efficient system.[136] With several competing demands on domestic resources, this is a major entry point for the assistance of the international donor community; however, all aid should be designed with the ultimate goal of creating self-sustaining systems.

4. A System that Judicially Expedites Decisions

Because the legitimacy of the entire government may rest on the validity of election results, complaint proceedings must be expeditious. The importance of timing is widely recognized in international conventions and treaties, even though the language may vary. For example, the time-sensitive nature of resolving complaints requires the proceedings to take place "within a reasonable time" or "without undue delay."[137]

A. Expeditious Proceedings

The importance of a timely remedy has been recognized by courts as inextricably linked to fair public participation in government and elections. There must be time limits for resolving electoral complaints.[138]

[135] IFES, Timor-Leste: Development of a National Electoral Framework 26-27 (2008) [hereinafter IFES Timor-Leste Report].

[136] Staino, *supra* note 6, at 1-2.

[137] ICCPR, *supra* note 11, art. 14, § 1(c); American Convention, *supra* note 14, art. 8; European Convention, *supra* note 26, art. 6, § 1; see also Autheman, *supra* note 51, at 6.

[138] SADC Parliamentary Forum, Norms and Standards for Elections in the SADC Region 15 (2001) [hereinafter SADC Norms], *available at* http://aceproject.org/ero-en/regions/africa/regional-resources-africa/sadcpf_electionnormsstandards.pdf/view.

In *Kwiecien v. Poland*, the European Court of Human Rights acknowledged the legality of summary proceedings brought under local election law, stating that "proceedings of this type are conducted within very short time-limits . . . such a summary remedy during periods of (local and national) electoral campaigns serves the legitimate goal of ensuring the fairness of the electoral process and as such cannot be questioned from the Convention standpoint."[139] Timeliness requires states to make a two-step effort: (1) ensure that the substantive and procedural law provide for such timing requirement; and (2) provide the courts or commission in charge of electoral complaint adjudication with the ability and resources to implement those time limits stated in the law. Some international experts agree that deadlines for filing or deciding on a complaint or an appeal should be set in the electoral laws or appropriate regulations. The timeframe could be short provided that the court hearing election complaints can clear its schedule for the duration of the election or effectively prioritize election-related cases.

Delays in adjudicating complaints can hurt public confidence and delegitimize a government. For example, in Nigeria, an electoral dispute arose concerning the 14 April 2007 gubernatorial election in the Ekiti State, after INEC declared Mr. Olusegun Oni of the People's Democratic Party as the winner. The opposition party candidate, Dr. Kayode Fayemi of Action Congress, challenged the elections before the Election Petition Tribunal and alleged malpractice, in the form of multiple balloting and voter registry manipulation.[140] Despite the requirement of Section 148 of the Electoral Act of 2006, which provides that "an election petition and an appeal arising therefrom . . . shall be given accelerated hearing and shall have precedence over all other cases or matters before the Tribunal or Court,"[141] the Nigerian court system took nearly two years to resolve the dispute.[142] It was not until 17 February 2009 that the Court of Appeal ordered a re-run

[139] Kwiecien v. Poland, Eur. Ct. H.R., App. No. 51744/99, Judgment of 9 Jan. 2007, ¶ 55.

[140] Oni v. Fayemi, [2009] (C.A.) (Nigeria); see also Demola Akinyemi et al., Court Sacks Oni, Orders Fresh Polls in Ekiti, Vanguard, Feb. 18, 2009, *available at* http://allafrica.com/stories/200902180002.html.

[141] Electoral Act 2010, § 142 (Nigeria), *available at* http://placng.org/Electoral percent20Act percent202010- percent20as percent20Gazetted.pdf.

[142] This provision of the electoral law recalls section 294(1) of the Nigerian Constitution, that "every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evIdence and final addresses." Constitution of the Federal Republic of Nigeria (1999), § 294(1).

election in several wards of the state. In the meantime, Governor Oni had spent nearly two years in office. Following the decision of the Court of Appeals, the Ekiti State organized a re-run of the elections in April 2009; however, the turn-out was low and other electoral petitions were filed to the electoral complaint adjudication body concerning the re-run elections. According to observers, the delays concerning the 2007 electoral complaints have created a deep legitimacy and credibility crisis in the Ekiti State. Despite the ramifications of the two-year delay, however, the judgment was considered by some as "another milestone for the Nigeria judiciary, expressing optimism that the nation's democracy, would be better off sooner than later."[143]

It should also be noted that the electoral complaint adjudication system in Nigeria has considerably improved over time. In the 1999 and 2003 elections, it took approximately five years for a petition to be adjudicated. In other cases, the complaints were simply ignored by the judges. After the 2003 elections, domestic stakeholders and international experts undertook a huge effort to strengthen the Nigerian complaints adjudication process. International election experts participated in the training of judges for the Electoral Petition Tribunals in 2006 and 2007 and introduced case management techniques, including pre-trial procedures.[144] At first, the electoral experts faced resistance from the Nigerian judges. In order to overcome this resistance, the experts had to address the existing acceptability of long delays plaguing the process of election petitions. Due to the collaborative efforts of the President of the Court of Appeals, Honorable Justice Umaru Abdullahi, CON, reforms were enacted that improved the process of complaints adjudication. Following the 2007 elections, it took two years for the election tribunals to rule on the case stated above, but over 85 percent of the complaints logged were solved by May 2008. Even if there are still delays in the adjudication of complaints in Nigeria, the successes should be highlighted. The improvement of the complaints adjudication process in Nigeria has had a clear positive impact on the confidence of the public in the electoral system as a whole.

[143] Akinyemi et al., *supra* note 140.

[144] IFES, Support to the Electoral Process in Nigeria: Final Report 35-39 (2009). Barry Weinberg and Judge Nikki Ann Clark participated in the training of judges for the Electoral Petition Tribunals in 2006 and 2007. *Id.*

The 2001 presidential elections petitions in the Republic of Zambia also illustrate the need for a timely adjudication of complaints. Following the elections, eleven political parties contested the presidential elections before the Zambian courts to allege irregularities. It was not until 16 February 2005 that the Supreme Court issued its final decision and held that the 2001 presidential election was valid even if some ballots had flaws.[145] However, positive steps were taken by the state to avoid the repetition of such long delays in the electoral complaints adjudication process. In 2006, the electoral law was modified to include the stipulation that "an election petition shall be tried and determined by the High Court within one hundred and eighty days of presentation of the election petition."[146] The Republic of Zambia explained this reform in a report to the U.N. Human Rights Committee to show its compliance with the ICCPR.[147]

Another example of delays in adjudicating electoral complaints is evident in the electoral complaint adjudication system in Pakistan. IFES conducted a project to monitor Pakistan's complaint resolution process from February to November 2008, and found that roughly 39 of the 220 Election Petitions filed in the 2002 General Elections remained unresolved in 2008.[148] While the electoral law sets a time limit of four months to adjudicate an electoral complaint, in practice some of the complaints remained unresolved five years later, rendering them effectively moot. It is clear that Pakistan has not met its obligations under the international treaties and conventions to which it is bound; however, the ECP seems to have

[145] U.N. Human Rights Comm., Zambia's Responses to the List of Issues From the Human Rights Committee Relating to the Periodic Report on the International Covenant on Civil and Political Rights 18 [hereinafter Zambia Response] ("The State party wishes to acknowledge the fact that the some delay did occur in the disposal of the case and the reasons were that firstly, the law at the time did not give a time frame within which election petitions must be dealt with and secondly, there were a lot of adjournments at the instance of both parties to the case."), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/zambia_replies90.pdf; U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Zambia: 2005 Report (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61599.htm.

[146] Electoral Act No.12 (2006), § 102(1) (Zam.) ("An election petition shall be tried and determined by the High Court in open court, within one hundred and eighty days of the presentation of the election petition as provIded under section ninety-seven: ProvIded that where an election petition is not tried and determined within the period specified in this subsection due to a failure by the petitioner to actively prosecute the petition, the High Court shall dismiss the petition for want of prosecution."), *available at* http://aceproject.org/ero-en/regions/africa/ZM/Electoral percent20 percent20Act percent202006.pdf.

[147] Zambia Response, *supra* note 145, at 18.

[148] Peter Lepsch, IFES, Pakistan, Post-Election Community-Based Mediation and Adjudication Program: Election Tribunal Monitoring Project, Phases one and two Final Report 6 (2008).

made a good faith effort to respond to this issue and has since taken into account the importance of avoiding undue delays in electoral complaint adjudication. Specifically, the ECP held an electoral reform workshop in June 2008 to address, among other problems, the issue of exceeding the statutory period for resolving petitions by the electoral tribunals.[149]

IFES legal experts made similar observations regarding the delays in hearing complaints from the 2004 elections in the Philippines. The IFES assessment report states that the complaints and adjudication process contained "substantial due process safeguards," but was "complex, extremely slow, and plagued by frivolous complaints."[150] The report listed different factors that explain delays in electoral contests, such as the caseload or ignorance of legislative deadlines. Because of the mistrust that is endemic among election stakeholders, many complaints are insincere and intend only to bother the other candidate.[151] Moreover, there is no mechanism to avoid frivolous claims or to prioritize the most important claims.[152] These elements are among the factors that can encourage lengthy proceedings in electoral cases. The overwhelming number of claims and the lack of resources with which to adjudicate or dismiss them are obvious causes of the delayed resolution of electoral complaints as well.

The Supreme Court in Ghana has also stressed the necessity of setting clear time guidelines for judges and the public. Lady Justice Georgina T. Wood, Chief Justice of the Ghana Supreme Court, stated in July 2008 that she "appreciate[d] the sobering fact that an important safeguard of election integrity lies in an effective resolution of complaints and appeals with minimum delay,"[153] and explained that the "judiciary is well positioned and equipped to deal competently, expeditiously and efficiently with all election disputes within reasonable time lines."[154] Moreover, the Supreme

[149] IFES and Pakistan Election Commission Host National Electoral Reform Workshop, Aceproject.org, http://aceproject.org/today/feature-articles/ifes-and-pakistan-election-commission-host (last visited Jan. 8, 2011).

[150] Peter Erben et al., IFES, CEPPS Philippines Election Observation Program: Strengthening the Electoral Process, Final Report 1, 26-29 (2004), *available at* http://www.ifes.org/publication/899bba68af1bc80415544d96cce580a9/Philippines_2004_ElectionReport.pdf.

[151] *Id.* at 27.

[152] *Id.* at 27-29.

[153] Foreword to Ghana Manual, *supra* note 7.

[154] *Id.*

Court of Ghana recognized "the crucial question of the timing for making referrals to the High Court."[155] In *Republic v. High Court*, the Court held that "whenever there are no disputed facts to be resolved, for either a determination of whether or not a genuine question for interpretation has arisen, or for a formulation of the issues for referral, it [the referral] ought to be made without delay."[156] Courts must be held to a timeline that addresses the unique importance of timing in election complaints.

Courts are not the only entities that acknowledge the importance of timing in electoral matters. Whether electoral complaints are solved by the judiciary or by an independent entity, the electoral law should provide for expeditious proceedings. Indeed, the Independent High Electoral Commission in Iraq, in Article 7, § 2 of its electoral law, states that "the Board shall promulgate necessary procedures for resolving such disputes, including procedures for filing a claim and conducting expedited factual inquiries, and may delegate jurisdiction to resolve disputes in the first instance to the Electoral Administration."[157] The judge or arbiter should then make all necessary efforts to settle the issue as quickly as possible.

Scholars and non-governmental organizations continually stress the importance of expedited proceedings in electoral complaint adjudication.[158] In 1994, the National Democratic Institute drafted recommendations on an electoral

[155] Republic v. High Court (Fast Track Division) Accra, [2006], S.C.G.L.R. 514, 539 (Ghana), *available at* http://www.judicial.gov.gh/c.i/content/EX percent20PARTE percent20ELE percent-20COMMI percent20 percent20(METTLE-NUNOO.htm.

[156] *Id.*

[157] Independent High Electoral Commission of Iraq, Coalition Provisional Authority, Order No. 92, art. 7, § 2, May 31, 2004, *available at* http://www.ihec.iq/downloads/cpa_92_ieci_en.pdf.

[158] Robert Dahl, IFES legal policy advisor, affirmed that "almost all democracies provide for some form of judicial review of election related matters, either through the normal judicial hierarchy or expedited review by higher courts." Robert A. Dahl, IFES, Electoral Complaints Adjudication and Dispute Resolution: Key Issues and Guiding Principles 3 (2008), *available at* http://210.69.23.129/download/d_6/IFES.doc. The Carter Center addressed the same issue following Ghana's Presidential Elections in 2008, finding that "[t]he major obstacle regarding electoral dispute resolution in Ghana has been the low confidence that people have in the ability of the courts to provide timely responses to election-related complaints." *Preliminary Report, Carter Center Finds Ghana's Presidential Run-off Elections Credible and Peaceful*, The Carter Center (Dec. 30, 2008), http://www.cartercenter.org/news/pr/ghana_prelim_123008.html [hereinafter, Carter Center Ghana Report]. But Ghana seems to have understood the importance of timing. Indeed, the E.U. election observation mission in Ghana acknowledged that "[a]lthough one of the shortcomings of the appeal system is the lack of deadlines imposed by law," the Chief Justice prioritized "election-related cases inside the courts." E.U. Election Observation Mission, Final Report: Presidential and Parliamentary Elections 2008 Ghana, at 27 (2009). The Carter Center added that for example the judiciary established special branches to hear cases, and approved "weekend work hours for the courts." Carter Center Ghana Report, supra.

results dispute in Namibia, stating that "the procedures for challenging the results of elections . . . can leave political contestants and the electorate in an uneasy state of suspense concerning the validity of elections to offices that come under challenge. It may, therefore, be appropriate to consider mechanisms to accept and process complaints in a more rapid fashion."[159] This state of suspense can lead directly to the breakdown of democratic systems; specific deadlines and adequate resources must be in place to support expedited proceedings as part of a well-functioning election complaint system.[160]

In addition to cumbersome procedures, frivolous complaints, or an inability to prioritize and triage complaints, an expeditious decision can be limited by other structural factors within the adjudicatory body, including inadequate numbers of staff persons and outdated or limited resources.[161] In order to rule without undue delay, an arbiter will need adequate technology and logistics and the support of a full, qualified staff.[162] When designing the electoral complaint process, it is also important to avoid overly fragmenting the individual stages of election complaint adjudication. The more entities involved in the electoral complaint process, the greater the potential for delays. Indeed, if another entity, such as the police, is mandated to investigate claims, the electoral complaints body will generally have less control over the timing of the process. In developing democracies, however, complaint adjudication bodies usually do not have the resources necessary to undertake all steps in the complaint adjudication process.[163] In

[159] NDI, Comments on the Namibian PresIdential and National Assembly Elections 8 (1994), *available at* http://www.accessdemocracy.org/files/150_na_comments.pdf.

[160] See National Democratic Institute & Carter Center, Statement of the NDI/Carter Center Pre-Election Delegation To Liberia's 2005 Elections 2 (Sept. 9, 2005) ("To build public confIdence in the impartiality of the electoral complaint process, NEC should outline and publicize its methodology for resolving election-related complaints. The NEC timeline should establish specific deadlines for the filing of complaints to ensure that electoral disputes are not used to disrupt the electoral process. Sufficient resources should be dedicated to ensure that the potential volume of complaints can be processed impartially and on an expedited basis with adequate transparency in accordance with due process requirements and equality before the law."), *available at* http://www.ndi.org/files/1907_lr_statement_090905.pdf.

[161] Vickery, *supra* note 34, at 15, 25.

[162] Organization of African Unity, Declaration on the Principles Governing Democratic Elections in Africa, 38th Ordinary Sess., arts. II(4), III(c), AHG/decl. 1 (xxxviii) (July 8, 2002) [hereinafter African Elections Declaration], *available at* http://www.au2002.gov.za/docs/summit_council/oaudec2.htm.

[163] IFES, The Kingdom of Thailand, Analysis and Issues for Consideration: The Organic Act on Election of Members of the House of Representatives and Installation of Senators and the Organic Act on the Election Commission 10-11 (2008) [hereinafter Kingdom of Thailand Report].

such cases where several actors are involved, there is a need to establish safeguards and accountability mechanisms that will avoid undue delays or mismanagement of a complaint.

Electoral tribunals or complaints commissions should provide expeditious proceedings in electoral matters, as there is a clear connection between such proceedings and the legitimacy of the incoming government.[164] However, maintaining timely procedures requires a careful balance between the need to act swiftly and the need to carefully assess whether justice is being delivered, as discussed below.

B. A Balance of Interests: A Proper Administration of Justice

Like any legal standard, the importance of time-sensitive deadlines is subject to limitations. Expeditious decisions cannot be made to the detriment of the right to a fair trial or the ability to prepare a defense. The proper administration of justice requires that principles such as equality before the courts, the right of an individual to be heard in his or her own defense and the right to a fair and public hearing by a competent, independent and impartial tribunal be respected. [165] The concept of due process embraces all of these rights and all of these principles are guaranteed in the major international and regional human rights conventions.[166] This concept is also recognized in domestic legal regimes; for example, the Ghana Supreme Court held that the Court was required to act "in the supreme interest of justice to prevent illegalities and a failure of justice and also ensure fairness and facilitate the expeditious disposal of cases."[167] Thus, it is generally recognized that an expedited decision is critical in electoral complaint adjudication, but should not severely compromise due process guarantees.

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[164] Editorial, *Nigeria: Ekiti Re-Run Tribunal - Against Endless Proceedings*, Daily Indep. (Lagos, Nigeria), July 28, 2009, *available at* http://allafrica.com/stories/200907280196.html.

[165] U.N. Human Rights Comm., CCPR General Comment No. 13, Art. 14: Equality Before The Courts And The Right To A Fair And Public Hearing By An Independent Court Established By Law, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) (April 13, 1984)[hereinafter CCPR General Comment No. 13], *available at* http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f264c12563ed0049dfbd?Opendocument.

[166] ICCPR, *supra* note 11, arts. 10, 11, 14, 15, 16; African Charter, *supra* note 14, arts. 6, 7, 25.

[167] British Airways v. Att'y Gen. [1996-97] S.C.G.L.R. 547, 552-53, 554 (Ghana); see also Constitution of the Republic of Ghana April 28, 1992, art. 135.

Jurists also recognize the importance of due process and the limitations it places on expeditious decision-making, as recognized in the dissenting opinion in *Electoral Commission v. Bakireke* (Uganda Court of Appeals).[168] Justice S.B.K. Kavuma stressed that "what constitutes 'adequate' time [the right to adequate time and facilities for the preparation of a defense] will depend on the nature of the proceedings and the factual circumstances in a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings etc."[169] Justice Kavuma referred to the Amnesty International Fair Trial Manual, stating "the right to trial within a reasonable time may be balanced against the right to adequate time to prepare a defense."[170] In the Ugandan case at issue, appellants were given a mere 20 days to respond to the allegations of the affidavits while the respondents had five months to assemble the evidence that was introduced before the court. While an expeditious adjudication of electoral complaints is key to the effectiveness of the process, the elements that ensure a proper administration of justice, such as the right to prepare a defense, should be taken into consideration and should not be undermined.[171]

It is important to note that these requirements must be adequately addressed when implementing efforts for speedy adjudication. For example, after the 2009 elections in Afghanistan, the ECC — due to the extensive scope of the alleged fraud and limited time to stage a potential second round before winter — chose to use a sampling method for the recount in order to reach a quick result. This approach addressed the specific circumstances being faced by the complaint adjudication body in a post-conflict

[168] Electoral Commission v. Bakireke, (2009) U.G.C.A. 12 (Ct. App.) (Uganda), *available at* http://lawviatheinternet.org/ug/cases/UGCA/2009/12.html.

[169] Id. (Kavuma, J., dissenting) (citing Lawyers Committee for Human Rights, Basic Gulde to Legal Standards and Practice 16 (2000), *available at* http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf).

[170] Id. (citing Amnesty International, Fair Trials Manual § A, ch. 8 (1998), *available at* http://www.amnesty.org/en/library/asset/POL30/002/1998/en/947b99f9-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.html).

[171] See also Boddaert v. Belgium, 16 Eur. Ct. H.R. 242 ¶ 39 (1992) ("Article 6 [of the European Convention] commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice."). The court reaffirmed that notion in 2007, stating that "as desirable as the expeditious examination of election-related disputes may be, it should not result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings, in particular the defendants." Kwiecieā v. Poland, Eur. Ct. H.R., App. No. 51744/99, Judgment of 9 Jan. 2007, ¶ 55.

country and may have prevented a constitutional crisis and political unrest; however, since making this decision, the ECC has faced questions about its credibility and legitimacy.

In short, as elections are time-sensitive political events that distribute state power and give governments their legitimacy, timely resolution of complaints is vital. This requirement is noted on a regular basis by international conventions, case law, NGO reports and scholars. However, considering the stakes involved and as the cases discussed have shown, adjudicatory bodies should make every effort to find the appropriate balance between the expeditious disposal of cases and the fairness of the adjudication process.

5. Established Burdens of Proof and Standards of Evidence

Another guiding principle in adjudicating election complaints is the establishment of a fair burden of proof and standards of evidence. These guidelines must be established well in advance of a complaint so that the parties involved will have notice and a reasonable understanding of what will be required of each side in order to resolve the matter.[172]

However the state chooses to define its standard, this definition should be known to both parties and the tribunal before hearings begin, and preferably before the elections are held. Once set, this standard must be adhered to throughout the proceeding. To do otherwise — for example, by applying ad hoc standards as the trial unfolds or holding different complainants in similar actions to different standards — would call into question the fairness and impartiality of the tribunal, and would cast doubts on the legitimacy of the entire process (and possibly the election as a whole), regardless of the outcome of the proceeding.

[172] This is a truism in most legal systems, and as such is rarely addressed by commentators and courts, even in dicta. For an example of a court discussing this issue in a non-election law context, see Panovits v. Cyprus, Eur. Ct. H.R., App. No. 4268/04, Judgment of 11 Dec. 2008, ¶ 60.

A. Burdens of Proof

In most legal contexts, the burden of proof rests with the party making the allegation.[173] For instance, in the United Kingdom it is "fair to place the burden of proof on the person who positively asserted a particular state of affairs, rather than the person who denied that a state of affairs existed, given the difficulties which arose where proof of a negative was required."[174] The Court recognized that this principle is common in every civil legal action.[175]

For election challenges, the burden will generally fall on the persons challenging the outcome of the election or alleging misconduct on the part of another. This structure implies that there is a presumption of regularity on the part of officials and official actions.[176] As the party asserting that some aspect of the election should be overturned, the petitioner can reasonably be expected to bring forward evidence to prove the assertion. Requiring the challenged party to affirmatively prove that no misconduct took place or no irregularity occurred would serve as an invitation to losing candidates or parties to bring challenges as a form of harassment. The prevailing party could be forced to vigorously assert the validity of an election in multiple recurrent hearings or face having its lawful, proper election result overturned due to the difficulty of proving a negative.

But, there is at least one argument in favor of having the burden of proof rest on the challenged party: in the case where an entrenched ruling party or polity is being challenged by a minority, or the challenge is against the electoral management authority itself, the challenger may well lack the resources to properly maintain its rightful challenge while the challenged party would have the resources to produce evidence of a proper election. In such a case, it may be appropriate to apportion some burden of proof to the more powerful of the parties to the dispute. Nonetheless, this is an atypical assignment of the burden of proof for the aforementioned reasons, and is not well supported by any of the most common rule of law principles.
In short, in most actions relating to electoral complaints, the burden of

[173] Black's Law Dictionary 196 (6th ed. 1991).

[174] McVicar v. United Kingdom, Eur. Ct. H.R., App. No. 46311/99, Judgment of 7 May 2002, ¶ 40.

[175] *Id.* ¶ 41.

[176] Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles That Control Election Challenges 16 (2d ed. 2008).

proof should be on the party alleging that some fraud or actionable irregularity has occurred. This is the typical understanding of how a burden would be applied, and the burden should be shifted to the defending party only in extreme situations or to prove an affirmative defense.

B. Standards of Evidence

In addition to determining which side in a dispute bears the burden of proving its case, the election law should also define the degree to which that side must prove its case in order to persuade the arbiter or finder of fact that it is correct. This is usually called the "standard of evidence." There are many different standards applied in legal systems throughout the world, and the one that is used depends on a multitude of factors, including the unique legal traditions of the country, the severity of the allegation being made, the severity of the remedy sought, and the nature of the evidence to be introduced at trial. There is currently no international consensus on what standard of evidence the challenger must meet in order to establish electoral fraud or other misconduct. There are three standards that are frequently applied in election cases, however: preponderance of the evidence; evidence beyond a reasonable doubt; and clear and convincing evidence.[177]

"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. This is the general standard that is applied to civil actions in many, if not most legal systems.[178] Since election complaints are usually treated as civil (rather than criminal) cases, this may be a reasonable default standard to apply in election cases. There are several possible drawbacks to using a preponderance standard, however, since it might prove too easy a standard for the challenger to meet in many election complaints. As a practical and philosophical matter, to enforce the rule of law, official election results have a presumption of validity and should not be overturned because the factual balance seems to tilt slightly in favor of a challenger. Election results based on complex legal and administrative processes should generally stand;

[177] See generally Huefner, *supra* note 25, at 313-14.

[178] *Id.*; see also Prodan v. Moldova, Eur. Ct. H.R., App. No. 49806/99, Judgment of 25 April 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).

otherwise, this would lead to grave uncertainty about the outcome of any election and the mandate of the government to continue functioning.[179]

On the other end of the spectrum, proof 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.[180] In at least one U.S. election case, the court applied a reasonable doubt standard when a stricter standard than preponderance of the evidence was required.[181] Using a reasonable doubt standard in election cases is appropriate when the remedy is being sought in conjunction with criminal prosecution, especially in countries such as Nigeria that require a reasonable doubt standard even in civil actions if the civil suit would turn on the question of criminal guilt.[182] 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."[183] In other words, the reasonable doubt standard may be too strict to apply in election cases.

In some countries, the only remedies provided for election law violations are criminal sanctions for the offenders, which accentuate the issue of technicality versus justice.[184] Specifically, the fair adjudication of an elec-

[179] See Huefner, *supra* note 25, at 314.

[180] 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.

[181] Rogers v. Holder, 636 So. 2d 645 (Miss. 1994).

[182] 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."), *available at* http://www.nigeria-law.org/EvidenceAct.htm#ProductionAndEffectOfEvidence.

[183] *Mimiko's Case And The Issues Of Burden And Standard Of Proof In Election Petitions*, Compass Nigeria, Feb. 17, 2010, *available at* http://www.compassnewspaper.com/~compas/NG/index.php?option=com_content&view=article&Id=41516:mimikos-case-and-the-issues-of-burden-and-standard-of-proof-in-election-petitions&catId=44:law&ItemId=690.

[184] See, e.g., Law No. 73 of 1956 (Law on the Exercise of Political Rights), Al-Jarida Al Rasmiyya, 1956 arts. 39-51 (Egypt); see also President of the Arab Republic of Egypt Legislative Decree No. 220 of 1994 (To Amend Certain Provisions of Act No. 73 of 1956 to Regulate the Exercise of Political Rights), Al-Jarida Al-Rasmiya, 27 Oct. 1994, vol. 37, No. 43 (Supp.), pp. 3-5 (Egypt).

toral complaint should not be put in jeopardy by the weight of formalities: "rules of procedure should be used as handmaidens of justice but not to defeat it."[185] For example, in Pakistan the law does not clearly distinguish between administrative and criminal claims within the range of electoral offenses. The courts follow criminal law procedures and impose the reasonable doubt standard as the burden of proof for most of the electoral cases that they handle. In a system where the focus of criminal prosecution for election law violations is on punishment of the guilty rather than remedy of a flawed election, any action to challenge the outcome of an election itself requires the establishment of a separate process to deal with election complaints.[186]

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.[187] 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. 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.[188] 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.[189] In Thailand, the Organic Act for the election of members of the Parliament and of the Senate states that the

[185] Hon. Lady Justice Constance K. Byamugisha, Justice of the Court of Appeal of Uganda, Greenwatch, Administering Justice Without Undue Regard to the Technicalities (2003), *available at* http://greenwatch.or.ug/pdf/news/Administering_Justice_Without_Un_due_Regard_to_Technic.pdf.

[186] Craig C. Dosanto et al., Federal Prosecution of Election Offenses (7th ed. 2007).

[187] See, e.g., Grogan v. Garner, 498 U.S. 279 (1991). The modern definition of clear and convincing evldence evolved in the U.S. legal system, but has since been adopted in international contexts as well.

[188] 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).

[189] 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); Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991).

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.[190] Similarly worded standards have been adopted in many international cases involving human rights.[191] Clear and convincing seems to have become the default standard of evidence in international civil law.[192]

In his 2007 article on electoral complaint adjudication, Steven Huefner recommends that the United States adopt the clear and convincing standard for election cases, which have been dealt with inconsistently by different states using all three standards.[193] He argues that this standard will be proper to use in electoral disputes as the U.S. election processes, though imperfect, have "earned a strong presumption of correctness." Thus, the rebuttable presumption to void or modify an election result should require more than a 51 percent probability that "the official certification is not trustworthy."[194] Huefner justifies his preference for the clear and convincing test to prove an irregularity and to prove that this irregularity alters the outcome or at least renders it uncertain. He added: "Accepting clear and convincing evidence that the result is not reliable is likely to correct more election defects without destabilizing the system, but in turn calls for the kinds of greater guidance . . . about what remedy to impose."[195]

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[190] 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 . . . .").

[191] 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 "clear, convincing, and unambiguous evidence"); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (applying an unnamed standard between reasonable doubt and preponderance of the evidence), *available at* http://www.icj-cij.org/docket/files/70/6503.pdf.

[192] 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).

[193] Huefner, *supra* note 25, at 314.

[194] *Id.*

[195] *Id.*

This heightened standard can help ensure that adjudicatory bodies do not overturn valid elections due to misconstrued pieces of commonly available evidence, or as a result of nuisance complaints submitted by disgruntled losing parties, both of which are likely using a less stringent standard. On the other hand, the heightened standard will still allow a challenger to prove a case despite not necessarily having access to evidence that has been concealed or destroyed by a party committing fraud, something that would be much more difficult if the action required a showing beyond a reasonable doubt. A clear and convincing standard provides a balance to ensure that the complaint adjudication system is fair and accessible. In addition, the clear and convincing standard as it is currently used throughout the world applies equally well if the election complaint is construed as a civil fraud action (as in the U.S. and U.K. application of the standard), or as a civil human rights matter (where the standard is common in other countries). The Afghanistan Electoral Complaints Commission used clear and convincing evidence as the standard for complaints involving the 2009 Afghan elections.[196]

In many circumstances, however, the clear and convincing standard can also damage the electoral complaint adjudication process. Indeed, in a practical sense complainants may face great difficulty in obtaining evidence, and struggle to gather the facts that prove their allegations, particularly in the developing democracies that are in particular need of an effective adjudication system. The election officers, the electoral commission or the opposing political party will have access to such evidence, but the complainant will likely not. Thus, as discussed above, a preponderance of evidence standard may already be a difficult burden to handle for the claimant, and a clear and convincing standard may further blunt meritorious claims. As Nigerian Supreme Court Justice Kayode Eso affirmed in the case of *Chinwendu v. Mbamali*, "care must be taken not to sacrifice justice at the altar of technicalities. The time is no more when disputes are dealt with rather on technicalities and not on merit."[197] Using the heightened standards, legitimate claims could thus be dismissed and irregularities would not be corrected even if the outcome of the election

[196] Rules of Procedure of the Electoral Complaints Commission, §§ 7.2, 17.2 (2009) (Afg.).

[197] Chukwudi Nwokoye, *Burden Of Proof In Election Petitions*, Nigeria Village Square (Dec. 29, 2008), http://www.nigeriavillagesquare.com/articles/chukwudi-nwokoye/burden-of-proof-in-election-petitions.html.

was at stake. Such dismissals of legitimate claims can lead to a major distrust in the electoral process.

Ultimately, the choice of standard of proof often depends on the rules of procedure of a country's legal system. In some countries, the law does not make any distinction between administrative or criminal claims and thus, the standard of proof remains the same regardless the specific nature of the dispute. Thus, varying standards of evidence may be used in election complaint adjudication around the world. A uniform standard will probably not be adequate to handle every type of electoral complaint, and it can be dangerous to impose one standard over the others. In light of these considerations, a complaints adjudication entity should be prepared to require differing thresholds for evidence that the petitioner must provide depending on the nature of the claim at stake.[198] For example, there is a great difference between a case in which a complainant argues to overturn a nationwide election result, and a claim of ballot stuffing in an isolated precinct, and the standards of evidence required for those claims might reflect those practical differences. The choice of what standard to apply to each type of electoral complaint might be made by the electoral management body, 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.[199]

The level of flexibility permitted within a defined standard will depend on the type of complaint at issue. As noted by Lord Denning in *Bater v. Bater*, a civil court considering a charge of fraud will naturally require a higher degree of probability than it would require if considering a charge of negligence. For example, in its judgment on the 2001 Zambian presidential elections 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

[198] Bater v. Bater, [1951] P. 35, 37 (C.A.) (U.K.) ("The degree of probability in civil cases depends on the subject matter in question."). Similar reasons were used in support of the criminal standard later in Preston-Jones v. Preston-Jones, [1951] A.C. 391, [1951] 1 All E.R. 124 (H.L.) (U.K.) (determining legitimacy of a child in petition for divorce based on adultery claim); see also, In re Doherty, House of Lords, [2008] UKHL 33 (appeal taken from N. Ir.).

[199] See *supra* Part 2 (describing the international standard of a clearly defined regimen of electoral standards and procedures).

than on a mere balance of probability."[200] 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."[201] The gravity and public importance of certain issues involved in a complaint can require that the standard of proof be raised.[202]

There is no universally accepted or necessary standard of proof; within a defined regime of evidence law, legislatures, judges and arbiters can find a margin of freedom to lower or raise the standard depending on the nature of the claim being made. Each of the three most common standards discussed above might be useful or applicable in a country's election complaint adjudication system, and each has advantages and disadvantages to its implementation. When creating or revising an election complaint adjudication system, it is important that all of these factors be weighed before settling on the standard or standards to be used.

6. Availability of Meaningful and Effective Remedies

A functional complaint mechanism must provide for effective, timely and enforceable remedies. International legal conventions agree that, once a country has designated adequate rights and designed adequate procedures, the process of generating appropriate results is an imperative component of the protections of fundamental rights more generally. The Universal Declaration of Human Rights notes the importance of the "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[203] This

[200] Lewanika v. Chiluba, (1998) ZLR 86 [SC] (Zam.), *available at* 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.).

[201] Mazoka v. Mwanawasa, (2002) S.C.Z./EP/01/02/03/2002 (Zam.).

[202] Bater v. Bater, [1951] P. 35, 37 (C.A.) (U.K.).

[203] UDHR, supra note 10, art. 8. The ICCPR ensures the same guarantee to indivlduals in Article 2, § 3 and adds that "that the competent authorities shall enforce such remedies when granted." ICCPR, supra note 11, art. 2, § 3(a), (c). When interpreting Article 2, § 3, the Human Rights Committee conslders that "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." CCPR General Comment No. 31, supra note 100, ¶ 15. Moreover, the Committee sees Article 2, § 3 as creating an obligation for the "States Parties to make reparation to indivlduals whose Covenant rights have been violated." *Id.* ¶16.

language is mirrored by almost all major international legal documents. Although they may use different terms, many regional human rights systems provide individuals with similar rights.[204]

The Inter-American Court of Human Rights provides a strong example of the right to an effective remedy and its different components. In *Miyagawa v. Peru*, the Court heard a claim concerning a violation of Articles 23 and 25 of the American Convention.[205] Specifically, the applicant alleged that the National Elections Board arbitrarily and illegally deprived her of her right to stand for an election as an independent candidate, and further that this violation led to the denial of the right to vote for hundreds of thousands of Peruvian citizens. In its ruling, the Court reinforced the importance of an adequate remedy, holding that the obligation of the state is not limited to the mere existence of courts and tribunals or the possibility of accessing the court, but must instead provide a "real possibility to file a remedy," an opinion that addressed the merits of the case and the judicial authority to restore the enjoyment of rights at issue.[206]

Regional or international human rights courts can hear electoral complaints and provide effective remedies to challengers after the exhaustion of all available and effective remedies at the domestic level. In *Petkov v. Bulgaria*, the ECtHR interpreted the right to an effective remedy and affirmed that "the scope of the Contracting States' obligations varies depending on the nature of the applicant's complaint."[207] The Court added that the remedy must be "effective in practice as well as in law in the sense either of preventing the alleged violation or remedying the impugned state of affairs, or of providing adequate redress for any violation that has already

[204] Article 25 of the American Convention provides everyone "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal . . . and the competent authorities shall enforce such remedies when granted." American Convention, supra note 14, art. 25. Article 13 of the European convention refers to the right to "an effective remedy before a national authority." European Convention, supra note 26, art. 13.

[205] Miyagawa v. Peru, Case 11.428 Inter-Am. Comm'n H.R., Report No. 119/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 1262 (1999), *available at* http://www1.umn.edu/humanrts/cases/119-99.html.

[206] The claim evoked the constitutionality of political rights and more specifically, the right to register as an independent candidate. Castañeda Gutman v. Mexico, Case 12.535, Inter-Am. Comm'n H.R., Report No. 113/06, ¶¶ 92, 140 (2008).

[207] Petkov v. Bulgaria, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 74.

occurred."[208] In this case, the applicants brought a claim before the ECtHR and argued that the Bulgarian electoral authorities had not complied with the final judgments that were issued by the domestic court and had therefore deprived the applicants of their right to be elected to Parliament. The government of Bulgaria argued that the domestic remedies had not been exhausted and thus, the applicant's claim should be dismissed. The Court ruled in favor of the applicants and concluded that they "did not have at their disposal effective remedies in respect of their complaint under Article 3 of Protocol No. 1 . . . and holds that there has been a violation of Article 13 of the Convention."[209]

One way to provide an effective remedy in response to electoral irregularities is by modifying the electoral law and more specifically the provisions dealing with complaints adjudication. For example, in the 2004 presidential elections in Ukraine, the court system was flooded with complaints and the Supreme Court, based on the large number of allegations of electoral irregularities, ordered that a new election be conducted. Prior to the 2010 presidential elections, changes were made to the electoral law to avoid a repetition of the 2004 elections.

The Ukrainian example also demonstrates the difficulties in determining whether an effective remedy exists, particularly in emerging democracies, and within the politically charged atmosphere inherent in electoral conflict. On the eve of the 2010 presidential elections, "experts [were] warning that Ukraine's presidential elections law [was] so flawed that it could permit a repeat of the large-scale fraud that triggered the Orange Revolution."[210] But, following the second round on 7 February international election monitors reported that the elections were free and fair, and world leaders accepted the victor.[211] Despite these endorsements, the ousted incumbent, Yulia Tymoshenko, accused her opponent of fraud and challenged the out-

[208] *Id.*

[209] *Id.* ¶ 83.

[210] Mark Rachkevych, Can Ukraine's PresIdential Election Be Stolen Again?, Kyiv Post, Nov. 26, 2009, *available at* http://www.kyivpost.com/news/politics/detail/53728/.

[211] Luke Baker, *NATO, EU Follow U.S., Welcome Ukraine's Yanukovich*, Washington Post, Feb. 12, 2010, *available at* http://www.postchronicle.com/cgi-bin/artman/exec/view.cgi?archive=184&num=284224.

come of the elections before the Higher Administrative Court of Ukraine.[212] Oleksandr Turchynov, who ran Tymoshenko's campaign, "asked for a recount in more than 900 polling stations, claiming that 'falsification' influenced the election results."[213] In response, the head of the independent Voters Committee of Ukraine, Oleksandr Chernenko, stated that any challenge to the election should involve systemic violations that could theoretically influence the result and added that there was no proof of genuine systemic violations that would void the entire election.[214] The requirement of "systemic violations" highlighted by Chernenko could limit the number of complaints and discourage frivolous claims. However, such changes or restrictions in the law should not be used to discourage challengers from bringing legitimate claims. Two weeks after the 7 February run-off elections, Prime Minister Tymoshenko conceded the presidential elections by withdrawing her legal challenge, saying that she did not believe that she would get a fair hearing and that the Court was as biased as the Central Electoral Commission.

This recent example in Ukraine illustrates the difficulty of making a clear distinction between purely political allegations and legitimate and fair electoral complaints. Some candidates may refuse to accept defeat, and make frivolous and unsubstantiated charges, whereas others may have valid grounds and evidence to justify a complaint. While there are clearly difficulties in determining whether a system provides adequate remedies in response to electoral irregularities, an election complaint adjudication entity that establishes guarantees for a timely decision, a legal justification, a final decision that is no longer subject to appeal, and mandates for sanctions and penalties, will go a long way to providing an effective remedy.

[212] Peter Fedynsky, *Tymoshenko Refuses to Concede Ukraine Election Defeat*, VOAnews, Feb. 11, 2010, *available at* http://www1.voanews.com/english/news/europe/Tymoshenko-Refuses-to-Concede-Ukraine-Election-Defeat-84113287.html; see also James Marson, *Ukraine Opposition to Form Coalition*, Wall St. J., Feb. 12, 2010, *available at* http://online.wsj.com/article/SB10001424052748703525704575060923471876374.html?mod=googlenews_wsj.

[213] Daryna Krasnolutska, *Timoshenko Weighs Conceding Ukraine Presidency to Stay Premier*, Business Week, Feb. 10, 2010, *available at* http://www.businessweek.com/news/2010-02-10/timoshenko-weighs-conceding-ukraine-presidency-to-stay-premier.html.

[214] Fedynsky, *supra* note 212.

A. The Right to an Appeal

The right to an appeal is a key component in ensuring access to an adequate remedy. International human rights conventions all recognize, implicitly or explicitly, the fundamental value of an appeals mechanism.[215] Article 14, § 5 of the ICCPR provides for such a right in criminal matters and the United Nations Human Rights Committee has underlined that the guarantee of an appeal is not confined to only the most serious offenses.[216] The outcome of an electoral complaint can also be of paramount importance and an appeals process can reinforce the right to an effective remedy, in particular in more serious claims in which the outcome of the election is at stake. The European Commission for Democracy through Law also recognizes in its code of good practice that a system of appeals is necessary to provide for an effective remedy. Individual citizens and candidates should be able to fully challenge any electoral irregularities, before an election tribunal, an electoral commission, or a constitutional court.[217] The ECtHR has also stressed that "an effective system of electoral appeals is an important safeguard against arbitrariness in the electoral process."[218]

Electoral law should clearly provide for a mechanism of review. In Nicaragua, the electoral law only provides for a right to appeal for decisions by the CSE when the issue is the cancellation of a political party's registration.[219] The CSE is the electoral management body in charge of initial complaints, and is also the final judicial instance regarding electoral irregularities. Apart from electoral crimes that fall within the jurisdiction of the ordinary criminal courts, there is no independent avenue of appeal; this stunted legal process has the potential for real conflict if complainants feel

[215] ICCPR, supra note 11, art. 14, § 5; American Convention, supra note 14, art. 8(2)(h); Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 22, 1984, C.E.T.S. No. 117 (entered into force Nov. 1, 1988), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm; African Charter, supra note 14, art. 7(a); Constitutional Rights Project v. Nigeria, African Comm'n on Human and Peoples' Rights, Comm. No. 60/91 (1995); UN Human Rights Comm., CCPR General Comment No. 32, Art. 14: Right To Equality Before Courts And Tribunals And To A Fair Trial, ¶¶ 47-50, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter CCPR General Comment No. 32].

[216] ICCPR, *supra* note 11, art. 14, § 5; CCPR General Comment No.32, *supra* note 215, ¶¶ 47-50; CCPR General Comment No. 13, *supra* note 165, ¶ 17.

[217] Venice Commission Code, *supra* note 44, at 29-30.

[218] Petkov v. Bulgaria, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 63.

[219] The CSE is the last instance of judgment for almost all election-related complaints. E.U. Nicaragua Report, *supra* note 38, at 23.

that their claims were not adequately addressed at the CSE level.[220] Establishing an independent mechanism of review for electoral complaints, or granting ordinary courts broader jurisdiction to hear appeals regarding electoral complaints, could remedy such a gap.

In Brazil, the constitution provides for a right to appeal the decisions from the Regional Electoral Courts to the Superior Electoral Court. This right to appeal is limited to: decisions that are rendered against an express provision of the Constitution or of a law; instances when there is a divergence in the interpretation of a law between two or more electoral courts; and when decisions relate to ineligibility or issuance of certificates of electoral victory in federal or state elections.[221] However, the "decisions of the Superior Electoral Court are unappealable, expect for those which are contrary to this Constitution and those denying *habeas corpus* or writs of mandamus."[222] Brazil provides an example of a codified right to appeal that maintains a clear and coherent interpretation of relevant law.

Appeals should not be confused with referrals. When it has jurisdiction, a regional or provincial post-election remedy body cannot refer a case to the national entity without first ruling on the case. The electoral law should also define when the decision becomes final and is no longer challengeable. For example, in the Philippines, complaints concerning elections for the House of Representatives and the Senate are heard by special tribunals. The latter will issue decisions that can be appealed to the Supreme Court but only on *certiorari*.[223] The Nicaragua system provides for a reviewing process by the electoral management body (CSE) regarding the electoral challenges and irregularities at the polling stations. The CSE does not provide for an appeals process. However, the criminal electoral offenses will be handled by the ordinary criminal courts that do provide for an appeal. Thus, while an appeals process does not exist in every

[220] *Id.* at 20.

[221] Constituição Federal [C.F.] [Constitution] art. 121, § 4 (Braz.).

[222] *Id.* art. 121, § 3.

[223] "Certiorari" is a Latin word meaning "to be informed of, or to be made certain in regard to." It is also the name given to certain appellate proceedings for re-examination of actions of a trial court, or inferior appeals court. A "writ of certiorari" is defined as an order by a higher court directing a lower court, tribunal, or public authority to send the record in a given case for review. Erben et al., *supra* note 150, at 27.

instance, it can be an important component in providing individuals and political parties with a more effective means to access remedies.[224]

B. A Limited Time Frame for Review

As discussed above, setting clear time limits for the review of initial filings and the determination of all required appeals is necessary in order to bring fluidity to the process.[225] Furthermore, reviews of claims by the electoral tribunal or electoral complaints commission should be fast and effective. Specific time frames should take into account the need for the adjudication of the claim to take place within the time limits of the election process,[226] for the remedies to be implemented in a similar timeframe, and for the decision to be released in a timely manner. Indeed, appeals should not be used to delay the certification of the results or to harass the adversarial party or candidate. Time limits for lodging and deciding appeals must be short. The European Commission for Democracy through Law, for example, has set the standard of three to five days for each at first instance.[227] This recalls and buttresses the general principle of expeditious proceedings in the adjudication of electoral complaints.

C. Legal Justification of Decisions

As previously stated, a transparent right of redress requires that the petitioner be informed of the reasons why the claim was dismissed or denied. Thus, the electoral complaint adjudication body should clearly state the legal basis used or factual determination made when it ruled on the particular case, based on a clear elucidation of the possible electoral offenses in the law. It is even more important to provide explanation for any decisions when there is no mechanism for an appeal, or for choices in remedy.[228] Thus, the judge or arbiter should detail in the decision, for

[224] Human Rights and Elections Handbook, supra note 9, at 16 ("The right to challenge election results and for aggrieved parties to seek redress should be provlded by law. The petition process should set out the scope of available review, procedures for its initiation and the powers of the independent judicial body charged with such review. Multiple levels of review, where appropriate, should be described as well.").

[225] Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, Republic of Kazakhstan: Review of the Election Legislation for Election Disputes, Appeals and Penalties 2 (2001) [hereinafter Kazakhstan Report], *available at* http://www.osce.org/odihr/elections/kazakhstan/item/14597.

[226] Commonwealth Convention, *supra* note 39, art. 10, § 2(f).

[227] Venice Commission Code, *supra* note 44, at 30.

[228] See E.U. Nicaragua Report, *supra* note 38, at 63 ("This is particularly serious given that this resolution was the last instance and no further appeal was possible.").

example, at what stage of electoral process the violation was committed, who committed the violation, and whether the violation influenced or might have influenced the outcome of the elections.[229] Judges and arbiters should provide relevant parties with the means to understand the reasoning behind the decision. The tribunal or commission should also provide the concurring or dissenting opinions of the judges or arbiters. This will permit transparency about the reasoning by which the arbiters reached a given conclusion and on any personal legal views that entered into the decision. A legal justification for a decision will also facilitate the enforcement of the decision and help in establishing the legitimacy of the final electoral results.

D. Restoration of the Infringed Rights

The right to remedy also embraces the right to redress for the injury suffered by the claimant. For example, in Petkov v. Bulgaria, three applicants alleged that their rights to run for office in the 2001 parliamentary elections had been unfairly abrogated.[230] The applicants' coalition withdrew their names from the candidates' list on account of their links with the former State security agencies.[231] The Supreme Administrative Court ruled in their favor and declared the striking of the applicants off the lists of candidates null and void. However, the electoral authorities failed to give effect to this final and binding decision and thus, the applicants brought the case before the European Court of Human Rights. They claimed that the right to an effective remedy had been denied "in respect of the electoral authorities' refusal to reinstate them on the lists of candidates."[232] The European Court acknowledged the failure on the part of electoral authorities and that it resulted in a violation of Articles 3 and 13 of Additional Protocol 1 of the European Convention. The Court added that even if the authorities disapprove the findings of the court (due to erroneous rulings or acts beyond its jurisdiction) they cannot refuse to comply with the judgment in a democratic society abiding by the rule of law. The right to an effective remedy requires the relevant authorities to comply with the ruling and to attempt

[229] Kazakhstan Report, *supra* note 225, at 5.

[230] Petkov v. Bulgaria, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶¶ 55-82.

[231] *Id.* ¶ 60.

[232] *Id.* ¶¶ 67, 83.

to erase all of the effects of the decision declared null and void. The Court also discussed the type of remedy that should be provided to the applicants in this case. Deliberate actions and omissions by the electoral authorities that prevent a parliamentary candidate from running for office cannot be remedied exclusively by an award of compensation.[233] If the breach cannot be remedied prior to the election, a post-election avenue of redress should look at the consequences of this violation on the outcome of the elections and in the most serious cases this body could even annul the election result, wholly or in part.[234]

E. Sanctions and Penalties

An effective remedy implicitly includes the existence of sanctions and penalties, such as the issuance of a warning to the offender (including political parties), imposition of a fine or criminal penalty, decertification of a candidate, disqualification of a political party, suspension of the right to campaign, invalidation of a ballot, or ordering a recount or a re-run election.[235] Clearly defined violations and sanctions in the regulatory framework and the electoral law will prevent arbitrary imposition of penalties (or failure to impose such penalties). Similarly, sanctions and penalties should be established in a manner that will deter candidates and others from violating electoral law. The right of redress cannot be fully effective if the electorate and the candidates are not aware of existing sanctions for violations.

When given discretion in applying sanctions, however, the judge or arbiter should ensure that the punishment is proportionate to the seriousness of the violation.[236] The sentence will depend on the accused's record, character, attitude, the public interest and the seriousness of the offense. For instance, a re-run election should not be ordered unless there has been a serious breach of elections standards. Indeed, once the wishes of the

[233] *Id.* ¶ 79.

[234] *Id.* ¶¶ 80, 81 (finding that, in the specific circumstances of the case, proceedings before Constitutional Court, which had concluded serious breach of applicant's rights did not require annulment of election, did not provlde adequate redress to applicants).

[235] Electoral Law, art. 54, § 1 (2004) (Afg.); Electoral Reform Law, §§ 22-25 (2004) (Liber.) (penalizing fraudulent registration and bribery), *available at* http://www.necliberia.org/content/legaldocs/laws/elereformlaw.pdf; The New Elections Law, § 10.25, 10.26 (1986) (Liber.), *available at* http://www.necliberia.org/content/legaldocs/laws/1986electionlaws.pdf.

[236] Kazakhstan Report, *supra* note 225, at 3.

people have been freely and democratically expressed, that choice should not be called into question, except in the presence of compelling grounds for the democratic order.[237] The law should thus provide for a gradation in the possible sanctions that can be imposed on individuals or political parties. For example, in April 2007 and in May 2008, IFES legal experts released thorough analyses of the Thai electoral legal framework, and advised the state to change its organic law on political parties and political finance.[238] These analyses stressed the need for sanctions proportional to the seriousness of the action and the degree of guilt (intentional, negligence, or mistake). The experts also recommended the establishment of civil penalties for administrative violations, such as arbitrarily denying or withdrawing candidate certification, as well as criminal sanctions.

The Philippines complaint adjudication system also provides an example of the broad spectrum of electoral offense sanctions. In 2004, IFES reported that the penalties implemented by the Philippines electoral authorities were harsh and not proportional to the committed offense. These harsh sanctions could discourage people from bringing a claim; a prospective claimant might not want to condemn a poll worker to jail time (the sanction provided in the law) for an offense such as failing to post the voters' list in the correct location.[239] IFES recommended that the legislative authority delink criminal and electoral law and establish sanctions more appropriate for the offenses in question, such as fines, loss of media access, campaign restrictions, and public apologies. [240]

Whether it is set in the electoral law or in internal rules of procedure, sanctions and penalties must be part of the electoral complaint adjudication regime and they must be clear and proportional to the offense.

F. Enforcement Mechanisms

The right to a remedy cannot be effective if the sanction is never actually implemented. Enforcement begins at the completion of a legal challenge;

[237] Petkov v. Bulgaria, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 81.

[238] Dahl et al., *supra* note 131, at 22; Kingdom of Thailand Report, *supra* note 163.

[239] Erben et al., *supra* note 150, at 28-29.

[240] *Id.*

that is, when a case has been fully adjudicated, and neither party can appeal the decision any further. In a 2001 report reviewing the electoral complaint adjudication process in the Republic of Kazakhstan, the OSCE underlined that enforcement cannot take place until all domestic remedies have been exhausted and final decisions have been reached.[241] For example, a run-off election cannot be ordered by a court if the decision is still subject to an appeal.

Moreover, enforcement requires the cooperation of the diverse authorities responsible for the implementation of administrative or judicial decisions. Electoral authorities, prosecutors and the police should understand the decision taken by the complaints adjudication body and should carry out sanctions and penalties.[242] The European Court of Human Rights in *Petkov v. Bulgaria* stressed that the "rule of law — one of the fundamental principles of a democratic society — entails a duty on the part of the State and public authorities to comply with judicial orders or decisions against them."[243] However, whether it is due to a lack of financial resources or to a lack of will, the enforcement of sanctions and penalties is not always effective in developing democracies. This unfortunately can lead to the denial of the right to an effective remedy and must be addressed if the electoral process is to be respected by the electorate and participants in the democratic process.

7. Effective Education of Stakeholders

As noted above, public trust is a key element in an effective electoral process. The state is obligated to "ensure that those responsible for the various aspects of the election are trained."[244] States should implement training programs for election workers, as well as national civic education programs that will enable the public to become familiar with election pro-

[241] Kazakhstan Report, *supra* note 225, at 6.

[242] Petkov v. Bulgaria, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 55 ("The applicants complained of the electoral authorities' refusal to comply with the final judgment of the Supreme Administrative Court declaring their striking off the lists of candidates null and vold, and of their resulting inability to stand in the parliamentary elections on 17 June 2001.").

[243] *Id.* at ¶ 62; see also Hornsby v. Greece, Eur. Ct. H.R., App. No. 18357/91, Judgment of 19 Mar. 1997, ¶¶ 40-41.

[244] Declaration on Elections, *supra* note 54, art. 4, § 2.

cedures and issues.[245] These programs entail large-scale public outreach to explain the powers and limitations of the complaints system, as well as training for legal unions, human rights and other civil society organizations, electoral management bodies (EMB), political parties, candidates, and any other persons with standing to bring challenges and complaints.[246] It is important that the public receives comprehensible and easily accessible information on elections generally, but particularly on the rights afforded to them to redress election irregularities.

The stakeholders involved in the electoral complaints adjudication process have different educational needs. Indeed, lawyers and arbiters need to understand the whole process of the claim: the parties who have legal standing; the required burden of proof; the possible appeals; and the sanctions and penalties. On the other hand, political parties, candidates and electoral management bodies need to know how to file a claim, which entity has jurisdiction to handle such a claim, and what evidentiary elements they should collect to support their claim. Understanding challenges and complaints may also lessen the workload of the complaints adjudication body, which will have to deal with electoral stakeholders that attempt to avoid accountability. In the light of this variety of stakeholders and needs, education and training programs should target individual groups, with the overall goal of improving the general understanding of the electoral complaints adjudication process.

A. Education of the General Public

Civic and voter education can encourage citizens to participate in democratic processes.[247] The United Nations Human Rights Committee has stressed that voter education and registration campaigns are necessary to ensure the effective exercise of the right to participation in government "by an informed community."[248] As discussed throughout this guide, public confidence is an important factor for stability, and it will give more legitimacy to

[245] *Id.* § 4(1).

[246] Afghanistan Challenges, *supra* note 29, at 25.

[247] U.N. Development Programme, Democratic Governance Group, Bureau for Development Policy, Civic and Voter Education: Electoral Assistance Implementation Gulde 42 (2007), *available at* http://www.undp.org/governance/docs/UNDP-Electoral-Assistance-Implementation-Gulde.pdf.

[248] CCPR General Comment No. 25, *supra* note 84, ¶ 11.

the elected government, parliament or local officials. Education programs should explain the electoral process in its entirety, from voter registration to the electoral complaints adjudication process, and assure citizens of the impartiality and integrity of the national and regional electoral commissions.[249] In Timor-Leste, for example, IFES provided the public with materials on election complaints via the media (TV and radio shows).[250] IFES also recommended that the National Election Commission implement adequate voter education campaigns, including the electoral complaint process.[251] This project, which sought to educate voters about the complaints adjudication process so that credible alternatives to political violence were widely understood, led to positive results. Clearly, public confidence and understanding of electoral complaint adjudication is an important factor for stability.

Moreover, "[v]oter education materials should be simple, straightforward and manageable in terms of voters' ability to absorb, understand and retain information."[252] If NGOs and political parties establish voter education trainings, the state should facilitate the implementation of those programs, such as making public buildings available for free. If executed properly, voter education may lead to greater transparency in the system, and increased accessibility to adjudication of irregularities.

Particular attention should be paid to women, minority and indigenous groups, persons with disabilities and inhabitants of rural areas who may otherwise be underserved in an education campaign. The UN Committee on Elimination of Racial Discrimination (CERD) prohibits any form of discrimination in the exercise of political rights and "in particular the right to participate in elections."[253] The Committee on the Elimination of Discrimination Against Women (CEDAW) underscores the indispensable role of

[249] Dahl et al., *supra* note 131, at 6.

[250] IFES Timor-Leste Report, supra note 135, at 10-11. As part of CNE's civic education activities, CNE, Radio Television Timor-Leste and IFES produced a series of six interactive radio and TV programs, called *Klabis*, which were broadcast in the two weeks before the parliamentary election. *Id.*

[251] *Id.* at 27.

[252] Dahl et al., *supra* note 131, at 7.

[253] CERD, supra note 12, art. 5(c); U.N. Human Rights Comm., Committee on the Elimination of Racial Discrimination (CERD), Gen. Rec. No. 23, Indigenous Peoples, 51st Sess., § 4(d) (Aug. 18, 1997), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c.

women in society,[254] and electoral outreach should reflect that convention and ensure that women have the same rights as men in political life.[255] CEDAW encourages the participation of women in public, elected bodies as well as in NGOs and associations dealing with political issues.

Electoral laws may allocate seats by gender or provide for quotas in political party candidate lists, for example. In 2002, the *Congreso de la Unión* (Mexican Congress) reformed the electoral law to require that no more than 70 percent of candidates for the posts of Deputies and Senators be of the same gender.[256] The goal was to make the position of women in governmental structures better reflect existing gender ratios in the population.[257] Today, no more than 60 percent of candidates for the posts of Deputies and Senators should be of the same gender, but neither the *Cámara de Senadores*, nor the *Cámara de Diputados* have complied with this requirement yet. Regardless of whether this particular approach is used, special measures should also be taken regarding the participation of women in political life, and women should be informed of their rights to redress when their electoral rights are infringed. Female electoral officials should be trained to receive, investigate and adjudicate a claim. They should be taught how to access the complaint process and how to file a claim.

Several human rights conventions insist on the right of minorities to participate effectively in cultural, religious, social, economic and public life.[258] When setting up voter education programs, NGOs, political parties or state agencies should include a special focus on these disadvantaged or underrepresented groups. For example, in Guatemala, even where some progress has been made, the turnout rate of marginalized indig-

[254] CEDAW, *supra* note 12, art. 7; ICCPR, *supra* note 11, art. 22; UDHR, *supra* note 10, art. 20.

[255] CEDAW, *supra* note 12, arts. 7, 9.

[256] *30 Essential Questions*, Instituto Federal Electoral, Question 15 (Mexico), http://www.ife.org.mx/portal/site/ifev2/30_essential_questions/ (last visited Jan. 12, 2011) [hereinafter 30 Essential Questions].

[257] CEDAW, supra note 12, art.8; E.U. NEEDS Project, Benchmarks For Electoral Standards: A Gulde For European Union Election Observation Missions 12 (2005), *available at* http://www.pedz.uni-mannheim.de/daten/edz-h/az/05/gulde_for_eu_elections_observation_missions.pdf.

[258] CERD, supra note 12, art. 5(c); U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, art. 2(2), U.N. Doc. A/RES/47/135 (Dec. 18, 1992), *available at* http://www.un.org/documents/ga/res/47/a47r135.htm; Venice Commission Code, supra note 44, at 19.

enous people is still far less than their demographic weight.[259] Moreover, electoral materials should be translated to ensure full understanding of the electoral complaint process. Illiteracy rates among minorities and indigenous groups present additional challenges to take into account when developing educational materials. Furthermore, some groups may face intimidation when trying to file claims or access the electoral complaint process.

An equal and fair representation of all the groups in an election can maintain or bring stability to a country; focusing on these groups and their access to redress for election violations will further this goal.

B. Political Parties

Political parties are essential instruments for democratic participation and take part "in the management of public affairs by the presentation of candidates."[260] As clearly stated by the National Democratic Institute, "by competing in elections and mobilizing citizens behind particular visions of society as well as through their performance in the legislature, parties offer citizens meaningful choices in governance, avenues for political participation, and opportunities to shape their country's future."[261]

i. Trainings

Political parties should receive training on how to effectively participate in elections, as well as in how to respond if they feel the process is not being conducted in a free and fair manner. Political parties should know, for example, how to file a complaint before the electoral complaint adjudication body. As they are often involved in complaints, they should fully understand the process so that they will accept and respect the final decision. Political parties should also be trained on the importance

[259] E.U. Election Observation Mission, Guatemala General Elections Final Report XV (2007) [hereinafter E.U. Guatemala Report]; E.U. Mexico Report, *supra* note 60, at XXIII.

[260] Venice Commission, Report on the Participation of Political Parties in Elections 4 (2006), *available at* http://www.venice.coe.int/docs/2006/CDL-AD percent282006 percent29025-e.asp; see also Venice Commission, Guldelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues (2004), *available at* http://www.venice.coe.int/docs/2004/CDL-AD percent282004 percent29007-e.asp.

[261] Political Parties, National Democratic Institute, http://www.ndi.org/political_parties (last visited Jan. 8, 2011).

of taking into consideration the participation of women,[262] young voters, and religious and ethnic minorities.[263]

For instance, in preparation for the 2010 municipal elections in Georgia, lawyers from 18 political parties received training about the electoral code, new amendments, filing and examining complaints, and administrative resources. This training provided the political parties with a greater understanding of the electoral process as well as the ability to effectively lodge complaints.

ii. Codes of conduct

Political parties should be encouraged to adopt codes of conduct to regulate their activities and behavior while campaigning, and during the entire election period, including polling day.[264] In a few countries, the election management body has adopted a code of conduct for political parties to sign[265] and, in some cases, the body has some enforcement responsibilities. These codes should set a minimum standard of acceptable behavior for political parties and their supporters. [266] Such guidelines will not be enforced by complaint adjudication bodies unless they are included in law-based regulations and the failure to abide by the code of conduct is defined as a violation. Political parties could also establish their own disciplinary authorities and handle internal disputes by themselves. When dealing with challenges such as primary elections, nomination proceedings, appropriate composition and sharing of lists, political party committees or other disciplinary bodies could handle such cases and thus, lessen the workload of the complaints adjudication body.

In Sierra Leone, in late 2006, the newly established Political Parties Registration Commission (PPRC) and the political parties adopted a Code of

[262] African Elections Declaration, *supra* note 162, art. III(j).

[263] CEPPS/International Republican Institute, Quarterly Report- Liberia: Political Party Empowerment Program 5 (2005) [hereinafter CEPPS/IRI Liberia Report], *available at* http://pdf.dec.org/pdf_docs/PDACF452.pdf.

[264] SADC Norms, *supra* note 138, at 13-14.

[265] Election Commission of Pakistan, Code of Conduct for Candidates: General Elections, 2007-08, No.F.2(1)/2007-Cord. (Nov. 20, 2007), *available at* http://www.ecp.gov.pk/Misc/COCFinal.pdf.

[266] CEPPS/IRI Liberia Report, *supra* note 263, at 4, 8, 11-17.

Conduct that provided for the establishment of monitoring committees.[267] These committees offer major election stakeholders (parties, the PPRC, civil society and the police) a forum to discuss and resolve conflicts that could lead to violence at the local level. Since the 2007 presidential and parliamentary elections, IFES has provided assistance to the 14 District Code of Conduct Monitoring Committees to assist their work to reduce tension and conflict.[268]

Political parties should provide for transparent measures that will lessen corruption or undue influence. The E.U. observer group recommended to Nicaragua after the 2007 General elections (presidential, parliamentary, and municipal) to set up "transparent and accountable mechanisms to record, disclose and audit the donations to political parties and their expenditure during the electoral campaign."[269] The 2007 electoral reform in Mexico took this element of funding transparency into account as well and established within the Instituto Federal Electoral an autonomous and specialized entity in charge of the surveillance of political party finances. Thus, political parties must disclose all the information on the origin, amount, destination and application of the funding received by any source.[270] Political finance deserves a separate and more focused discussion that cannot be developed extensively in this guide.[271] Such measures may help in the long term to bring more transparency to the electoral system and to avoid disputes dealing with political parties' activities as well.

iii. Dissemination of information to the general public

Political parties should also disseminate this same information to the general public. It should be incumbent upon parties to improve voter education and the understanding of the complaint adjudication process.[272] Po-

[267] *See generally About Us*, Political Parties Registration Commission of Sierra Leone, http://www.pprcsl.info/index.php?option=com_content&task=view&Id=13&ItemId=30 (last visited Jan. 8, 2011).

[268] *See Sierra Leone: Strengthening Sierra's Capacity to Regulate Political Parties*, IFES, http://www.ifes.org/Content/Projects/Africa/Sierra-Leone/Strengthening-Sierra-Leones-Capacity-to-Regulate-Political-Parties.aspx (last visited Jan. 8, 2011).

[269] E.U. Nicaragua Report, *supra* note 38, at 67.

[270] 30 Essential Questions, *supra* note 256, Question 18.

[271] See Magnus Ohman & Hani Zainulbhai, IFES, Political Finance Regulation: The Global Experience (2009).

[272] CEPPS/IRI Liberia Report, *supra* note 263, at 1.

litical parties should make efforts to mobilize and train voters who will in turn inform the wider public about the complaint system. Such trainings on the electoral complaints process by parties could be part of a general program on voter education, and conflict prevention and resolution tools, for example. In Timor-Leste, IFES' program objective was to resolve and prevent conflicts by improving electoral complaint adjudication in combination with election violence monitoring. IFES educated political parties and candidates about the contents and potential problems in the election laws passed in December 2006. Moreover, IFES trained and gave briefing materials to political parties and candidates on the election complaints process.[273] As a result, the parties and candidates were better equipped to disseminate relevant information to the general public.

C. Actors with a Technical Role: Electoral Officials, Lawyers and Arbiters

To provide an effective remedy in case of an electoral irregularity, all the actors involved in the process of complaints adjudication should understand the electoral complaint adjudication process and their roles within it. Complaint adjudication processes vary among countries as to the role or extent of involvement of the judiciary, of the election commission or of separate complaints adjudication entities.

All the personnel that work in the organization and the conduct of an election, including regional or provincial staff, the investigation team and polling station workers, should be educated about the complaint process. Moreover, the lawyers are also important actors in the adjudication of a complaint. They should fully understand the law and the procedural rules and they should clearly explain the process to their client. Whether the adjudication entity is judicial or not, arbiters and judges should also be well versed in how to apply and interpret the relevant laws in the matter in dispute.

Electoral officials should receive standardized training on complaints adjudication at all levels of the election administration.[274] Some staff

[273] IFES Timor-Leste Report, *supra* note 135, at 27.

[274] Venice Commission Code, *supra* note 44, at 28; Declaration on Elections, *supra* note 54, art. 4, § 6 ("[B]allot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.").

will not be directly involved in resolving electoral complaints, but other staff will have specific roles and thus they will need specific training on the claim process, investigation, and adjudication. Expectations will be higher for the arbiters of the adjudicatory body, but administrative staff should also be aware of the rules and procedures that must be followed in the resolution of electoral complaints.

States should allocate adequate resources for electoral management bodies to provide ongoing training for their staff to improve their professional qualifications.[275] The electoral management body should also focus on educating candidates and the general public about the electoral complaints process. Instructively, in April 2009 the Pakistan Electoral Commission, in collaboration with IFES, held a workshop to inform and train electoral judges and staff on the principles and practices of electoral dispute resolution.[276] The purpose of the meeting was to raise awareness of the system, and to provide a starting point for standardizing and streamlining the complaint adjudication process.[277] The electoral management body should also plan and develop such trainings and thus provide officials and the general public with the necessary information on the right of redress.[278] A recent example is the assistance that IFES provided to the Ukrainian Central Election Commission in 2009 on a training program for the 2010 presidential and future elections.[279] IFES developed training strategies, methodologies and offered a series of recommendations for the training of the staff from the Central Election Commission, the District Election Commissions (DECs), and the Precinct Election Commissions (PECs). These recommendations encour-

[275] Commonwealth Convention, *supra* note 39, art. 19, § 2(i).

[276] Vickery, *supra* note 34, at 14; see also Farrah Naz, *Improving Pakistan's Election Complaints System*, IFES (May 13, 2009), http://www.ifes.org/Content/Publications/Opinions/2009/May/Improving-Pakistans-Election-Complaints-System.aspx.

[277] Vickery, *supra* note 34, at 15.

[278] Grant Kippen, Elections in 2009 and 2010: Technical and Contextual Challenges to Building Democracy in Afghanistan 10 (2008) ("The ECC's most significant challenge during the 2005 elections was its lack of time and resources for the effective planning and managing of its many programmatic activities. The key will be to start the planning cycle early, and to give it the complete independence and resources it needs to fully meet its mandate." (internal citations omitted)), *available at* http://www.unhcr.org/refworld/docId/492c0e5b2.html.

[279] IFES, Ukraine Election Management Body Training Assessment Report (2009) ("IFES conducted a study in May and June on the past and currently planned training programs to prepare commission members prior to elections in Ukraine. The report summarizes training strategies, methodologies, and materials, and offers a series of recommendations for the training program."), *available at* http://www.ifes.org/publication/7b42caa0658b67bc7b4d1cd963bfb70f/TNA_Ukraine_Eng.pdf.

aged the Central Election Commission to develop a manual that includes the electoral commissioners' duties in light of the general rules to adjudicate complaints, the handling of Election Day complaints at PECs, and the adjudication of complaints at DECs.[280]

Training of key actors in the electoral complaint adjudication process should obviously include arbiters, judges and lawyers. In East Timor in 2007, the credibility of the complaints process was assisted by six Timorese lawyers that IFES hired, paid and trained as complaints officers and who worked to assess complaints and make recommendations to the Commission. [281] IFES has also implemented important projects in Nigeria and the Philippines to effectively train judges. Additionally, in Georgia, IFES trained lawyers from 18 political parties and chairmen and lawyers from 73 District Election Commissions. This training covered filing complaints, use of administrative resources, and protocol on administrative violations. It should also be mentioned that the Mexican Electoral Tribunal provides technical assistance to other courts or to complaints adjudication entities abroad regarding the training of their arbiters.[282]

D. The Media

The media is also an important component of the organization and conduct of an election. The media has a responsibility to cover the topic of election complaints accurately, and a civic obligation to report violations or problems that may arise from an election. The media can "shine its own spotlight on the election process and expose corruption or other illegal activities."[283] The media also has a responsibility to understand and abide by regulations governing the media's role in an election process (e.g. allocation of airtime, avoiding inaccurate or biased stories), in order to avoid fuelling conflicts or becoming the object of an election complaint.

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[280] *Id.* at 1, 7 (describing content of training material, including Ukrainian legislation, handbook, description of election commissioner duties, general rules for adjudicating complaints and appeals, maintaining voters' lists, preparing for polling, counting votes, and more).

[281] IFES Timor-Leste Report, *supra* note 135, at 25; see also Schramm et al., *supra* note 2, at 11-13.

[282] *International Activities 2008-2009*, Instituto Federal Electoral, http://www.ife.org.mx/portal/site/ifev2/International_Activity_2008_2009/#2 (last visited Jan. 10, 2011).

[283] IMPACS, Media + Election: An Election Handbook Report 12 (2004) [hereinafter IMPACS Report].

The United Nations Human Rights Committee underlined that "the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."[284] States should encourage the development or maintenance of private media outlets that will provide impartial and trustworthy political coverage.[285] If the media is government-controlled, the state must take the necessary steps to guarantee non-partisan coverage.[286] The electoral management body should set up rules or codes of conduct to conform to freedom of the press and to punish arbitrary censorship or restraint by the government. The EMB should also restrict media outlets from engaging in behavior that could intimidate or coerce voters, or wrongfully interfere with the legitimate voting process.[287]

i. Training

The media should be trained in how to cover electoral complaints and basic electoral issues in a fair and accurate way. Balanced media coverage of proceedings of election tribunals is exceedingly important and judicial reporters must be properly trained in some elementary law to ensure the release of honest, fair and accurate information.[288] In Pakistan, the ECP, with the support of IFES, drafted an *Election Dispute Resolution Pamphlet* to provide the media with a guide for "understanding the various and overlapping dispute resolution processes under the Election Law."[289] This handbook focused in particular on post-election procedures. It was made available to numerous actors thanks to translations in Urdu and Sindhi and wide distribution by media agencies and regional press clubs.

[284] CCPR General Comment No. 25, *supra* note 84, ¶¶ 17, 20, 25.

[285] Declaration on Elections, *supra* note 54, art. 3, § 4; Human Rights and Elections Handbook, *supra* note 9, at 16 .

[286] Council of Eur., European Comm. of Ministers, Measures Concerning Media Coverage of Election Campaigns, Recommendation No. R (99) 15, 678th Mtg. of Ministers' Deputies, §§ I(2), II (1) (Sept. 9, 1999) ("Underlining that the coverage of elections by the broadcast media should be fair, balanced and impartial."), *available at* https://wcd.coe.int/ViewDoc.jsp?Id=419411; see also SADC Norms, supra note 138, at 9.

[287] Declaration on Elections, supra note 54, art. 4, § 2 (urging states to "encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period").

[288] Communique, IFES, Nigeria: Two Day Seminar Organised for Election Tribunal Petition Tribunal Judges by the Court of Appeal in Collaboration With the International Foundation for Electoral Systems on 6th & 7th May 2008 4-5 (June 4, 2008) (on file with IFES).

[289] Vickery, *supra* note 34, at 16-17.

Moreover, in Nigeria, IFES, with the collaboration of the Legal Defense Centre, organized a consultation on electoral dispute resolution to facilitate discussion among stakeholders on monitoring and reporting the activities of Election Tribunals.[290] Forty-two representatives of civil society organizations, the media, the judiciary and the Nigeria Bar Association attended the consultation, in which moderators presented a thorough background on complaints adjudication and the reform process.[291] Timor-Leste also provides us with a strong example of the role of media in the complaints adjudication process. Following strong national and international criticism about the National Election Commission in Timor-Leste's (CNE) public outreach and lack of neutrality, IFES fielded a media advisor for CNE spokespersons before and during the parliamentary election cycle.[292] IFES helped to produce a series of interactive radio and TV programs that included topics on election complaints and developed summaries of all complaints and a weekly Complaints Analysis Report accessible to the public and the media.[293]

The media's role is to provide the public with accurate and impartial information.[294] Each candidate and political party "shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views."[295] The 2004 presidential elections in Ukraine provide an instructive example of bias in state-funded media. As pointed out by John Hardin Young in *International Election Principles*, more air-time and more positive press were given to Viktor Yanukovych, the incumbent Prime Minister.[296] The opposition leader Viktor Yushchenko was thus put at an unfair disadvantage. Such media practices undermine the integrity and impartiality of the election process. The allegation of impartial coverage along with the alleged fraud can lead to lack of faith in the electoral process and to massive post-election protests. Following the last Guatemalan General Elections, the E.U. Observation Mission recommended that Guatemala "revise the current limits on the amounts of time and space that may be used in the media for the pur-

[290] Almami Cyllah, IFES, Support to the Electoral Process in Nigeria 37 (2009).
[291] *Id.*
[292] IFES Timor-Leste Report, *supra* note 135, at 9-10.
[293] *Id.* at 11.
[294] IMPACS Report, *supra* note 283, at 12.
[295] Declaration on Elections, *supra* note 54, art. 3, § 4.
[296] Young, *supra* note 60, at 296.

poses of electoral propaganda [in order to fall in line with internationally established standards for democratic elections]."[297] Afghanistan's electoral law also provides guidance on the role of the media during the electoral campaign period. The provisions deal with the access to unbiased and fair information for the public.[298] Media outlets are encouraged to set up their own rules and codes of conduct to guarantee the respect of such principles in the coverage of an election.[299]

ii. Codes of conduct

Adjudicatory bodies should have the power to adjudicate any offenses committed by or against the media during an election, providing an effective, predictable and timely enforceable remedy in case of violations of the media as envisaged in the Election Law.[300] Some states provide for an independent media commission to assume such a role.[301] For example, there has been an Independent Media Monitoring Commission organized under the auspices of the Guyana Election Commission since 2006.[302] Media organizations agreed to the establishment of the Elections Media Monitoring Commission (MC) that handles "complaints about performance in the reporting and coverage of events during the election campaign."[303] The Commission has the power to sanction violations of the Code of Conduct and the establishment of such a mechanism has been very effective in changing the tone of media coverage. Means of accountability should be developed so that the "media is not used to distort public opinion."[304] The existence of an effective right of redress will deter journal-

[297] E.U. Guatemala Report, *supra* note 259, at 65.

[298] Electoral Law, art. 50, §§ 1, 2 (2005) (Afg.) ("[S]tate-run media shall publish and disseminate, as agreed with Commission, the platforms, views, and goals of the candidates in a fair and unbiased manner.")

[299] *Id.* art. 50, § 3 ("State-owned media shall institute, as necessary, goals, policies and procedures to ensure fair coverage of the elections and implement the provisions of sub articles (1) and (2).").

[300] E.U. Mexico Report, *supra* note 60, at 53.

[301] Electoral Law, art. 51, § 1 (2005) (Afg.) ("The MC shall monitor fair reporting and coverage of the electoral campaign period and shall deal with the complaints concerning any breaches of fair reporting or coverage of political campaign, or other violations of the Mass Media Code of Conduct. Appeals may be lodged with the Commission.").

[302] See generally Guyana Elections Commission, http://www.gecom.org.gy/elections_commission.html (last visited Jan. 10, 2011).

[303] Media Code of Conduct Roundtable, A Media Code of Conduct for Reporting and Covering of Elections in Guyana in 2001, art. III(8) (Oct. 9, 2000), *available at* http://www.anfrel.org/resources/others/mediacodeofconduct.pdf.

[304] Dahl et al., *supra* note 131, at 24.

ists from committing violations. They should thus be aware of the rules to which they are bound.

E. Election Observers

In order to promote a free and fair election, local and international observers seek to determine whether the election process is in compliance with international standards.[305] The presence of election observers contributes to the awareness and openness of elections, as the reported findings of the observers should provide accurate, impartial, and reliable information.[306] These findings are even more important if disputes arise concerning the election results.[307] Observer missions are encouraged to communicate with all the parties involved in the electoral process to try to obtain information on the integrity of the elections.[308]

States and electoral management bodies have stressed the importance of the presence of observers in the conduct of an election and also have created laws to better define their activities. The African Union requires its Member States to "compile and maintain a roster of African Experts in the field of election observation."[309] A roster can be used to deploy competent and professional observers[310] who are armed with the skills necessary to

Declaration of Principles for International Election Observation

International election observation has become widely accepted around the world and plays an important role in providing accurate and impartial assessments about the nature of electoral processes. Accurate and impartial international election observation requires credible methodologies and cooperation with national authorities, the national political competitors (political parties, candidates and supporters of positions on referenda), domestic election monitoring organizations and other credible international election observer organizations, among others…

[305] Venice Commission Code, *supra* note 44, at 29.

[306] Commonwealth Convention, *supra* note 39, art. 15, § 1.

[307] U.N. Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers, § 5 (Oct. 27, 2005) [hereinafter, Election Observation Declaration], *available at* http://www.accessdemocracy.org/files/1923_declaration_102705.pdf.

[308] *Id.* § 15(a), (b).

[309] African Elections Declaration, *supra* note 162, art. VI(e).

[310] *Id.*

oversee all aspects of the voting process. Similarly, the Organization of American States (OAS) has established guidelines that ensure observation teams are managed by professionals with considerable experience.[311] One of the specific objectives of the OAS international electoral observation efforts is "to assist, by means of their presence, in dissuading potential irregularities" on Election Day.[312] The international observers need, therefore, to clearly understand the electoral process, including complaint adjudication, in order to adequately report any fraud or other election offenses they may witness.

The Independent Election Commission of Afghanistan issued a Code of Conduct for observers that states that "all necessary measures must be taken to ensure that the representatives are familiar with and follow the Electoral Law, this Code of Conduct, instructions regarding electoral violations, and any directions, information, guidance, or other instructions and notifications of IEC, the Electoral Complaints Commission or the Secretariat of the IEC."[313] The OAS in its guidelines for observers insists on maintaining a policy of strict neutrality in its observation missions, preventing observers from intervening in or giving support to any part of the electoral process.[314] However, in countries such as Ethiopia, international observers can ask questions as long as they do not disturb the voter and may bring irregularities they observe to the attention of election officers at the polling stations or counting venues.[315] While the electoral laws of many countries only allow observers to bring irregularities to the attention of election officials, a few countries, like Bosnia and Herzegovina, Kosovo and Geor-

[311] General Secretariat Organization of American States, Best Practices in OAS Electoral Observation, 2004-2007, at 28-29 (2008) [hereinafter GS/OAS Best Practices].

[312] *Id.* at 7, 22.

[313] Independent Electoral Commission of Afghanistan, Code of Conduct of Observers (2008), *available at* http://www.iec.org.af/pdf/code_of_conduct/english/observers_code_of_conduct.pdf; see also Islamic Republic of Afghanistan, Independent Election Commission Secretariat, Fact Sheet: Agents and Observers, *available at* http://www.iec.org.af/assets/pdf/factsheet/eng/fs8E.pdf

[314] GS/OAS Best Practices, *supra* note 311, at 7.

[315] National Electoral Board of the Federal Democratic Republic of Ethiopia, Code of Conduct of International Election Observers, § 3(c)(g) [hereinafter Ethiopia Code of Conduct] ("Election observers may bring to the attention of election officers at the polling stations or counting venues any irregularities they might have observed.").

gia, have gone so far as to allow observers to file formal complaints.[316] But, it should be highlighted that generally observers are not permitted to publicly comment on their observations during the conduct of an election, give instructions to election officials, countermand their decisions, or file a complaint.[317] Whether they are domestic or international, observers should demonstrate high levels of competence, impartiality, objectivity and professionalism during the election process.[318]

i. Guidelines and codes of conduct

Generally, states establish rules for the selection of election observers. Mexico requires a timely application to register to be an observer, and observers may not have party affiliations. Observers are also asked to attend training courses held by the Instituto Federal Electoral or by observation organizations.[319] In order to ensure complete neutrality and optimal performance the OAS has several rules that guide the selection of observers: observers may not be citizens of the host country and they must not be of a nationality that poses a potential conflict.[320] Regarding skills and competencies, the guidelines require the observers to have "educational and professional experience in the social sciences" [321] and that knowledge and fieldwork experience in political and electoral matters is also recommended. Thus, it is essential for observers to be informed and/or trained

[316] Official Gazette of Bosnia and Herzegovina (23/01) art. 16.9 (Bosn. & Herz.). The current version of this law hedges slightly on this position by stating that observers may send notice to the proper authority which will be treated as if it were a complaint filed by a political party. *Id.* art. 17.9; see also Law on General Elections (No. 03-L073), art. 56.2 (June 5, 2008) (Kos.) ("During the electoral process, including the voter registration process, an accredited observer may submit a complaint of any violation of applicable Rules, Administrative Directions, Electoral Rules, or Administrative Procedure to the CEC in accordance with its procedures."); Election Code, arts. 70, 77 (Geor.) (allowing observers to lodge complaints to and appeal decisions of Precinct and District Elections Commissions).

[317] OSCE/ODIHR, Election Observation Handbook 21 (5th ed. 2007) ("Observers will undertake their duties in an unobtrusive manner and will not interfere in the electoral process. Observers may raise questions with election officials and bring irregularities to their attention, but they must not give instructions or countermand their decisions."), *available at* http://www.osce.org/publications/odihr/2005/04/14004_240_en.pdf; Venice Commission Code, supra note 44, at 29 ("Generally, international as well as national observers must be in a position to interview anyone present, take notes and report to their organization, but they should refrain from making comments.").

[318] Ethiopia Code of Conduct, *supra* note 315, § 4(d).

[319] 30 Essential Questions, *supra* note 256, Question 24.

[320] GS/OAS Best Practices, supra note 311, at 29. Specifically, "[i]t is important to ensure that observers' nationalities do not create tensions or mistrust among the citizens of the host country. It is important to ensure that observers do not come from countries that have undergone recent political or diplomatic tensions with the host country." *Id.*

[321] *Id.*

on the entire electoral process of the country where the mission is taking place, which should include information on pre-election, Election Day and post-election irregularities.

States are encouraged to adopt codes of conduct for their election observers, in order to maintain consistent guidance on behavioral requirements and to provide for accountability in the case of violations.[322] The E.U. adopted an *Election Observers Code of Conduct* providing for pre-election training for observers.[323] The code also requires impartiality and compliance with the national laws and regulations of the host country. Election observers have a duty to report any violation of electoral law or rules of procedure and they should base their conclusions on well-documented, factual, and verifiable evidence.[324] They are also encouraged to promote the removal of undue restrictions or interference that may put in jeopardy the integrity of electoral processes.[325] As such, observers can play a key role in both facilitating and encouraging redress for election law violations.

When a state issues guidelines or codes of conduct for election observers, a distinction should be made between international and national observers. For example, the rules on legal standing regarding the filing of a complaint may differ. In Ukraine, the law makes a distinction between national and international observers, giving the former the right to lodge complaints but not the latter.[326] Ideally, observers should not be allowed to initiate complaints, as that makes them participants in the election, and their mission should be limited to observation and reporting. If they participate in the electoral process it will create a conflict of interest and undermine their independence. In the Afghan 2009 elections, the ECC agreed to accept complaints from the main national observer group, the Free and Fair Election Foundation of Afghanistan. However, the ECC did

[322] Ethiopia Code of Conduct, *supra* note 315, § 4(d) ("Election observers may bring to the attention of election officers at the polling stations or counting venues any irregularities they might have observed.").

[323] European Union Election Observers Code of Conduct, *pursuant* to Council of Europe Dec. No. 9262/98, PESC 157, COHOM 6, *available at* http://www.eueom-afghanistan.org/EN/PDF/EU_documents/Code_of_Conduct.pdf.

[324] *Id.*

[325] Election Observation Declaration, *supra* note 307, § 15(d).

[326] Law of Ukraine on Elections of People's Deputies of Ukraine (Act No. 2777-IV), arts. 59-61 (2005).

not accept complaints from international observers. The inherent distrust in many countries of outsiders participating in a domestic election necessitates that international observers should be non-participants in the election complaint adjudication process. They should refrain from meeting with the judges or arbiters involved in the adjudication of complaints or from filing complaints. However, in the course of investigation and adjudication, an election complaint adjudication body should be permitted to hear evidence from any available witnesses, including international observers, and organizations that sponsor observation missions should have their observers appear voluntarily before the body if requested.

Civic and voter education of the electorate, political parties, EMB officials, and observers is crucial to ensure a clear understanding of the electoral complaints adjudication process. Without such efforts, the system of complaint adjudication is liable to be poorly understood, underused, subject to targeted misinformation, and ineffective in fulfilling its stated purpose.

International Standards: Concluding Themes

The seven international standards discussed in this chapter have been subject to broad application and detailed interpretation in both international and domestic courts. As the body of judicial case law on electoral complaints grows, these principles will become more refined, useful, and consistently applied. It will be a greater challenge to ensure, however, that these complaint adjudication principles work in emerging democracies. The remaining chapters will outline specific programming experiences of election law practitioners who have experience in establishing, improving, or perfecting a system of complaint adjudication rooted in these standards. In its report on the 2007 presidential elections in Kenya, the Kriegler Commission noted that: "Electoral dispute adjudication requires flexibility and pragmatism, an eye to the political exigencies, sometimes even at the cost of strict legalism."[327] This quote illustrates the basic challenges in adopting a practical approach to complaints adjudication. In the remaining chapters of this guide, IFES experts will examine the application of these

[327] Kriegler Commission Report, *supra* note 3, at 142.

standards in cases around the world, in order to provide a global practices manual for election practitioners and other interested individuals. A thorough understanding of international standards, should underpin the entire electoral process. It is also necessary to consider other factors such as legal traditions and customs, and the history and the culture of a particular country. This expansive approach will result in electoral complaints adjudication mechanisms that comply adequately with international standards and fit the needs of a particular country.

In light of the standards discussed in this chapter, IFES experts will review the following programmatic areas and how they contribute to electoral complaint adjudication processes: legal reviews and advising; training of parties to a dispute (EMBs, political parties, and civil society); training of judges and arbiters; approaches to voter education and civil society; and alternative dispute mechanisms.

2

LEGAL FRAMEWORKS FOR EFFECTIVE ELECTION COMPLAINTS ADJUDICATION SYSTEMS

By Robert Dahl
with contributions from Michael Clegg

Supporters of ousted former Prime Minister Thaksin Shinawatra wave flags during an outdoor rally on 13 December 2008 in Bangkok, Thailand.

Introduction

A strong electoral structure must have the capacity to resolve complaints and disputes arising during elections through a fair, transparent and efficient process. Successful democracies recognize the need for such capacity by creating an adjudicative system for election complaints. Election complaints that are not properly and rapidly processed weaken a society's dedication to both the rule of law and honest elections. Ongoing disputes create an environment of political mistrust and suspicion that can undermine the legitimacy of elections and of the elected government.

The increasing number of new and developing democracies, and their intensely competitive political environments, has led to greater awareness of problems in the complaints adjudication arena of election management. Election authorities have generally become more competent in fulfilling their basic responsibilities for conducting elections. More complicated and difficult aspects of holding elections are now being addressed. Election laws are becoming more comprehensive, and global experiences in this area are now more easily shared. As presented in Chapter 1, international standards have been developed for evaluating the fairness and effectiveness of complaints adjudication systems. Discussion of election complaints adjudication has now moved beyond simply stating principles to a focus on practical considerations for effective implementation.

Election complaints pose acute challenges for the election officials, courts and other bodies tasked with their resolution. These authorities rarely receive credit, and are often given blame, for trying to resolve hundreds or thousands of disputes and complaints in a short time period.[1] Some disputes represent very significant matters that involve strong political sensitivities and carry serious potential consequences. Other complaints

[1] One example of this issue is the 2010 investigation of the Afghanistan Independent Election Commission (IEC) and the Electoral Complaints Commission (ECC) by the Afghan Office of the Attorney General. Following the IEC and ECC's move to disqualify winning candidates from the September 18 elections for fraud offenses, in December of 2010 the Attorney General's office accused IEC and ECC officials of conspiring to perpetrate fraud, and requested that the Supreme Court nullify the election results. At the time of this writing, the Attorney General's investigation of the IEC and ECC is pending, and is being conducted in closed proceedings. See Yaroslav Trofimov, *Afghan Supreme Court Asked to Vold Election*, Wall St. J. (December 12, 2010), *available at* http://online.wsj.com/article/SB10001424052748703380104576014981538748112.html.

are often insignificant, false, frivolous or duplicative. Perhaps the greatest challenge is to establish a complaints adjudication system that can quickly distinguish between important and unimportant grievances, and can efficiently apportion time and resources in resolving them.

The issue of adjudication of electoral complaints and disputes is of special interest today within both developing and advanced democracies because of the significance of credible adjudicative processes for producing stable election outcomes.[2] However, few resources are available for development practitioners when designing and implementing assistance programs that address these needs.

This chapter outlines key issues for development practitioners to consider when reviewing the legal and administrative framework for election complaints adjudication in new or consolidating democracies. The discussion begins with a set of key characteristics for successful systems, and outlines the role of various stakeholders in the adjudication process (including election management bodies, complaints commissions and tribunals). Case studies from across the globe provide examples of the role of these bodies. At the conclusion of the chapter, a detailed checklist will help to ensure that practitioners have sufficient resources to develop technical assistance programs and review legal and administrative frameworks for complaints adjudication systems.

It is difficult to generalize in the field of complaints adjudication because of the lack of documented practices and decision-making examples outside of established democracies. And, as in all aspects of democratic development, electoral frameworks and administrative practices for election complaints adjudication must be based on the unique cultural, political and legal traditions in each country. No single approach or model works everywhere. As illustrated by the country examples provided later in this chapter, success in election complaints adjudication requires a particularly serious commitment of organizational assets, political will and perseverance.

[2] The Carter Center, International Obligations for Electoral Dispute Resolution 3-10 (2009), *available at* http://www.cartercenter.org/resources/pdfs/peace/democracy/des/edr-approach-paper.pdf. See also Rafael López-Pintor, Assessing Electoral Fraud in New Democracies: A Basic Conceptual Framework, IFES Electoral Fraud White Paper Series (2010).

Key Issues and Considerations for Establishing Complaints Adjudication Systems

Laws or regulations that are implemented to establish complaints adjudication systems must clearly define responsibility for receiving and handling different types of complaints and disputes: for "point of entry" and initial review; for investigation; for preliminary adjudication and the appeals process; and for the finality of decision-making in resolving election-related matters. Clarity in election laws and implementing regulations is essential. The legal framework must identify and empower existing bodies, such as courts and EMBs, or new institutions such as complaints commissions or electoral courts, to properly and quickly handle these complaints and disputes. Ambiguous or conflicting jurisdictions among courts and administrative bodies are confusing and unfair to political parties, candidates, the news media and the voting public.

Election laws must also provide clear rules and procedures for where, when, how, and in what form complaints or demands must be filed, including standards for sufficiency of evidence. Reasonable but tight deadlines and time limits should be established for complainants and for the adjudicative bodies that deal with these cases.

The format and formal requirements for election complaints should be clear and specified in the election law or in implementing regulations that are developed by election authorities. An officially approved form that is made widely available (on the internet, but also in simple print forms) is a good basis for ensuring that complaints are well-crafted and comprehensive in their statement of facts, allegations and legal basis. If complaints are relatively complete when filed, adjudicative bodies will have fewer obligations to conduct independent fact-finding and will be able to assess or resolve matters more quickly.

Implementing regulations should explain the requirements for the nature and sufficiency of evidence. Election laws should generally require signed and sworn statements by complainants and witnesses, except in extreme

circumstances where the safety of witnesses could be jeopardized. A balance should be struck between seeking a solid factual record without being overly burdensome and unfair to the complainant. A fair opportunity should be provided for a complainant to revise and supplement their assertions if found to be inadequate initially by the complaints authority. Also, the object of the complaint (often called a "respondent") must be afforded a reasonable opportunity to provide a response to the allegations of the complaint. The holding of hearings may be desirable in some cases, but should not be viewed as an absolute right or necessity for processing all complaints.

The law should be clear about who can bring complaints and who is entitled to seek administrative or judicial remedy (for more information on the issue of standing to bring a complaint, see section 1.D of Chapter 1: International Standards). That may include specifying that only parties or candidates are entitled to bring complaints regarding some issues, or that complainants must have personal knowledge of the facts and/or a personal stake in the outcome (such as a citizen who is denied a rightful place on the voter registry or personally knows of someone who should not be on the list).

Transparency in the process by which complaints are accepted and resolved should be encouraged. The need for confidentiality during the course of investigations and internal decision-making by an adjudicative body is understandable. However, the adjudicative process should be open, to the extent basic information about the nature and progress of cases can be revealed as they are pending to permit political participants and the public to monitor them, and to avoid the spread of false rumors and conspiracy theories. Most importantly, the process should provide full transparency after final adjudication as to the reasons for decisions and the supporting evidence. Decisions of adjudicative bodies and their basis for decision-making should be explained, published and made available on the internet.

Civic education can play an important role in improving the complaint process and encouraging citizens, civil society and electoral participants to do a better job of focusing their complaints and stating allegations. Public un-

derstanding of rules and procedures, and public confidence in the fairness and openness of the adjudicative process, are fundamental to assuring widespread acceptance of the legitimacy of the outcomes of elections (for more information on the role of civic education in the complaints adjudication process, see Chapter 5: Approaches to Voter Education and the Role of Civil Society).

Penalties and sanctions for violations of electoral laws should be reasonable and proportionate to the seriousness of the offense and to the culpability of the offender (mistake, negligence, deliberate or repeated misconduct). Punishment for equivalent electoral offenses should be consistent; penalties and sanctions should not be dispensed in an arbitrary or biased manner. As noted above, distinctions should be drawn between serious offenses that genuinely deserve being treated as criminal violations and others that could more fairly be considered (and efficiently handled) as administrative in nature.

Political sanctions imposed upon political parties and candidates may be an effective method of punishment for and deterrence of flagrantly improper conduct. These types of sanctions (such as suspension of campaigning, decertification of candidates, disqualification of parties from competing in elections or, at the extreme, dissolution of political parties) are often repugnant to the political establishment in emerging democracies, however. Political sanctions also carry a risk of arbitrary enforcement and political manipulation if election authorities or courts are under partisan influence. Thus, political sanctions should not be abused. Citizens should not be denied their freedom to associate in political parties or other organizations for political advocacy. They should not be prevented from choosing political leaders or proposing candidates for election that they prefer. These freedoms should only be limited in exceptional circumstances that threaten the fundamental integrity of the election process or of public safety and order. Nevertheless, political sanctions serve as a valuable intermediary punishment between administrative penalties and criminal prosecution.

Allegations of criminal violations are often directed to local police and prosecutors, or forwarded to those officials by EMBs. It is preferable, however, for a record of such complaints to be first (or also) made at the appropriate EMB

level for the sake of accountability. The highest EMB should be apprised of allegations of widespread improprieties by election officials, or complaints that could result in imposition of criminal or severe administrative penalties, or political sanctions for electoral contestants (such as large fines, political party dissolution or disqualification of candidates).

Administrative remedies may also be used as recourse for certain kinds of cases in which penalties and sanctions would not offer an appropriate resolution, especially in the pre-election day phase of the electoral process. These types of remedies may include corrections of omissions or errors in the voter register, reinstatement of candidates or parties that have been erroneously rejected, granting media airtime to candidates or parties that have been shortchanged, or providing meeting locations for groups that had been incorrectly denied permits.

Repeat elections do not necessarily mirror the intentions of voters on the original Election Day and should not be undertaken without strong justification. Repeat elections are not an appropriate means of punishment for violations of election laws unless the violations truly call into question the validity of vote outcomes. Holding repeat elections is especially wrong if used to collectively punish voters for bad behavior (such as presumed complicity in vote-buying).

Elections are meant to give voice to the will of the people. The results of elections should not be disregarded lightly or easily. Election outcomes should only be overturned in extraordinary circumstances, where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clear and, importantly, where such improper behavior has distorted the vote outcome.

Absent such extraordinary circumstances, candidates and parties that lose elections should accept electoral outcomes rather than routinely claim the elections and the governments they produce are illegitimate. Complaints adjudication mechanisms should not be manipulated to continue political battles after the election and to undermine the finality of official election results. Persons who violated the law may still be pursued through administrative or criminal processes without holding up election results.

Key Areas for Election Complaints

Although each complaints adjudication system will likely face its own unique set of challenges, there are several important lessons about the key loci for election complaints. Specifically, election challenges and complaints often arise in the following areas:

- **Compilation of voter registers.** As the foundation of virtually all election management components and Election Day accountability, the accuracy and timeliness of the voter register often becomes a crucial test point for the legitimacy of an election. As a general rule, laws accommodate a "complaint" process by allowing voters to inspect and verify their proper and accurate inclusion in a preliminary register. In some contexts, parties may file objections to the register. Notwithstanding normal routines for challenging voter's lists, registers are often challenged when inaccuracies are perceived as being egregious or widespread. The most common complaints center on omissions of significant numbers of voters, failure to purge deceased voters from the lists, insufficient controls over voters who have requested temporary changes to vote at polling stations other than their own on Election Day, the presence of duplicate entries, and assignment of voters to incorrect polling stations. Resolution of deficiencies is commonly relegated to planning for future elections, and not as a remedy or sanction for the elections that were just conducted. Challenges need not always be filed in courts to result in major changes, however. Sometimes the "court of public opinion" is so strong and widespread to stimulate reforms, and in some countries has prompted the initiation of a voter registration campaign to rebuild the registers from scratch.

- **Challenges to candidates.** At the outset, there should be an accessible and credible process to allow for challenges to candidates. Some of the main disqualifications include: illegal militia activity; non-residency; having a criminal record; and holding

a senior government position or a military or security office. In order to determine challenges, the electoral complaints body must have a viable, well-planned and independent structure, as it will be required to make difficult and controversial decisions. The challenge process must also be timely, in order to avoid an unduly long pre-election period.

- **Appointment of temporary EMBs and Polling Station Committees.** EMBs at the lower levels are sometimes appointed for multi-year terms, although in many contexts they are appointed to serve for a specific election in much the same manner as polling station committees. The appointment process can be subject to challenges and complaints especially in those contexts where laws require that membership on such commissions be based on balanced party representation. Where parties are allowed to submit nominees, smaller parties are frequently unable to supply a sufficient number of names and larger parties are often seen to dominate membership. Complaints and challenges about potential bias and unfairness, usually trafficked through upper EMB channels, can become a quagmire that delays completion of the appointment process and seriously interrupts orderly preparations for the election. In many cases such delays result in last-minute appointments of officials who have not been trained.

- **Intimidation.** Campaign intimidation may be passive, personal or violent. Strongly worded letters to voters are best addressed through complaints. Intimidation at rallies is best dealt with by prevention, through careful rally planning, a permit system to prevent clashes, and innocuous police presence. Intimidation by home visits is significantly more difficult to control.

- **Campaign violations.** In the pre-election period, it is not uncommon for complaints to be filed by aggrieved parties and candidates who believe they have been disadvantaged by actions taken by authorities or the media, or by unfair or unethical campaign tactics waged by opponents. Such complaints

usually relate to perceived campaign violations, especially in environments where campaign financing, allocation of media time, government approval of facilities for public events and rallies, and dedication of public locations for posters and billboards is stringently regulated in laws and/or local ordinances. One of the main challenges in resolving these types of complaints is that they are often heard by bodies other than courts or EMBs, such as media commissions or campaign finance committees. These types of bodies are often inadequately prepared to deal with them, or have no enforcement authority once a decision is made. Likewise, remedies are often too late and sanctions against violators do little to make the complainant "whole."

- **Polling and counting offenses.** The majority of complaints are directed at polling day violations. They usually relate to limits to access, long waits or congestion, inaccurate lists, refusal by polling officials to provide a ballot to a potential voter, double voting, underage voting, voter intimidation, campaigning in or impermissibly close to the polling location, removal of a ballot box from public view, tampering with seals or the insertion of fraudulent ballots. In many cases, the complaints process will not produce a remedy or correction as such, although punishment of the violator may result. In an extreme case, a particular ballot box may be voided. Timely, thorough, and professional investigations of polling and counting offenses are especially necessary to maintain public confidence in the process and resolve election complaints in an efficient manner.

- **Tabulation and seat allocation offenses.** The greatest opportunity to manipulate results comes at this stage. However, transparency, tight process control and the attendance of international advisers and experienced teams of observers are generally effective in prevention. The process of releasing results of the count locally also makes it possible for parties and candidates to keep their own records and demand explanations for variances.

Characteristics of Successful Complaints Adjudication Systems

A. Structure and Flexibility

The type and variety of election-related complaints and challenges have practical consequences for a well-designed adjudication system. Different types of electoral grievances — depending upon their nature, seriousness, timing, location and other factors — may necessitate the use of different institutions along with distinct rules, processes, timeframes or levels of decision-making authority. As in the exercise of all judicial and quasi-judicial powers in a society, election complaints adjudication mechanisms should be appropriate and adaptable to the characteristics of the matter being decided.

As noted above, the provision of administrative remedies to certain election-related complaints may alleviate some of the burden on complaints adjudication systems. The need for complaints to be resolved at the highest levels of the election management body or complaints commission may be mitigated by administrative actions taken to resolve issues as they occur.

Care must be taken to construct a system that utilizes institutional resources to adjudicate a wide range of election-related complaints and disputes in an effective, impartial and rapid manner. Experience shows that implementation can sometimes strain a complaints adjudication system in advanced democracies. When creating or improving these systems in developing democracies, a multi-faceted approach will likely be needed, with the goal of producing a system that is neither too complex nor too simple to accommodate a variety of election grievances. Implementation problems must be anticipated and legal processes carefully crafted to accommodate a country's unique cultural and political circumstances.

B. Fairness and Timeliness

Election cases involve a difficult combination of two important elements. First are the fundamental rights of democratic participation. These include the rights to: associate politically through a political party; seek office as

a candidate; support political parties and candidates during the campaign period; and cast votes (for further detail, see Chapter 1: International Standards). The second element is time constraints. Most election disputes and complaints need to be resolved within the legally mandated and compacted schedule of various stages of the election process, most notably during the voting and counting process or immediately following polling day. A successful complaints adjudication system must balance standards of due process with the pressure for election authorities and courts to act quickly, depending upon the seriousness of election-related grievances. Reasonable deadlines and timetables for adjudicative procedures must be established within the law to allow for a fair but speedy adjudication process.

As discussed extensively in Chapter 1, the international democracy assistance community has sought to develop international standards in the field of election complaints adjudication for many years. However, earlier efforts at compiling international standards tended to emphasize the role of the judiciary and due process guarantees, including rights to a hearing and to an avenue for appeal, at the expense of timeliness of decisions. Recourse to the judiciary and the attributes of "due process" are essential when fundamental rights are jeopardized and the legitimacy of elections is clearly undermined. International standards that set a high bar for legal processes in election complaints adjudication are certainly correct to the extent that they address the most serious cases of alleged election irregularities or misconduct, particularly regarding illegal or fraudulent actions of election authorities.

But many (perhaps most) complaints and challenges presented during the election period do not rise to that level. Given the short timeframes inherent in the election calendar, a system that treats every complaint as deserving of all protections of due process will almost certainly become overwhelmed with cases. In those circumstances, even relatively simple matters may not be decided until after the election or not at all. The expression "justice delayed is justice denied" is particularly apt. No stakeholders benefit from a system for election complaints adjudication that cannot reach adjudicative outcomes in a timely and efficient manner.

A related issue is the tendency of developing democracies to criminalize all violations of the election law, including minor electoral misconduct and irregularities in election procedures. That usually forces all election-related complaints and disputes into the court system, which triggers all the requirements of due process (including guarantees of holding hearings) and results in slow adjudication of complaints that should be dealt with more expediently. Relatively minor election misconduct should be treated as non-criminal (administrative) offenses, outside the purview of laws governing criminal electoral offenses.

This distinction will permit less burdensome and more expeditious processes for initial review and adjudication, allow for an administrative process to reduce penalties for minor offenses to low monetary fines (or reprimands), promote remedial actions to fix any problems, and encourage admissions by violators (who would be spared a criminal conviction on their record). Codes of Conduct for political parties and candidates, though often advisory, can also be useful in seeking voluntary compliance with norms for campaigning that do not merit codifying into election laws (encouraged by the scrutiny of NGOs, the news media and political competitors).

The international democratic development community has begun to recognize that implementation of complaints adjudication systems in the broader electoral context should not be subject to the most rigorous legal standards that apply to serious administrative or criminal cases affecting fundamental rights and the legitimacy of elections. In early 2009, the Carter Center convened a meeting of experts to discuss criteria for assessing electoral dispute resolution as part of democratic electoral processes. The post-meeting report included participants' points of agreement, including the following observations[3]:

> *Disputes which do not relate to the infringement of fundamental rights, or which involve non-discriminatory State actions, can be considered informal in nature and do not necessarily require legal*

[3] The Carter Center, Electoral Dispute Resolution Experts' Meeting 1 (2009), *available at* http://www.cartercenter.org/resources/pdfs/peace/democracy/des/electoral-dispute-resolution-meeting.pdf.

proceedings to reach resolution. Administrative bodies can act as the single and final arbiter of such disputes. However, if actions involve an alleged violation of fundamental rights, are found to have been discriminatory in nature, or to have been decided in an arbitrary manner, complainants must have access to a tribunal. In addition, administrative disputes, if inadequately resolved, can become more formal at subsequent levels of adjudication and require the availability of review by a tribunal.

Availability of appeal to a higher court for disputes relating to the election process that require resolution by a tribunal should be considered a best practice, rather than an obligation… The right to appeal is not guaranteed in the adjudication of a dispute, and appeals may be limited or denied in order to respect the need for efficacy and efficiency in the resolution for electoral disputes.

C. Credibility

A major requirement for a complaints adjudication system is that it supports the credibility of the election process. If the election process is not seen as credible by the population, both losing candidates and the electorate will be unwilling to accept the results. The election process itself may be blamed for a host of governance ills: a dysfunctional assembly, or poor government and slow economic development. Apathy may develop and can lead to civil unrest. Lack of credibility also affects international relations and reduces foreign investment due to a loss of investor confidence.

There are two main aspects of credibility:

- The broad assessment by the public on the general state of governance and the tendency to connect other failings to the election process; and
- The more specific issue of public trust in the process itself.

Public attitudes are often a composite of both of these aspects. If the election is not generally seen as credible — fairly or not — the entire electoral process will represent a waste of resources, since there will be no real foundation for government authority or accountability.

Issues of Credibility in the Election Process

If exclusion of unqualified applicants is properly carried out, but the quality of candidates is still poor, the resulting legislative body may not function well. This issue can be minimized by an effective challenge process to exclude the most corrupt and criminal applicants.

If candidates are not organized into parties or other groups (either before or after the election), it can be difficult for the legislative body to function effectively. This is not directly affected by the election process, but can be mitigated by an election system that encourages development of a party structure.

A truly independent media is the best way to prevent a situation in which the incumbent government or party receives nearly all of the media coverage prior to an election. If the media is insufficiently independent, even a well-run election can produce an outcome that is unsatisfactory, because the electorate's choices will not be well informed. This can be minimized by international insistence on and support for independent media.

There is a tendency for the voting public to expect too much from an election. An election is a high-profile and well-defined event. Therefore, the international community and media outlets tend to focus on elections in the short-term, giving only a superficial analysis regarding its success before turning their attention to other matters. This tendency promises to magnify expectations that a given election will lead swiftly to peace and prosperity. This has two specific implications for the election process. First, it means that every effort must be made to avoid defects in the process, as any noticeable defects will be magnified and blamed for other, negative outcomes. Second, if these outcomes are not satisfactory, the public may blame the process on the *election*, and not on the elected. Well-defined election processes, combined with an efficient, transparent, and fair complaints adjudication system and appropriate public education, can mitigate this problem and help to reduce public expectations that the election will solve all of the country's problems.

Complaints Adjudication System: Scope of Authority

1. Election Management Bodies

The process of prescribing rules for filing complaints or disputes necessarily raises the important policy questions of where to file and what institution should serve as the point of entry and initial adjudicator. Complaints that dispute the official election outcome as announced by the election management body (EMB) must generally be directed to courts after the election. But in the area of pre-election complaints alleging irregularities in the electoral process or violations of the election laws, election management bodies often play an important preliminary and primary role. Systems that permit complainants to choose between EMBs, other administrative bodies, or local courts to file pre-election complaints (as is often true in new democracies in Eastern Europe or the former Soviet Union) run the risk of a duplication of complaints or a dual appeals process, and can even encourage institutional rivalry. Such choices also allow what is called "forum shopping," which further risks encouraging corruption at the local level.[4]

EMBs and election officers are given the demanding task of administering elections. Moreover, decisions (or lack of action) by election authorities are often the object of complaints or challenges. Assigning responsibility for all stages of complaints adjudication to the election management structure is thus subject to conflict of interest problems and lack of accountability.

However, relying on the judiciary as the sole means of election complaints adjudication directs all election-related complaints and challenges into a system that usually has little familiarity with the implementation of election laws and is inherently slow to act (due to legitimate concerns about due process built into the judicial system, or simply because of case over-

[4] Forum shopping is the informal term given to the practice by which complainants seek out the venue or court that is believed to be most likely to provlde them with a favorable judgment for their case.

load). Courts are not designed to quickly filter out frivolous or unsubstantiated complaints and, therefore, are unable to resolve election complaints expeditiously. Also, involving courts in the initial stages of adjudication subjects them to political pressure and potential corruption.

Absent an entirely separate, dedicated institution for receiving and adjudicating election complaints and challenges (discussed below), many countries designate EMBs — at a level appropriate to the location, nature and seriousness of the complaint — to be the entry point for all election-related complaints (other than post-election disputes about the official election results, or serious allegations against the EMB itself). The electoral laws should specify the scope of the commissions' jurisdiction and authority. Several reasons support this approach:

- EMBs are presumably appointed through an open process that seeks either independent or multi-partisan impartiality from commission members. Hopefully, members have been well-selected and are well-trained to review the factual and legal basis for complaints and make preliminary judgments. Through their experience, election commissioners develop expertise in election law and implementing regulations. Although local judges can certainly read and apply the law and may develop expertise, local EMBs are valuable to give initial perspective and to reduce the case load for higher commissions or courts hearing complaints on appeal.

- Election matters may involve disputes between participants in the election, complaints about election officials or other public officials, or allegations of violations of the election law or regulations. In all cases, it is valuable to have an EMB immediately begin preparing a factual record and collecting evidence such as witness statements. If cases are appealed to courts, those courts will inevitably be responsible for some fact finding. Given the time constraints, it is better for the election process that courts do not have to start from the beginning, and it is also better to preserve the freshness of witness statements and evidence. It is important to develop a strong factual record early, and elec-

tion management bodies are the most efficient places to start the process. To this end, EMBs need adequate funding and the capacity to investigate claims professionally and efficiently.

- If complaints are about administrative actions or inactions of an election management body, such as denial of voter registration by a local commission or denial of candidate certification by a regional EMB, it is appropriate to permit that body to first reconsider its decision or correct mistakes. If not resolved to the satisfaction of the complainant, appeals of administrative decisions may then be reviewed by a higher election management body, with the possibility of judicial review by a court to decide if an injustice has been done.

- Complaints alleging deliberate misconduct or fraud by an EMB, particularly in voting or vote counting, should be first directed to the highest EMB for review, with a right of appeal to courts. Courts should have discretion to affirm the decisions of EMBs without restarting the case.

- Designating local courts as the point of entry for most election-related complaints places too much burden upon courts and uses them inefficiently. Exceptions must exist, of course, for situations of extreme urgency, such as voter registration or voting problems on the day of the election, where local courts must hear complaints, decide and act quickly to prevent irreparable harm. At the risk of complexity, election laws and regulations must clearly distinguish exceptions to the general rules to provide for early or special intervention by courts.

- Complaints arising from elections are often unsubstantiated and based on hearsay and rumor. Sometimes it is the collective weight of many allegations that causes the most controversy in an election environment, rather than the substance of any one specific allegation or any convincing show of evidence.[5]

[5] *See generally* John Hardin Young, *Recounts*, in International Election Principles: Democracy and the Rule of Law 301 (John Hardin Young ed., 2009).

Allowing EMBs a stronger preliminary role permits election related cases to be quickly reviewed as to their seriousness and substance, and allows commissions to screen frivolous or insignificant matters. Courts should be able to deny a full review and affirm actions or judgments of election authorities when those authorities have properly prepared for judicial review. Thus, election management bodies not only gather evidence more quickly, but also can serve as a filter to initially screen out trivial or unsubstantiated allegations, and to prioritize investigation of serious cases (subject to appeal).

A. Country Example: Thailand[6]

In many countries, the authority of the national EMB and subordinate commissions in adjudicating election-related disputes and complaints is often unclear under the electoral laws. By contrast, the Election Commission of Thailand (ECT) has been provided extraordinary powers for complaints adjudication as an independent body established by the Constitution. The ECT is authorized by law to exercise broad authority for investigation, adjudication and imposition of severe penalties to punish election law violators, based upon a historically defensible emphasis upon deterring "vote buying." The ECT uses its power to overturn election outcomes as a primary means for punishment and, presumably, deterrence. Repeat elections are ordered in cases where the elections are deemed to have not been fair because of widespread allegations of violations, particularly due to vote-buying, regardless of whether the violations have been shown to have changed the election outcome.

The tradition of the ECT requiring repeat elections and issuing "red cards" (banning certain candidates from further participation) and "yellow cards" (accusing certain candidates of likely violations) based upon ECT review of allegations has become engrained in the Thai system as the main sanction for electoral violations. This mechanism involves arguably harsh penalties for candidates considered to have committed, collaborated in or ignored violations of electoral laws (with potentially severe consequences for their

[6] Robert A. Dahl, Adjudication of Election Complaints: Overview and Assessment of the Legal Framework and Process, Presentation at a Conference Sponsored by the Election Commission of Thailand (June 2008).

political parties, which face potential dissolution if their leadership is determined to have been complicit in the violations).

Practices employed in Thailand may not be easily transported into other societies and political systems. Few governments in the world would be willing to give their EMB so much adjudicatory and enforcement power, which also carries great responsibilities and burdens for the EMB and invites corruption. Recent events suggest these extraordinary powers granted to the Election Commission of Thailand may create or exacerbate serious political tensions, however fairly and well-intentioned they are employed. An EMB as powerful as the ECT may not be the ideal model for other countries, as the exercise of these powers (or the failure to exercise them) was one of the motivations for the political unrest in Thailand from 2008 to 2010.[7]

2. Election Complaint Commissions

In most countries, as noted, the traditional (default) mechanism is for EMBs to serve as the primary complaints adjudication body, subject to appeals to courts. The points outlined in the previous section indicate this may not be a bad solution, provided that the law is clear in determining the jurisdiction, procedures and timelines for exercise of this authority. However, many experts would disagree with the idea of EMBs continuing to perform a principal role in complaints adjudication.

Progressive thinking in this field has tended to support the creation of special institutions for handling election complaints and challenges. As noted above, EMBs are already busy with the heavy burden of actually administering elections, and may themselves be the object of complaints. The judiciary is also usually occupied with its normal duties, and sending all election-related complaints and challenges to regular courts is generally a slow and inefficient process.

However, few countries have created a genuinely separate entity for election complaints adjudication. Some countries emerging from conflicts have

[7] *See, e.g., Democrats Under Fire After Ruling*, Bangkok Post (Apr. 13, 2010), *available at* http://www.bangkokpost.com/news/politics/36012/democrats-under-fire-after-ruling.

been encouraged to adopt election complaint bodies, such as Kosovo's Elections Complaints and Appeals Commission (ECAC). As the experience of Kosovo shows, however, these institutions often become embroiled in "turf" battles with both EMBs and courts, as their jurisdiction can be murky and their quasi-judicial authority questioned. In Indonesia, the institution of *Bawaslu* (formerly *Panwaslu*, which predates *reformasi* following the collapse of the Suharto regime in 1998) relies as much upon moral authority as any real adjudicative power. In both countries, the special complaints bodies are grossly under-financed by their governments, and are placed in competition with their EMBs for obtaining sufficient resources. Successful models for creating a separate complaints adjudication tribunal in non-conflict countries are discussed later in this chapter, as well as in Chapter 4: Case Studies Related to Training of Arbiters in Election Complaints, and include Mexico's establishment of the Federal Electoral Tribunal (TEPJF).

A. Country Example: Pakistan[8]

Under Pakistan's legal structure, a temporary Election Tribunal is established for challenges to vote outcomes after election results are announced. At the beginning of the election process, appeals of determinations by Returning Officers in accepting or rejecting candidate nomination papers are handled through Appellate Tribunals. Thus, mechanisms are already established for disputes arising during those two phases at the two ends of the election process.

However, under the Pakistani system, there is a lack of clear procedures for resolution of election complaints filed during the pre-election campaign period and on polling day, particularly for allegations that do not constitute serious criminal violations. The system offers alternative procedures and multiple entry points for filing complaints during those stages. Responsibility for receiving, investigating and resolving pre-election complaints seems unclear and widely dispersed. Few complaints are resolved, including those related to criminal behavior. Many election-related complaints and challenges get lost in the bureaucracy or are decided long after the elections are over. The Election Commission of Pakistan (ECP) and other officials are often unfairly blamed for the outcomes under an inherently

[8] IFES, Pakistan ECA Conference Report (November 2009) (draft document).

flawed system. Electoral participants and the general public in Pakistan lack confidence in the dispute resolution system's capacity to function or an understanding of how they can successfully gain access to it.

The rules for conduct of the adjudication process need to be clarified and rationalized. Authority and powers of institutions that are responsible for adjudication of pre-election and polling day complaints must be unambiguously stated. The Election Commission of Pakistan (ECP) has already demonstrated its recognition of the need for reforms in this area and shown its firm commitment to improving procedures through the ECP's Election Complaint Adjudication (ECA) Reform Project. A proposed solution that emerged from the ECA Reform Project was a proposal to establish "District Enquiry Committees" at an intermediate level of election administration for submitting and disposing of complaints and challenges in a more expeditious manner. These Committees would provide a designated "point of entry" for complaints and challenges during the pre-election period and on polling day (along with the ECP itself).

B. Country Example: Ghana[9]

In Ghana, decisions of the Electoral Commission can be appealed to the courts, including cases involving voter registration and candidate nomination. Settlement of challenges to an application to register as a voter is under the responsibility of the District Registration Review Committee and its decision can be appealed to the Chief Registration Officer (High Court Judge of the region). For the purposes of hearing the cases relating to the challenged applications at the time of registration, a District Registration Review Committee (DRRC) was established in each district, made up of representatives of the active political parties in a district and not more than four local persons known to be neutral and fair-minded. The Secretary to the District Registration Review Committee was the District Electoral Officer and the Commission provided that the District Education Officer, the District Police Officer and a representative of the traditional authority in the district should also be members. The Commission further provided that the Supervising High Court Judge of each region should be the Chief Reg-

[9] European Union Election Observation Mission, Ghana Final Report: PresIdential and Parliamentary Elections 2008 27 (February 2009), *available at* http://www.eueomghana.org/EN/PDF/Final_report/EU_EOM_Final_Report_Ghana.pdf.

istration Review Officer for the region and should determine the appeal of a voter aggrieved by a decision of the District Registration Review Committee.[10] Objections or complaints related to the provisional voter register are settled by the District Registration Revising Officer who is the Magistrate of the District Court and the decision can be appealed to the High Court.

The validity of a parliamentary election can be challenged by a petition presented to the High Court within 21 days after the date of publication in the Gazette of the election results. However, if a petition questions the election on the grounds of a corrupt practice involving payment of money, it may be presented to the High Court before the official publication of results in the Gazette.

C. Country Example: Palestinian Territories[11]

Pursuant to the Local Council Elections Law (Number 10 of 2005) (LCEL) for the Palestinian Territories, the Central Election Commission is responsible for administratively responding to complaints in two specific areas: 1) allegations of inaccuracies in voter registries; and 2) objections to registration of candidate lists and nomination of candidates.

These CEC decisions are subject to judicial appeal at the judicial level of Courts of First Instance (FICs). These courts are designated by the 2005 LCEL as the "competent court" for bringing challenges (appeals) of decisions reached by the CEC (or through its subordinate branches) upon complaints alleging inaccuracies in voter registries and objecting to registration of candidate lists and nomination of candidates. The FICs are also granted the very significant jurisdiction to hear objections contesting the officially announced election results. Importantly, the LCEL provides that the FICs' judgments on challenges to the CEC decisions and on objections to election results are final. In advance of local elections in the Palestinian Territories, the CEC appears ready to coordinate with the FICs to ensure cases coming to the FICs are properly prepared, and to engage in joint training.

Unfortunately, the LCEL gives no guidance as to the process for the CEC or

[10] See Electoral Commission of Ghana, Electoral Reform, http://www.ec.gov.gh/node/10.

[11] IFES, *Technical Assistance to Strengthen the Complaints and Appeals Process for Local Council Elections in the Palestinian Territories* (April 2010) (concept paper).

courts to handle other types of election-related complaints, such as polling and counting irregularities, violation of campaigning rules by candidates' supporters, voter registry discrepancies on polling day and allegations of criminal violations of the election law. This void in the law threatens the operations and public perceptions of the entire complaints adjudication process in Palestine, and requires attention by the CEC.[12]

3. Electoral Tribunals

Democracies across the world have shown remarkable ingenuity in devising election complaints adjudication institutions that match their unique cultural, political and legal traditions. As the following examples demonstrate, the development of new institutions, and their implementation practices, has often resulted in a coordinated mix of election administrative and election complaints adjudication duties, including specialized responsibilities. Latin American countries have particularly pioneered a combination of institutional practices that combine election administration responsibilities with acknowledgement of an obligation to provide for election complaints adjudication mechanisms.

A. Country Example: Brazil[13]

Brazil is viewed as having an effective complaints adjudication system based on strong provisions in its Constitution and electoral laws. The adjudication system utilizes a Superior Electoral Court (*Tribunal Superior Eleitoral*, TSE), a Regional Electoral Court in the capital of each state, plus one in the Federal District. Larger cities have municipal election judges, and smaller towns have local election boards. The Brazilian Constitution details the composition of the Electoral Courts and states that a supplementary law should be adopted to define the "organization and competence of the electoral courts, judges and boards." Constitutional provisions and Parliamentary acts that establish complaints adjudication institutions help to protect the right to judicial review in electoral matters.

[12] IFES, *Election Complaint Appeals Process in Palestine: Assessment and Recommendations* (April 2010).

[13] IFES internal research, June 2010. See: http://www.v-brazil.com/government/laws/titleIV-Justice.html.

The TSE was created in 1932[14] and has a broad jurisdiction covering all aspects of elections and regulating the functioning of political parties. It is both an adjudicative body and the primary electoral management body for Brazil. Its powers include supervising party conventions and internal elections; granting or canceling registration of parties; registering candidates and certifying those elected; regulating and supervising party access to free television and radio time during an election; and registering voters. For instance, during the 2010 runoff presidential election between Dilma Rousseff and Jose Serra, the TSE intervened to compel Rousseff's campaign manager to post retractions of comments he had made via the social networking site Twitter impugning the integrity of the Serra campaign.[15] The TSE is also a good example of a strong independent complaints adjudication body: it sets its own budget, and oversight of the members is provided by both the president and the judiciary, while auditing of expenditures is done by the legislature and the judiciary.[16]

B. Country Example: Costa Rica[17]

The Supreme Electoral Tribunal (*Tribunal Supremo de Elecciones*, TSE) of Costa Rica was established as an independent agency in 1946. Before then, election administration was the responsibility of the internal affairs secretary, who was part of the executive branch of government. The TSE was incorporated into the new constitution of 1949 as a constitutional agency with full powers to administer elections. Since then it has become one of the most prestigious institutions in the country. The TSE has power to organize, implement and supervise all elections, including presidential, legislative and local elections. It serves as the election complaints adjudication mechanism. The constitution provides that the TSE is responsible for the authoritative interpretation of both the constitutional and legislative

[14] The TSE was disbanded following the adoption of a new constitution in 1937, but was reestablished in 1945 and has been in continual operation since. History of the Superior Electoral Court, http://www.tse.gov.br/internet/ingles/institucional/o_tse.htm (last visited Jan. 3, 2011).

[15] *Brazil: The Superior Electoral Court Intervenes Over Offenses to Jose Serra*, Momento24, Oct. 30, 2010, http://momento24.com/en/2010/10/30/brazil-the-superior-electoral-court-intervenes-over-offenses-to-jose-serra/ (last visited Jan. 3, 2011).

[16] *Brazil Comparative Data*, ACE Electoral Knowledge Network, http://aceproject.org/epic-en/CDCountry?country=BR&set_language=en (last visited Jan 3, 2011).

[17] See Rubén Hernández Valle, Costa Rica: A Powerful Constitutional Body, http://aceproject.org/ace-en/topics/em/electoral-management-case-studies/costa-rica-a-powerful-constitutional-body.

norms regarding electoral matters. This means that the constitution gives the TSE constitutional, legislative and judicial powers.

The decisions and resolutions of the TSE are not subject to appeal. This is a remarkable and important attribute, because no one can contest the results of an election in court. During the election campaign period, which lasts three months, the TSE assumes direct control of the Civil Guard (part of the domestic security forces). This is intended to guarantee that elections are free and without interference from the political authorities.

The Congress cannot enact any law regarding electoral matters later than six months before polling day or earlier than six months after polling day. The TSE must be consulted in advance on every proposal for legislation regarding electoral matters; if this is not complied with, the resulting law is null and void. For the Legislative Assembly to enact legislation contrary to the opinion of the TSE, a majority of two-thirds of its members is required.

Political parties generally have full confidence in the independence and impartiality of the TSE, mainly due to the TSE's ability to deliver elections on schedule and to remain neutral and transparent throughout the electoral process. Civil society groups' views about the quality of the working relationships they enjoy with the TSE are positive. Their contacts with the TSE have always been open and based on mutual trust.

C. Country Example: Uruguay[18]

The Electoral Law of 1924 established an autonomous, independent and permanent electoral body in Uruguay. Election administration was brought together under the jurisdiction of the Electoral Court (*Corte Electoral*). In 1934, the existence and powers of the Electoral Court were enshrined in the constitution. The Court's membership is a hybrid, with five "politically impartial" members elected by the legislature as a whole, and four representatives of the leading political parties elected by the members of each party in the leg-

[18] Sara Staino, Uruguay: The Electoral Court — A Fourth Branch of Government 1-2, *available at* http://aceproject.org/ero-en/regions/americas/UY/Uruguay_ percent20The percent20Electoral percent20Court percent20- percent20A percent20Fourth percent20Branch percent20of percent20Government.pdf/view?searchterm=uruguay percent20electoral percent20court.

islature. The Electoral Court then oversees the permanent Electoral Boards (*Juntas Electorales*), which act as the EMBs at the departmental level.

The Court's electoral authority includes traditional management responsibilities, including voter registration and the actual conduct of elections. In addition, it oversees the internal elections of political parties and university elections nationwide. The Court also serves as the highest court on all election-related matters, including adjudication of electoral disputes and complaints. With the affirmative vote of six of its nine members, of which at least three must be politically impartial members, the Electoral Court has the authority to formally investigate the outcome of all elections and referendums, to reject election results and declare them null and void, and to carry out scrutiny of ballot results. Moreover, the court has the exclusive authority to issue administrative, jurisdictional and regulatory acts, and none of the acts it issues can be revised by any branch of government. This latter power is unique in the government of Uruguay — no other body may promulgate rules or laws in its field of expertise that may not be reviewed by another governmental entity. This political independence and absolute authority makes the Electoral Court of Uruguay an unusually powerful adjudicatory body.

D. Country Example: Nigeria[19]

In Nigeria, the Electoral Tribunals are mandated under the Constitution, and the 2006 Electoral Act No.2 also provides for the electoral complaints adjudication mechanisms. The Act states that election petitions arising from the conduct of a Presidential election are handled by the Court of Appeal and in any other election petition they are handled by the Election Petition Tribunal. The Court of Appeal and the Supreme Court can also have appellate jurisdiction.

In the 1999 and 2003 elections, it took approximately five years for a petition to be adjudicated, and sometimes the complaints were simply ignored by the judges. After the 2003 elections, a huge effort to strengthen the complaints adjudication process in Nigeria was undertaken. The case management techniques that the Election Petition Tribunals followed, in-

[19] IFES, *Election Tribunal Assessment in Nigeria* (May 2008) (report).

cluding pre-trial procedures, allowed the tribunal judges to compel the parties in these cases to focus only on germane issues, to limit witnesses to only those who had relevant, non-cumulative testimony, to exchange documentary evidence pertinent to the proceedings, and to avoid adjournments except when necessary.

E. Country Example: Mexico[20]

The 1990 Federal Code of Electoral Institutions and Procedures gave the EMB (*Instituto Federal Electoral,* IFE) and the Federal Electoral Tribunal (*Tribunal Electoral del Poder Judicial de la Federación*, TEPJF) shared responsibility for election law enforcement. The Federal Electoral Tribunal oversees the entire election process, resolves disputes, and certifies the validity of election results. It is composed of a permanent seven-member Superior Chamber, and five Regional Chambers. The Tribunal is highly respected and effective, and its trustworthiness was crucial in deciding the very close election for President in 2006. However, this model

Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System (OSCE Report, 2000)

… A variety of approaches and mechanisms, forged by different legal and political traditions, are used by governments in the resolution of election disputes. The system chosen derives primarily from the overall electoral framework, depending upon the institutions and procedures involved in the process…

There are also a variety of models of legal process through which election disputes are handled. Final decisions on claims can either remain within the hierarchy of EMBs, be dealt with by the ordinary court system exclusively or rest upon the constitutional court, acting as an electoral court. In addition, different remedies may be provided, including among others administrative action by state and/or election officials to correct a problem, and criminal prosecution of an alleged election fraud…

Obviously, there is no single method that is equally suited to all countries. Which model is endorsed largely depends upon the degree of consolidation reached in the democratic process. However, a country's discretion in its choices is not unlimited and must be exercised consistently with international standards. The right to a remedy for violation of human rights is itself a human right…

[20] See Tribunal Electoral del Poder Judicial de la Federación, http://www.trife.org.mx/ingles/index.asp (English page).

requires an enormous commitment of resources and political will that very few countries can make. This system is covered in greater detail in Chapters 4 and 5 of this book.

Recommendation Checklist

A central theme in establishing or improving systems for election complaints adjudication is the importance of recognizing the varying nature and seriousness of different types of complaints and disputes arising from elections. An effective complaints adjudication system must develop flexibility in its use of institutions and procedures to adjudicate this variety of election grievances and to impose penalties and sanctions. This chapter has emphasized (and country examples have illustrated) the need for mechanisms to fit the particular cultural, political and legal traditions of each country.

The following checklist presents key issues for practitioners to consider when developing or reviewing legal and administrative frameworks for complaints adjudication:

√ **Election complaints body formation:** The election complaints adjudication body is usually referred to as a Complaints Commission, Tribunal, Court, Panel or other name that reflects its quasi-judicial character. The choice of name should reflect the way the terms are used and understood locally. Occasionally, complaints are handled by the EMB itself. The legislation establishing the complaints body must also specify the number, method of appointment and term of its members, its independence, jurisdiction and powers.[21]

√ **Clear jurisdiction:** The establishing legislation for the election complaints adjudication body should be clear and should define the following: standing; the required burden of proof for complaints and the nature and sufficiency of evidence; and the jurisdiction of the bodies handling various aspects of the elections process.

√ **Independence:** The appearance and reality of independence of an election complaints authority derives from the provisions of the

law under which it is established; the method of appointment of its members; the professional experience and standing of members; the security of funding it receives; its ability to hire and retain competent professional staff who support its independence; and the public respect it gains from the credibility of its election processes. The inclusion of the word "independent" in the provision that establishes the election complaints authority is most important.

√ **Membership:** Members should ideally be appointed to ensure that they are non-partisan, or, if that is not possible, that the political influence is balanced. Nominations by political parties lead inevitably to politicization and are not recommended. Appropriate nominators include: the courts; an association of universities; a well established human rights organization; the law society; a national business association; or a national labor organization.

√ **Terms of appointment:** The term of appointment should be sufficient to encompass preparation and training before the election to the resolution of complaints after the election. Between elections, members should be available on a day-by-day basis for approving reports and making decisions regarding permanent staff, among other duties. Continuity of records and staff expertise would be maintained by the few key staff that would remain.

√ **Member characteristics:** As an election complaints authority has a quasi-judicial role, its members are usually senior judges or lawyers. In many countries, the amount of time needed for this work would not prevent a judge or lawyer from taking an appointment and maintaining a permanent position as a judge or practicing lawyer. In other countries, the extent and complexity of elections would necessitate a leave of absence.

√ **Funding:** The election complaints authority should be funded by an annual budget that comes from the legislature and should not be routed through the Ministry of Finance. This prevents the governing party from having an undue influence on the budget and places its review before an open, public and multi-party committee.

√ **Procedural clarity:** The established procedures for the election complaints authority should be clear about the rules for filing an action and provide unambiguous definitions of standing and burdens of proof for specific allegations.

√ **Legitimacy:** If an election complaints authority functions well, issues clear reports of just decisions, applies proper sanctions and reports serious cases for prosecution, its own record will establish the public respect that is the best support of independence. This reflects back to the reporting and public information role the key permanent staff can play between elections.

√ **Continuity in non-election years:** The function of the permanent staff between elections should be to complete and publish the records of the determination of complaints in the past election; review and improve procedures and systems to deal with complaints; participate in public information programs on elections; keep informed on changes in the election process; administer occasional maintenance training for the temporary staff they plan to bring back for subsequent elections; and prepare for subsequent elections.

√ **Judicial experience of members:** The complaints adjudication process is essentially a judicial assessment and determination. The experience of a judge or possibly a senior lawyer is highly and probably uniquely relevant to the task. A panel of judges, retired judges or senior lawyer will ensure that key aspects of the determination are professionally addressed.

√ **Witness testimony:** There is a tendency for political party officials to submit complaints on the basis of party agents' reports. The law, regulations or procedural rules should be clear that the election complaints authority must receive, directly and in person, the evidence of the person who witnessed the offense against the law or the violation of a regulation that founds the complaint, or who has personal knowledge to support the challenge to a candidate. A second hand report from a party official is hearsay and cannot be subjected to questioning.

√ **Time limits:** The law, regulations or procedural rules must establish time limits for submitting a challenge or complaint. Regarding the submission of complaints of offenses or violations, a short time limit of 24, 48 or 72 hours after the offense or violation was witnessed is sufficient. There is no need to allow time for a political decision to be made on whether to file a complaint. The question of time limits to which the election complaints authority must adhere is problematic. A limit of five or even fifteen days after receiving the complaint may result in the decision being abandoned, and encourage delay by the accused. Critical complaints may well involve complicated investigation. Speed is important, but not at the price of justice.

√ **Reasonable sanctions:** The election complaints authority must have the power to apply sanctions that are established by law; are reasonable; are proportional to the offense; are varied in range to meet different circumstances; are applied consistently; are not unduly limited by minima that remove discretion; include sanctions that are useful in cases where punitive action is suitable and also corrective, where possible; include disqualification of candidates or dismissal of elections staff for serious offenses; include a referral for criminal prosecution; and if applied, do not exclude additional punishment for included crimes on prosecution.

√ **Publication of proper records:** A summary of decisions taken should be issued on a regular basis during the challenges and complaints periods. This greatly adds to the credibility of the process. On the other hand, expectations must be managed. As soon as time permits, a full report should be published, including the details of the more critical decisions. This is a task that the staff can complete for approval by the members, after final results.

[21] For an example of establishing legislation, *see* Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], *as amended*, art. 186, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995 (Mex.) (establishing TEPJF); Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, arts. 41, 60 & 99, Diaro Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (describing the constitutional powers and duties of the federal electoral tribunal).

3

COMPLAINTS ADJUDICATION TRAINING FOR ELECTION MANAGEMENT BODIES AND POLITICAL PARTIES

By Steven Gray and Linda Edgeworth

An elderly Kosovar woman casts her ballot at a polling station in the village of Trstenik, central Kosovo, on Sunday, 9 January 2011. Election officials say polls were opened in five Kosovo regions where voters recast ballots after authorities found fraud was committed in the 12 December 2010 general election.

Introduction

Multiple steps are necessary to ensure the existence of an efficient, comprehensive, and functional election complaints adjudication system (as discussed in Chapter 2: Legal Frameworks for Effective Election Complaints Adjudication Systems). The legislative body must create a suitable legal framework for resolving election complaints that meets domestic and international standards. The executive branch must be forthright in its willingness to enforce the various provisions. Lastly, stakeholders that are expected to be guided by the system must have the requisite knowledge to follow its mandates. This chapter will focus on the creation of training programs that will prepare the members of electoral management bodies (EMBs) and political parties to effectively implement and utilize a country's complaints adjudication processes.

This chapter will be presented in three parts, followed by a conclusion and recommendations for development practitioners seeking to assist countries with complaints adjudication programs. The first part will cover some fundamental principles and concepts that are equally applicable in the development of any effective training program. The importance of establishing training objectives, selecting the most suitable training methodologies and performing training evaluations are covered in this initial section. The second part will focus on approaches and challenges of developing a training program on election complaints adjudication for EMBs. The third part will offer suggestions regarding the development of a similar training program for political parties.

General Principles for Effective Training

A. Overview

The following principles are fundamental to developing effective training programs, regardless of the nature of participants and skills to be covered.

i. *Training must be competency-based*

The overall goal of a training program is for participants to gain the ability to effectively and fairly resolve electoral complaints according to the proce-

dures outlined in the electoral code or regulations. Throughout this chapter, the term "competency" is used to refer to the skills, knowledge or attitudes which with participants should leave the training program. A training program not only needs to attempt to transfer competency, but should also include methods of determining if it has been effective. How else will trainers or election management bodies know if the training was successful?

ii. Effective adult learning models should be utilized

It is important to understand the target audience participating in the training program. Regardless of their backgrounds, participants will be adults with varying degrees of experience in the area of complaints adjudication. Given the time constraints that are likely to limit sessions, serious thought should be given to selecting the best training model that will allow participants to absorb a great deal of new information quickly. Long lectures should be abandoned and replaced with short presentations, combined with more active, experiential learning methods.

iii. Creativity may be necessary to overcome limited resources

One of the biggest challenges in developing an effective training program is usually the lack of resources. Reference materials are usually scarce, and reports detailing past cases or a country's history with election complaints are often inaccessible or non-existent. This is where creativity will be necessary. It is difficult to make a definitive list of the materials that will be needed to conduct the training. In some countries, a training session may be held outdoors. In others, there will be more sophisticated technology available, such as PowerPoint presentations on projector screens. Probably the greatest resources that can be tapped in developing the concepts and contents of the training program are EMBs, relevant stakeholders and others who have experience instigating, hearing, investigating or adjudicating electoral complaints.

iv. The use of real cases adds relevance

Incorporating examples from actual cases will make training more real and more relevant to the participants even if they have to be disguised to protect the identity or privacy of the individuals involved. Use of actual cases will also give participants a marker with which to identify when they have to investigate or decide cases. They may also aid recollection of principles or skills imparted during training.

B. Training Objectives

The importance of writing specific competency-based training objectives cannot be understated. Specificity is important, but truly great objectives are those that are SMART. SMART is an English-language acronym used to remind us of certain characteristics that all objectives should have, as described in the text box below.

If the training objectives are SMART and based on the competencies needed by participants, then it will be possible to determine the success of the program. Ultimately, success should be measured by the degree to which participants achieve competence in filing legitimate complaints, or in investigating or adjudicating electoral complaints in a fair and judicious manner.

Some suggested topics for the training of participants in electoral complaint management are listed below. They are not listed in any specific order, nor are they exhaustive. But, hopefully, they are all SMART objectives. Those responsible for developing a relevant training program will undoubtedly be able to define other objectives that are more specifically suited to their legal environment.

SMART Training objectives should be:

Specific: The learning objective is targeted at explicit and well-defined results.

Measurable: Data can be gathered to determine if the objective has or has not been met.

Attainable: The objective is realistic and within the resources of the training program.

Relevant: It is pertinent to the problems, needs, or desires of the key stakeholders.

Time-bound: There is a set time limit as to when the objective is to be achieved.

To add specificity and clarity to the objective it should be assumed that each is preceded by the phrase, "by the end of training, participants will be able to:"

- Articulate the importance of consistency, neutrality and fairness in resolving election complaints;
- Identify and refer to the relevant laws that govern the election complaints processes;
- Identify the different bodies responsible for adjudicating election complaints;
- List the general categories of complaints that might be filed and identify the relevant adjudication body to which they must be referred;
- Identify the individuals or entities who are entitled under the law to file election complaints;
- Define the deadlines by which complaints must be filed and the timelines by which they must be decided;
- List the types of complaints that could be lodged:
  - during the registration of parties and candidates;
  - regarding the registration of voters;
  - during the campaign period;
  - on Election Day;
  - during the counting and tabulation of results;
- Fill out all of the forms related to electoral complaints without omissions or mistakes;
- Demonstrate an understanding of basic principles involved in investigating election complaint cases;
- Understand the burden of proof required for a complaint to be successful;
- Demonstrate an understanding as to the administrative remedies that can be applied by EMBs at the polling station level, the District or Regional Level and at the Central level;
- Identify the conditions under which recounts are to be conducted, results are to be annulled, or repeat elections are to be called;
- Differentiate between an administrative and criminal complaint;

- List three actions the EMB can take to reduce the number of electoral complaints;
- List three actions the political parties can take to reduce the number of electoral complaints; and
- Feel more confident about their ability to fulfill their electoral complaints responsibilities.

One major challenge in devising an effective training program is time. The amount of material that can be covered is often limited by the time available for training. Obviously, more can be achieved in a five-day training program than in a one-day training program. To achieve all of the objectives above, a four to five day course is probably warranted. This assumes that participants are new members of their respective bodies, or at least have not had training before on electoral complaint responsibilities. A shorter time frame is possible, especially for more experienced participants or if a smaller number of training objectives are to be achieved. The dilemma with shorter training programs is that they limit the time available for participants to work collaboratively on examples of electoral complaints. In addition, it becomes more difficult for participants to fully absorb and assimilate the entirety of information needed and to demonstrate that they have achieved the desired competencies.

C. Training Methods

An active training program uses a variety of methods to impart knowledge and help participants gain competency. Lengthy lecture sessions should be avoided in an active training program, as they are the least effective in terms of imparting information that will be remembered. Instead, wherever possible, participants should learn by hands-on activities. Still, some lectures will be unavoidable. Below are short explanations of different training methods found to be most useful in designing active, experiential learning models.

- *Mini-lecture:* Lectures, not more than 15-20 minutes without a break, can be used to impart a large amount of information in a relatively short amount of time.
- *Case study:* An account of the facts of a real-life situation that has been derived from EMB experience. Using the case study

information, participants will identify courses of action that must be taken and make decisions based on content or processes learned during training.

- *Role Play:* A structured scene or series of scenes involving interactions between two or more persons. Participants are assigned roles that enable them to demonstrate or practice interpersonal skills related to a training objective or outcome.
- *Group discussions:* A discussion with participants on an agreed upon topic that is facilitated by a trainer. Group discussions are a good way to get input on a topic from a group of people in a relatively short period of time.

These methods can be mixed and matched in the sessions defined above. For example, a session might begin with a 10-15 minute mini-lecture and then lead to a group discussion or preparation for a role play. A role play activity might be used to stimulate small group discussions. A presentation of a case study might be followed by group discussions on the best way to resolve the complaint presented.

D. Evaluating Training

One important part of the training process that is usually neglected is an evaluation of the training program and its impact on the participants. Some of the more obvious questions that could be answered are: What did participants really learn? How well can participants apply the knowledge they gained during training? Are participants using the competencies gained when investigating or adjudicating electoral complaints? How did the training help them in other aspects of their work or life?

While all of these questions might have merit, the challenge is to focus the evaluation question. What is it that we are trying to learn? Are we measuring the number of competencies gained? Are we looking to determine if the trainer was a good trainer? Are we interested in the number of complaints resolved by EMBs? Do we want to know if the participants are happy with the training? Each of these questions differs in tone and purpose, and they imply different methods of eliciting answers.

The most common evaluation techniques involve:

- Questionnaires completed by participants at the end of a training session;
- Pre- and post-training tests;
- Follow-up interviews and studies including such activities as:
  - examining complaint decisions;
  - reviewing investigations; and
  - conducting focus groups with EMBs and judges, and with participating parties.

Training EMBs in Election Complaints Adjudication

A. Overview

EMBs are comprised of a variety of different individuals with different experiences, skills, and motivations. In most cases, EMB members will not be election professionals, but will gain their experience on the job. Members of EMBs at the upper end of the hierarchy will usually serve for set terms of office while at the lower end of the hierarchy EMBs are often put in place immediately before an election and serve only until the election results are certified.

In some countries, EMB members at the central level are appointed by the legislative body based on nominations submitted by competing political parties. Sometimes this manner of appointment can lead to an adversarial or competitive relationship among members. In other countries they are appointed from among judges. In a few countries, EMB members are civil servants who serve as professional election officials and work full-time coordinating and implementing election processes. At the polling station level, EMB members are recruited from among names submitted by local branches of the party, from public institutions such as public schools or local government offices or from among volunteers. School teachers are often chosen because they are respected in their communities and are seen to be fair and honest.

As a result of this diversity, the first task of any training program, whether in election complaints adjudication or another part of election operations, is

to understand who the target audience is and what they do or do not know. Most often, the largest challenge faced in training is that competency must be attained in a short period of time.

Before focusing on the task of training EMBs in electoral complaints adjudication, it is necessary to understand the challenges faced in developing training programs for election officials in general, especially in countries where democratic election systems have not yet had the time to fully mature.

B. Challenges

i. Electoral complaints adjudication systems are still developing

The discipline of electoral complaint management is still evolving. For many years, electoral complaints were primarily the domain of legal systems. This had its drawbacks, especially in those countries where the legal system was not held in high regard or was tarred as being unduly guided by political influences as opposed to an overarching notion of "justice." In some contexts, opposition leaders often felt they could not get a fair hearing due to the lack of objectivity on the part of politically appointed judges. In addition, courts often move at a glacial pace. Courts have systems of due process that err on the side of thoroughness and thus can sometimes be ill-suited for quick resolution of cases. This is not advantageous when an election hangs in the balance. As a result of these factors, many countries are moving towards systems where more and more election complaints are handled by special election courts, by EMBs or by commissions specifically created for deciding election cases. Such institutions primarily deal with administrative rather than criminal matters while the court system remains the channel for dealing with appeals.

A few examples illustrate the diversity of systems in place in many countries employing mixed systems.

- In Latvia, complaints and appeals are regulated by several laws and executed by a number of judicial and administrative bodies. Decisions of Municipal Election Commissions and Polling Station Committees may be appealed to the Central Election

Commission (CEC). In turn, CEC decisions can be appealed to the District Administrative Court. CEC decisions regarding election results can be contested at the Supreme Court.

- Greece has established the Supreme Special (Electoral) Court to hear cases involving compliance of legal acts with the Constitutional principles guiding the elections, violations of the election law, prohibitions to stand for election, and disqualification of elected officials. Other cases follow a chain from the polling station level to the courts of first instance in the relevant district. Media issues related to the campaign period are monitored by the National Council of Radio and Television (NCRT). The NCRT is governed by a plenary comprised of the Council's president, the Vice President and five members who are nominated by the Conference of Presidents.
- Portugal relies heavily on a diversity of laws and regulations, and the institutions handling complaints differ depending on the subject matter. The National Election Commission (NEC) has established rules whereby complaints can be submitted. The NEC then decides whether the complaint is eligible and whether further action or decisions are necessary. Decisions of the NEC can be appealed to the Constitutional Court.
- In Kosovo a special Election Complaints and Appeals Commission has been established, while in Indonesia Supervisory Bodies are appointed by the relevant provincial, district and municipal assemblies. These supervisory bodies are charged with the responsibility of reviewing all complaints and deciding the venue to which they are to be transferred for adjudication. They are also considered the monitoring bodies overseeing the work of the election commissions in their jurisdictions.

Such diversity points to the importance of ensuring that EMBs and political participants are fully informed as to how the process works in their countries and which adjudicating body has jurisdiction.

ii. Training non-legal experts is different

The implication of shifting election complaints to the EMB's domain is that complaints are being reviewed, and at least initially adjudicated, by people

who are not legal experts. There may be a lawyer or two on the EMB, but most, as noted above, are representatives of political parties, teachers, civil servants or community members. The task of training citizen-based EMBs is different from that used for EMBs consisting of lawyers or judges, as members will often lack the legal training at the heart of an evidence-based electoral complaints adjudication process.

iii. Training should be grounded in procedure

Related to this concept is the need to build respect for the process and to train EMBs to follow procedures precisely and consistently. Consistency and fairness is the best way to eliminate even the perception of bias. Generally, it is when an EMB's action or decision varies or diverts from the procedural rules that one side can argue that an advantage was given to an opposing party or candidate. EMBs need to be reminded that their actions, investigations, hearings and decisions are subject to review and can and will be appealed to a higher authority. Hearings are usually open to the public or, at the very least, to the adversaries in a complaint. EMBs need to be careful to follow procedures diligently, which helps to ensure a fair and judicious process.

iv. Time for training is limited

As noted above, there is often very little time in which to conduct the training. EMBs at the local levels or at the polling station level are often not appointed until the election period begins. In most countries this might be as much as 60 days or as little as 20 days before an election event. This means that training programs have to be ready for implementation at the moment EMBs are formed. Additionally, EMB members are often immediately busy with other election responsibilities such as verifying voter lists or demarcating an election precinct. Finding time to train members during this busy period is often one of the biggest challenges.

v. Stakeholders should be engaged

Any training program needs to be coordinated with and include the other key stakeholders in the election complaints adjudication process. Stakeholders might include representatives of the political parties, officials from the local administration and/or the local or national courts. If a training program is designed in collaboration with stakeholders, it allows for their

concerns to be taken into account. Their cooperation and involvement in developing, arranging or participating in the training sessions encourages their buy-in.

vi. Training opportunities are not always provided to EMBs

EMB members will often be unaccustomed to attending a comprehensive training program. Most often, the "training" EMB members receive is a short, large-group briefing in which they are given a brief lecture by a judge or national election commission member, and provided a copy of the country's electoral code. This type of training passes on little information and does nothing to build competency. As a result, members might be annoyed when attending their first comprehensive training program, since it may require a greater amount of time (and a night or two away from home and work) and possibly necessitate a trip to the national or regional capitol. The best way to minimize these and other unforeseen challenges is to engage in a planning process that carefully drafts the training invitation and engages key stakeholders. The more that all parties to a potential electoral complaint understand the objectives of the training and the reasons for having an electoral complaint process, the more likely that the process will be respected when parties disagree with the decisions.

One example of a carefully crafted and comprehensive training program for EMB members is BRIDGE (Building Resources in Democracy, Governance, and Elections). BRIDGE is a modular professional development program with a special focus on electoral processes, and it can be tailored to specific learning needs, such as complaints adjudication processes.[1] BRIDGE has been used by IFES, for example, in Nepal since 2008 to train appointed Election Commission staff on a range of elections topics. The program in Nepal was designed to provide an intensive overview of international standards and practical application of electoral processes, with specific sessions targeted at electoral justice and complaints adjudication.

[1] BRIDGE represents a unique initiative where five leading organizations (IFES, Australian Election Commission, International IDEA, UNDP, and the United Nations Electoral Assistance Division) in the democracy and governance field have jointly committed to developing, implementing and maintaining the most comprehensive curriculum and workshop package available, designed to be used as a tool within a broader capacity development framework. For more information, visit www.bridge-project.org.

Several years of successful BRIDGE implementation for over 350 participants in Nepal has solidified the programs's place in Nepal's EMB training process. To wit, Nepalese Election Commission Joint Secretary, Shyam Sharma, noted that "the BRIDGE program has become central to the Election Commission's training strategy. The Election Commission Staff come from the government civil service and by and large have generalist backgrounds. To carry out our work effectively, it is essential to build the skills of our staff…and the BRIDGE curriculum in terms of the content and methodology plays a key role in achieving this."[2]

C. Training Course Structure

A sample course structure is outlined below. Each session should be designed to achieve one or more of the objectives listed above. For each session, a session plan should be written to provide trainers with an outline of what the session should cover and how the training objective(s) should be achieved.

The list of sessions in the text box below illustrates how many different topics could be covered during a training course for EMB members on election complaints adjudication; however, it is not an exhaustive list. For example, it may be necessary to address alternative dispute resolution (see Chapter 6: Alternative Dispute Resolution Mechanisms) or how to best work with antagonistic complainants. These are topics that could be

Election Commission Structure – This session would provide an introduction to the national election commission and its departments and responsibilities. The national, regional and provincial structure of the election commission is discussed.

Roles and Responsibilities of the EMB – This session would provide an introduction to the role of the EMB in handling electoral complaints and how those responsibilities relate to other roles of the EMB (i.e. voter registration, polling station operation, etc.).

Introduction to Laws and Regulations – This session would cover the key articles of the Constitution, Electoral Code and election commission regulations pertinent to complaints.

[2] Katie Ryan, IFES, *BRIDGE Training by the Snow-Capped Himalayas, available at* http://www.ifes.org/Content/Publications/News-in-Brief/2010/Dec/BRIDGE-Training-by-the-Snow-Capped-Himalayas.aspx, 2010.

Concepts of Free and Fair Elections – A basic introduction to the concepts of free and fair elections and standards for evaluating the extent to which elections meet these tests.

Ethics in Election Administration – This session would examine the sources of ethical conduct and case studies of ethical dilemmas. This session also would ask participants to think about who the EMB stakeholders are and how to be accountable to them.

Electoral Offenses – A review of pertinent articles of the Electoral Code.

Handling Election Complaints – This session would provide an overview of the country's complaint procedures and the steps of the electoral complaints adjudication process, including standing and burden of proof requirements, as well as timelines during the process.

Sanctions and Penalties – This session would cover pertinent articles of the Electoral Code and discuss how EMBs can apply sanctions and penalties for various electoral offenses.

Election Monitoring and Observation – This session would provide a brief discussion of the role observers and candidate agents play in the election process and their rights and responsibilities regarding the filing of complaints.

Working with the Media – A short session on the media in the election process and how EMBs should handle media questions about their work.

Working through Complaint Procedures – Detailed review of steps in the election complaints adjudication process, including the forms used in the process and how to fill them out.

Media Complaints Process – If relevant, it is necessary to ensure that EMBs understand how complaints against media outlets (TV, radio and newspapers) are handled.

Complaint Case Studies – EMB members are provided an actual complaint and have to work through the case study, including filling out all of the election commission forms.

Election Day – An overview of the Election Day polling procedures and a chance to challenge EMBs to think about how they should handle complaints on Election Day.

Questions and answers – This session provides an opportunity for a representative of the EMB to answer additional questions from the training.

addressed in the initial training if there is sufficient time, or in a supplemental training course. It must be remembered that this is not an academically oriented course in which theory and history are examined. Rather, it is a training program designed to prepare EMB members to take on the often challenging and contentious task of resolving electoral complaints.

D. Developing an Abbreviated Course for Poll Workers

The training of EMBs may not always be best served by a "one-size-fits-all" approach. At times the objectives might be better served by designing specific training sessions relative to the functions for which election officials at various levels of the hierarchy are responsible, and the authorities under which they are allowed to take action. Particularly for EMBs at the polling station level, a more abbreviated course might be more suitable. Ideally, basic training on how to handle complaints can be accommodated during their regular poll worker training sessions.

At the polling station level, for example, poll workers are responsible for setting up the polling station and for implementing the proper procedures for conduct of the poll on Election Day. They are also responsible for accurately completing the paperwork to account for the receipt and use of ballots and other sensitive materials, documenting incidents or unusual events at the polling station and repackaging materials and ballot boxes for return to their regional or district EMBs. In many countries, counting of votes is handled at centralized counting sites; in many others, poll workers are also responsible for carrying out proper vote counting procedures after the polls have closed and preparing results reports.

Within the scope of work conducted at the polling station, chairpersons are usually obligated to respond to concerns or complaints raised by party or candidate representatives or observers, and to take immediate corrective action where it is deemed appropriate. The manner in which complaints are handled by an election official can factor heavily in a complainant's decision whether or not to file a more formal complaint at a higher level or to pursue litigation.

The key objectives that should be satisfied during poll worker training related to the resolution of election complaints should be to ensure that poll workers are competent to:

- Ensure equal, fair, timely and neutral treatment to all voters, representatives of political participants, and authorized observers who may be present at the polling station;
- Fully understand the extent and the limits on their authority to take decisions and the kinds of remedial action they are competent to effect;
- Maintain a cooperative attitude with any complainant who may raise a concern or objection to the manner in which the procedures are being carried out;
- Be able to observe the manner in which procedures are being carried out by the poll workers and to determine whether a complaint is justified;
- Take immediate corrective action where it is obvious that lapses in procedure or errors have occurred;
- Confidently explain to the complainant where any misunderstanding might exist in the event that the complaint is not justified;
- Advise a complainant who is not satisfied with the action taken how he or she might appeal the decision taken to a higher authority; and
- Ensure that the complaint, the action taken and any acknowledgement from the complainant is fully documented.

Preparing Political Parties in Election Complaints Adjudication

A. Overview

One of the most challenging aspects of preparing and conducting an election is maintaining fair, cooperative and responsive relationships with the political parties and candidates in the midst of what is, by its very nature, an adversarial political environment. In spite of all best efforts and dedicated commitment to administer the process fairly and competently, EMBs often find themselves faced with a barrage of complaints from political participants caught up in the heat of political competition. With so much at stake, it is not hard to understand why they are sometimes so demanding. They have committed their resources, their energies and their futures in compet-

ing for the trust and support of the voters of their communities. For each of them, there is a great deal invested in the outcome of the election.

When irregularities arise in the election, a political party has a vested interest in ensuring that these irregularities did not taint the results. The filing of complaints is a common response. Sometimes frustrations stem from unrealistic expectations, and a failure to fully understand the complaints resolution process and their rights and obligations relative to it.
For a party to fulfill this function effectively, training may need to be provided. The following materials are designed to detail challenges that may be faced and a program format that may be utilized in such training for political parties.

B. Challenges

i. Untested or under-developed election complaint laws

Under-developed elections complaint laws and regulations pose a significant problem for design of training programs, as the substance needed for the training will be woefully inadequate or missing. Organizers may feel the need to infer the necessary steps taken to successfully carry forth a challenge. It is critical that all such interpretive opinions offered are clearly prefaced as such. A related scenario emerges when the law is clearly written, but it has not been thoroughly tested in practice. In this situation there is a possibility that the legislature left gaps that require an interpretation or opinion by the judiciary, thus lending less predictability to the outcome. On some occasions, the written law and traditional practices do not fully mesh, thus leading to confusion in regards to the proper avenues to pursue full adjudication (for a salient example of this issue, see the Philippines case study in Chapter 4: Case Studies Related to Training of Arbiters in Election Complaints). These circumstances must be accommodated very carefully in considering how to approach them during the training and in any written materials that are distributed. It is critically important that the organizer of the training is not perceived as offering legal advice. At every instance, participants should be reminded that they should seek appropriate legal counsel and a pre-scripted disclaimer should be included not only in the oral presentation, but also in all written materials distributed to participants.

ii. The appearance of bias

Unlike EMBs, which are expected to maintain political neutrality, political parties by their very nature are partisan entities. Therefore, any deviation between training sessions or materials that are provided to separate parties can possibly be construed as an effort to confer a benefit for one over the other. Organizers of any training program must be mindful of the potential appearance of bias when planning and implementing any training program that will be presented to the various political parties. Offering a program once and making it available to all parties equally is an optimal method of avoiding the specter of bias, although there may simply be too many parties participating in the elections to make this a practical option. In such instances where one single training program is not feasible, a marked effort to provide consistent information during all training programs is of the utmost importance.

iii. Scheduling party training at the correct time

Selecting the appropriate time for conducting informative sessions for political participants regarding their rights related to the resolution of election complaints is a tricky business. It can be tempting to assume that the best time for conducting such a program is prior to an election. Interest is high, parties are at their most active and the immediacy of the election suggests that the information that would be imparted is timely. In fact, it may be the least effective time. The time periods between the announcement of the date of the election, the deadline for the registration of parties and candidates and Election Day can be quite short. Adding the planning and implementation of such programs can add a significant burden on EMBs when their capacities are already taxed in preparing for the election and recruiting and training election workers.

During this period, parties and candidates are preoccupied with campaigning and it can be very difficult to attract their interest. Many parties may simply choose to pass on informational opportunities in favor of pursuing their campaign activities. In the event that parties do opt to participate, it is unlikely that representatives of the full spectrum of parties will actually be on hand. Sometimes such events only attract representatives of smaller parties, as the larger parties, and especially parliamentary parties, may believe they do not need a refresher on the complaints and adjudication

processes. If the major parties fail to attend, the event can be perceived to be one planned for the "opposition." Party representatives who do attend may not always be those who will actually lead the party's efforts relative to the filing of complaints.

iv. Differing initial competencies

A separate challenge arises when the political party members attending the training program have differing initial competencies at the commencement of training. Some attending party members may be well versed in the nation's laws pertaining to complaints while others are relying on the training itself to establish a foundational basis. This scenario places the trainer in the position of relaying information that may seem redundant and superfluous to some attendees while simultaneously being essential to others. Providing a broad outline of the complaints adjudication process in the form of a handout will help guide less-informed party members along. Basic information can be gleaned from the document, as it will serve to answer questions that do not require deep expertise. The information orally presented throughout the training session will add more substance to this foundational layer.

v. Ancillary problems

It is assumed that by the end of training attendees will be well versed in the proper procedure to challenge election results. A concern that is not often raised is that training itself gives party members the tools needed, and possibly the impetus, to delay or discredit election results with unnecessary challenges. This de facto self-fulfilling prophecy does not lend itself to being accurately measured or quantified, but it may very well take place on occasion. Instilling in attendees the importance of integrity and the necessity to follow the will of the voters is the only deterrence for this potential problem, as the only alternative is to discontinue training political parties how to perform an important function. Penalties assessed against parties challenging the vote in bad faith would require a subjective determination that could lead to an unwanted chilling effect, wherein parties with a basis for a claim might fail to follow through with it out of fear of potential economic repercussions. Thus, focusing on the gravity of the function political parties perform is the best deterrence for these ancillary problems.

C. Training Course Structure

The following are some suggestions for potential training course sessions. The plans actually developed and utilized by trainers and organizers should take the situation on the ground into account, and therefore may differ markedly from the provided materials.

Introduction of Laws and Regulations – This session will detail the pertinent statutory laws and regulations that serve as the basis for electoral complaints adjudication. Case law, if extant, should be utilized as examples to clarify statutory law, and to clearly show the working law in practice.

Rights and Responsibilities of Political Parties – This session would clearly detail the function that the political parties serve and their relation to the democratic structure. Participants will be alerted to the legal rights parties have throughout the electoral process, with specific focus on post-election complaints. At the conclusion of this session attendees should be able to determine which rights they do and do not have when protecting the interest of their party and their party's candidates.

Electoral Violations and Election Offenses – This session should cover an overview of the types of violations or offenses relative to the various phases of the election cycle, and the difference between administrative and criminal complaints and their outcomes.

Electoral Complaint Procedure – This portion of training would serve as a detailed walkthrough of the complaints process, the types of complaints that can be filed, who has standing to file a complaint, and the adjudication body to which complaints must be submitted based on the subject matter.

Preparing Submissions – This session should familiarize participants with the forms required, the deadlines by which complaints must be submitted, how to avoid dismissal of complaints on technical grounds, and what constitutes sufficient evidence to support the claim (the burden of proof required).

Appeal Procedure – Lastly, training should outline the avenues of appeal should a complaint be rejected or an adverse ruling is entered.

The list of session topics found above is by no means comprehensive. For example, information in regards to strategizing before, or healing public perception after, disputing an election is not included. These concerns undoubtedly weigh heavily on any decision by a political party to

challenge the election's results; however, this training session is meant to convey merely the essential level of knowledge needed to initiate or survive the complaint process, not how to determine whether to engage in it at all. A separate training program detailing political concerns throughout the election cycle may be an attractive option to the parties in attendance.

Conclusion

A. General Lessons Learned

Elections worldwide are becoming more and more litigious. In countries where complaints adjudication processes are still evolving, the number of complaints and challenges filed tends to far exceed the number of cases that are actually heard and acted upon resulting in some kind of remedy. Many are dismissed on technical grounds, on the basis that they were submitted to the wrong authoritative body, or on the basis that they were not submitted on time. There are also those unfortunate trends involving submissions of frivolous cases which are politically motivated and intended to cloud the election process and impede the certification of results.

The nature of the remedies that can be expected in the event that the adjudication body rules in favor of the complainant is often misunderstood by complainants. Too often complaints are filed by stakeholders who believe that the violation they are reporting must have affected the results, without an understanding that proving that causality is often extremely difficult. It would be difficult to prove that the results were affected, for example, because poll workers failed to consistently ensure that family voting was prevented, or that some voters appeared to have been allowed to vote without showing identification. Likewise, the actual effect of certain campaign violations on the election outcome is impossible to prove with any degree of certainty. It may be a fact that the political posters were vandalized, for example, but demonstrating the effect of such vandalism on the outcome of an election is almost impossible to discern with any degree of legal certainty.

There is also the unrealistic expectation that if the complainant prevails, the results will have to be overturned, or that an election will be repeated in whole or in part. In the vast majority of cases, neither of these scenarios is likely. In the end, many of the remedies available have no effects whatsoever on the aggrieved party filing the complaint. Those filing complaints often fail to understand or distinguish among the types of violations and the different courses of remedial action that may be attributed to them. In cases involving criminal violations, a prison sentence or fine may be imposed on the perpetrator, but such a remedy does not provide any specific benefit to the party or candidate filing the complaint. Campaign violations may result in a sanction against a political party or a broadcaster without any appreciable satisfaction or effect on the status of the complainant.

Often, complaints are filed regarding the decisions or actions of an EMB or an act or failure to act on the part of an EMB member. These complaints frequently relate to a failure to adhere to procedural details. Even where such failures on the part of election administrators are substantiated, they are not usually considered overriding in comparison to the rights of the voters to express their will. The conventional wisdom is that voters should not be disenfranchised because officials fail to observe procedures contemplated in a statute. Often, administrative remedies may be possible. Reconsideration of a denied candidate's registration documents may result in the overturning of a decision to reject the candidate, for example. An appeal related to the omission of a person's name from the voter list can usually be rectified. The failure of an independent candidate to provide a sufficient number of signatures on a nominating petition can be overcome if the laws or regulations provide a period of time for the candidate to resolve the deficiency. Administrative remedies should always be pursued to avoid further litigation.

Laws of different countries vary significantly in their treatment of challenged results. In some jurisdictions, central EMBs are authorized to nullify results at a polling station independently based on their own internal audit procedures, or based on a complaint. In these contexts the law is usually quite specific with regard to the conditions that will prompt a recount of the votes for the relevant polling station, when votes are to be excluded

from the results, or when a repeat election must be held. In other countries, nullification requires a ruling by a designated adjudicating body or by a court. Regardless of a party's or candidate's expectation that they can have the results overturned if they prevail in court, it is a generally accepted standard that election results are only overturned if the seriousness and magnitude of the violation is of such significance that the outcome can no longer be determined. In most jurisdictions there is a reluctance to overturn results, and approaches to the treatment of tainted votes are based on the almost universal principal that they should only be overturned if the number of tainted votes is greater than the number of votes separating winners and losers. Even if an entire polling station is annulled, a repeat election for the polling station might not be called if the number of votes involved is insufficient to alter the outcome for the electoral district as a whole. It is in cases where evidence substantiates the perpetration of fraud, gross negligence and intentional wrongdoing that are more likely to result in the annulment of results or the repeat of the election.

It is always important to ensure that the rights of parties and candidates to file legitimate complaints are preserved and that these stakeholders have access to complaints adjudication processes wherever they are warranted. It is important that any training of parties and candidates in the area of election complaints adjudication include sufficient information about these realities. Accurate information and realistic expectations as to what benefits might be achieved through successful litigation could factor heavily in helping parties and candidates decide whether or not to pursue their cases.

B. Policy and Practical Considerations for Training Political Parties

The term "training" should not be taken so narrowly as to replace or preclude other opportunities for preparing political parties to understand and exercise their rights. EMBs are in a perfect position to ease some of the doubts and controversies that are likely to arise as political parties avail themselves of the election complaint processes. It can be uncomfortable for election administrators to face a barrage of complaints. However, as guardians of the process and charged with the responsibility and authority to ensure equal conditions for parties and candidates, EMBs must find ways to promote confidence and trust in the system.

One of the most important objectives of their efforts should be to ensure that all candidates and parties have equal access to the kinds of information and resources they will need to fully understand the process. Preparation of a handbook on the election complaints adjudication processes offers a perfect opportunity to fulfill that objective. Ideally such a book could provide an at-a-glance overview of such information as:

- Relevant provisions of the prevailing laws on the subject;
- An outline of the processes that need to be followed;
- A calendar that identifies the deadlines and time tables involved;
- Samples of all the relevant forms and how they are to be completed;
- Names, addresses and contact information for the various bodies that play a role in the adjudication of complaints, including EMBs at the Regional, District and Central levels;
- Where readers can go for help; and
- Other information deemed relevant and helpful.

Such a booklet could be issued at any time rather than in the heat of preparations for a specific election. It would also provide an opportunity for EMBs to ensure that uniform information is provided under controlled conditions to all parties equally.

Preparing a handbook of this type has some side benefits. It encourages election administrators to put themselves in the parties' shoes. From this perspective, EMBs can come to sense what issues will become significant to candidates and which procedural details may not be sufficiently clear. Looking at the process from the party's point of view can also be a useful tool in determining where the system is flawed and where additional training may be warranted. Finally, putting such a handbook together between election cycles allows EMBs to avoid surprises. As potential targets for litigation, the exercise gives EMBs a leg up on preparing for complaints when they do come.

Recommendation Checklist

As this chapter has discussed, objectives, topics, and training methodologies for effective training programs for both EMBs and political parties should be carefully considered. Development practitioners can play an important role in designing these programs and advising EMBs. The following set of recommendations can assist practitioners in this role.

√ **Basic characteristics of training:** competency-based agendas; utilization of effective adult learning models; use of creativity to overcome resource limitations; and the use of real cases in training for additional relevancy to participants.

√ **SMART training objectives:** Objectives of training should be specific, measurable, attainable, relevant, and time-bound.

√ **Session styles:** For maximum effectiveness, session styles should include a combination of mini-lectures; case studies; role playing; and group discussions.

√ **Evaluations:** Effective training programs should include post-training evaluations. These can take the form of pre- and post-test comparison, questionnaires, and follow-up studies and interviews.

√ **Topics for training programs for EMBs:** A basic training program for EMBs can cover election commission structure; roles and responsibilities of the EMB; key articles of the Constitution, electoral code, and regulations pertaining to election complaints; concepts of free and fair elections; ethics in election administration; electoral offenses; handling election complaints; sanctions and penalties for electoral offenses; role of election monitors and observers; working with the media, detailed review of complaint procedures; media complaints process; complaint case studies; and questions and answers.

It can be useful to design specific, abbreviated training sessions for EMBs at the polling station level. Ideally, basic training on how to handle complaints can be accommodated during their regular poll worker training sessions.

√ **Topics for training programs for political parties:** A basic training program for political parties can cover introduction of laws and regulations; rights and responsibilities of political parties; electoral violations and offenses; electoral complaint procedures; preparation of submissions; and appeal procedures. Separate training programs can be a good option for covering political concerns that are not included in the comprehensive training program.

√ **Additional resources:** A handbook on election complaints, to be distributed by the EMB in advance of Election Day, can be an invaluable resource for political parties and candidates.

4

CASE STUDIES RELATED TO TRAINING OF ARBITERS IN ELECTION COMPLAINTS

Case 1: **The Mexican Experience by Gerardo de Icaza Hernández and Ernesto Ramos Mega**

Case 2: **The Philippine Experience by Luie Tito F. Guia and Vincent Pepito F. Yambao, Jr.**

An electoral official holds ballots showing votes with errors during a partial recount of the 2 July elections in Mexico City, Mexico, on 9 August 2006.

Introduction

At the heart of most election complaints adjudication systems stands a judge or arbiter responsible for overseeing and rendering a competent judgment. There are multiple ways in which an election complaints body can be structured. It can be judicial or quasi-judicial, parliamentary or administrative, full- or part-time, permanent or temporary, and independent or appointed. The role of the arbiter may take different forms as well. The relevant decision-maker could be a single judge from a court of general jurisdiction who is hearing an election complaint, or it could be a dedicated multi-member panel that exists solely to adjudicate such cases. Whatever the nature of the adjudicative body's members, it is vital that they understand their role and power in the adjudication process from the time a complaint is filed to the resolution of the issue.

In that vein, a country's electoral management body must take the training of judges seriously if it is to ensure an effective outcome that encourages the fair, consistent and accurate resolution of election complaints. Procedures and rules for election complaints might differ from other civil, criminal or administrative actions (for more information, see Chapter 1: International Standards). A regimented training program that ensures the competency of each member is necessary to the success of a fair and impartial election complaints adjudication system.

Training programs for judges or arbiters must seek to impute a comprehensive and up-to-date understanding of the country's electoral complaints adjudication process and the current status of legislation and regulations, including all relevant procedures for investigation and adjudication. Ideally, training will aim at both increasing the professionalism and efficiency of the judges or arbiters in election-related cases as well as promoting the understanding of international best practices as the framework for domestic codes. These trainings should also promote the uniform and transparent application of electoral law through the development of informal but authoritative guidelines. In sum, training of judges and arbiters will inform all relevant decision-makers in a common framework, resulting in predictable and sound legal decisions.

This chapter brings together two different examples of training election adjudication bodies. First, the Electoral Court of the Federal Judiciary in Mexico shares its unique experiences, describing both its own history and the approaches it uses when it designs and implements training for electoral complaints adjudication bodies in other countries. The Mexican Court has been invited to develop judicial training programs throughout the world due to its pioneering work in independent electoral tribunals. In the second part of the chapter, Libertás, a prominent association of lawyers in the Philippines, shares its experience coordinating electoral complaints adjudication training for the 2010 Philippine elections.[1] This was Libertás' first experience with judicial training for elections, and the lessons learned in that process provide excellent insights into the importance of a well-designed and implemented training program.

Case 1: The Mexican Experience

Background

A. Evolution of Judicial Structures for the Adjudication of Election Complaints

Over the past 20 years, the approach by which electoral complaints are settled in Mexico has shifted substantially from a predominantly political to a purely judicial system. In 1987, the first Electoral Tribunal (*Tribunal de lo Contencioso Electoral*, TRICOEL) in Mexico was created with the capacity to resolve electoral conflicts derived from federal elections for both chambers of Congress as well as the presidency. Nonetheless, Mexico maintained a mixed electoral justice system, in which the Court's rulings could be amended by decisions made by the Electoral Colleges of both chambers of Congress. These institutions were, at the time, the only ones empowered to declare an election void.

In 1990, the Federal Electoral Court (*Tribunal Federal Electoral*, TRIFE) was created as an autonomous judicial institution, but the mixed nature of the system remained. TRIFE's decisions were subject to revision and

[1] Libertás (Lawyers League for Liberty) is an association of reform and civic-minded individuals committed to law and justice reform, democracy and human rights promotion, and the advocacy for good governance in the Philippines.

could be amended by the vote of two-thirds of Congress convened as an Electoral College.

In 1993, two substantive constitutional amendments were implemented. First, TRIFE became "the highest judicial authority in electoral matters." At the same time, legislation was passed eliminating the self-evaluation system that allowed the Electoral Colleges of the Congress to review elections. However, the mixed system was still in place for that year's Presidential Election as the change had not yet been validated by the Chamber of Deputies (the lower house of Congress). In 1996, as a result of a thorough constitutional reform, the Electoral Court of the Federal Judiciary (*Tribunal Electoral del Poder Judicial de la Federación*, TEPJF) was created. Since then, its rulings on Congressional and Presidential election complaints are final and unappealable. The TEPJF is also empowered to solve controversies that may arise from the Presidential Election, to conduct the final vote tally, and to validate the election. Needless to say, the reforms had an enormous impact on Mexico's electoral system.

TEPJF is divided into a High Chamber and five Regional Chambers. The High Chamber is a permanent body located in Mexico City and is composed of seven Electoral Justices. Since 1996, the Justices have been proposed by the Supreme Court of Mexico and appointed by two-thirds of the Senate. Following the 2007 Constitutional Reform, Electoral Justices are designated for a nine-year period. The Chief Electoral Justice is elected among the members of the High Chamber for a period of four years and can be reelected for an additional term. The Regional Chambers are permanent electoral bodies located in the cities of Guadalajara, Monterrey, Xalapa, Mexico City, and Toluca. These cities represent the five constituencies into which the country is divided for electing members of congress under the proportional representation system. Each Regional Chamber is composed of three Electoral Justices, designated in the same manner as the Justices in the High Chamber.

B. Present System of Electoral Complaints Adjudication

Electoral complaints are managed at multiple levels. The TEPJF High Chamber is empowered to hear claims involving presidential, gubernatorial, and congressional elections (of members of congress elected by proportional

representation). This chamber also resolves parties' challenges to decisions made by the Federal Electoral Institute (IFE). Regional Chambers are empowered to settle complaints related to congressional elections (legislators elected by majority) as well as of city councils and heads of administrative and political institutions of the local governments within their jurisdictions.

The Federal Constitution, the Law of the Federal Judiciary, the Federal Electoral Code and the Law of Electoral Complaint Settlement grant the TEPJF the authority to adjudicate electoral complaints. Through a Nonconformity Proceeding, the Court can resolve complaints in federal legislative and presidential elections. The interested parties may contest the results registered in a specific voting district within a four-day period from the following day after each district finishes the tallying of votes. The entire presidential election must be contested within four days of IFE's announcement of results. TEPJF can resolve appellate challenges to actions and decisions issued by IFE. Most of these decisions have to do with economic sanctions against political parties.

Challenges to rulings and decisions issued by competent state authorities to organize, evaluate or settle complaints in local elections that might entail decisive results for the development of an electoral process or to its final electoral results can be reviewed by the Electoral Constitutional Review. In order to work out challenges against actions and decisions infringing the political rights of citizens to vote, to stand for elections, to organize themselves in political associations, and to become affiliated with a political party, a Proceeding for the Protection of the Political and Electoral Rights of Citizens can be presented to the Electoral Court. The TEPJF is also competent to adjudicate labor complaints between itself and its employees, as well as between the Federal Electoral Institute and its employees. Finally, it is important to mention that the Court has the power to exercise constitutional review and ensures the compliance of the electoral laws with the Federal Constitution.

The preceding brief overview of the history, reforms and evolution of the Federal Electoral Court of Mexico highlights the functioning of the Mexican election complaints adjudication process. However, the Court not only adjudicates electoral complaints, it also provides training both at home and abroad, as discussed in the next section.

Training by the Electoral Court of the Federal Judiciary

Over the years, the Federal Electoral Court of Mexico has developed a strong institutional capacity and has quickly acquired great expertise in training international election professionals. Mexico's unique and successful electoral complaints adjudication mechanism has raised curiosity and interest from other electoral institutions and has led the Court to share its experience, train foreign judges and election officials and advocate for its model abroad. The Court also uses its expertise and resources to strengthen the knowledge and skills of its national judges and the election staff on election complaints adjudication matters.

A. International Training of Electoral Bodies

i. International training in electoral complaints adjudication matters

In 2008, the Federal Electoral Institute of Mexico (IFE), the Electoral Court of the Federal Judiciary (TEPJF) and the United Nations Development Program (UNDP) created a Mexican-based joint initiative for international training activities for foreign electoral commissions. Training began with a pilot program that was coordinated between IFE and the Electoral Court and held in Mexico City. The project was designed for the Central Electoral Commission of Bosnia and Herzegovina. Due to the success of the pilot program, it was formalized in 2009 with the creation of the *International Training and Electoral Research Project.*

Since the pilot program, the Court, IFE and the United Nations Development Program UNDP have trained electoral bodies from a range of countries in a series of electoral subjects, including electoral complaints adjudication. This international training project is part of a plan that considers the electoral cycle approach of the UNDP, which focuses broadly on all phases of the electoral process, not just on Election Day. The program is funded by the UNDP's Global Program for Electoral Cycle Support, TEPJF, and IFE, and takes a "south-south" perspective to cooperation for development. The training takes place in Mexico City and sessions are taught by international experts, as well as high ranking officers of the Court and IFE. The aim of

Technical Assistance for the Supreme Electoral Court of Guatemala (March 2009)

The TEPJF provided technical assistance to the Supreme Electoral Court of Guatemala (*Tribunal Supremo Electoral*, TSE) and developed a training mission on a wide range of topics, including funding and procurement of political parties and campaigns, integration and updating of voter registration lists, regulation of pre-campaigns and electoral campaigns, civic education and training strategies of electoral officials and members of polling stations.

Technical Assistance for electoral agents from the Ministry of Information of Lebanon (March – April 2009)

The workshop was taught to seven experts that collaborate with the Ministry of Information of Lebanon. Themes included international perspectives on methods of increasing objectivity of live media coverage of electoral processes, mechanisms to ensure fair and equivalent representation of individual candidates in the media as well as the distinctions between propaganda and information and between news and opinion during electoral coverage. These workshops were tailored to the specific interests of the Lebanese electoral institutions.

the project is to strengthen democratic institutions around the world by providing the information and the "know-how" that are required to manage successful electoral bodies.

Following a successful start, the TEPJF regularly receives requests for assistance from a variety of election stakeholders. Sometimes these requests come through the UNDP, the Organization of American States (OAS), or the Association of European Election Officials (ACEEEO). TEPJF has a Memorandum of Understanding with all of the aforementioned organizations. In other cases, TEPJF receives direct requests from electoral tribunals, ministries of the interior or electoral commissions through either its internal Office of International Affairs or Mexico's Foreign Office. TEPJF works on training programs by request only; it does not choose a country based on geopolitical or economic considerations.

TEPJF has built a network of election administrators, and focuses on a methodology that works to engage relevant institutions as equal partners. It has ongoing relationships with most election management bodies (EMBs) in Latin America, and also benefits from a multilateral network through the OAS, the Inter-American Union of Electoral Organizations (UNIORE) and electoral observation missions. After receiving a request, the TEPJF collaborates with the petitioner, taking into consideration its capacities and needs in order to best design a program that fits the requirements of the country. As a result, training agendas can range from such broad topics as a seminar on electoral justice to narrower subjects like workshops on democratic transitions or electoral results.

Technical Assistance to the Electoral Commission of Zambia (April 2009)

The TEPJF provided technical assistance to the Electoral Commission of Zambia. The workshop included the following subjects: electoral bodies and their mission in democratic governments, voter registration lists, electoral mapping and districting, civic education, voting from abroad, electoral justice, and strategic planning in electoral institutions.

Although a broad range of issues can be covered, training programs tend to focus on a smaller subset of topics: discussions of electoral organization and administration; electoral justice; electoral complaints adjudication; and social communication as a strengthening factor in electoral bodies. These subjects are then divided into more specific areas. The TEPJF always undertakes a preliminary assessment of the electoral process of the country requesting assistance. Moreover, the Court assesses the democratic development of the country in order to apply one of three levels of training: emerging democracies; more consolidated democracies that seek to solidify their electoral institutions; and specific problematic areas in mature democracies.

A typical training project is conducted during a one-week seminar in a roundtable format: one or two experts give short presentations, which are followed by question and answer sessions. The participants in the training are selected by the EMB that has requested assistance. Seminar presentations are given on the Mexican electoral complaints

Technical Assistance to the Electoral Commission of the Philippines (COMELEC)
(August 2009)

Ahead of the May 2010 elections in the Philippines, the TEPJF and the Electoral Commission of the Philippines (COMELEC) agreed to join efforts to further sharpen their electoral skills. Two senior COMELEC officials traveled to Mexico in August 2009 to exchange information and ideas with 24 Mexican electoral authorities and international experts.

IFES also took part in this initiative and acted as a bridge to bring electoral commissions from all over the world to exchange experiences and receive training with Mexican electoral authorities. These exchanges provide foreign electoral commissions the opportunity to learn from Mexico's electoral system, one of the most sophisticated in the world. In turn, the foreign commissions provide IFE the opportunity to continue building on its electoral expertise by becoming familiar with the different systems employed throughout the world.

The TEPJF held a workshop that addressed several subjects such as electoral funding, voter registration lists, electoral justice in Mexico, electoral technology and electronic voting, and programs of civil education and electoral training. Philippine and Mexican delegates realized that they shared similar challenges that emerged from their similar geographical and socio-political backgrounds and the issues presented by the management of modern elections. The Mexican presenters explained to COMELEC delegates the failures of the past, what they did to address them, and in many cases, what they are still doing to correct persistent flaws in the system.

adjudication process, the TEPJF's mandate and powers, and the criteria used to investigate and adjudicate complaints. Although the agenda of the training is based on the specific request from the election body, the TEPJF uses the opportunity presented by these meetings to advocate for the establishment of an administrative institution that organizes and conducts elections, with a separate judicial organ empowered to adjudicate electoral complaints.

Trainers are often international experts or high ranking IFE or TEPJF officers (e.g., trainers from the Training Center). Trainers produce their own materials for the participants, which are then translated in most cases to the appropriate language. The specific partner for a project will vary, though OAS, IFE and UNDP generally partner with the Court for EMB trainings.

Finally, at the end of each training project, the trainees are asked to fill out evaluation sheets with feedback and recommendations on TEPJF's work.

The organization of these training activities in such a range of countries does have practical limitations. The language barrier is the most obvious issue, although the Electoral Court has been successful in working around this challenge. In Eastern Europe, for example, the Court hired two simultaneous interpreters to translate from Macedonian to English and from English to Spanish. But language is just the tip of the iceberg when it comes to disparities in trainings; there is always a need to take into consideration other factors such as the history and the culture of a particular country, as well as legal traditions and customs. However, legal differences actually provide a lesser problem when compared to the gaps, ambiguities or incoherencies that may exist in the legal framework of a particular democracy. Nonetheless, unlike some other areas of law, there seems to be a consensus on international electoral principles being developed.

International Workshop of Electoral Administration for the Electoral Commission of the Republic of Macedonia and the Central Election Commission of Bosnia and Herzegovina (February 2010)

TEPJF co-organized an international workshop attended by the Electoral Commission of the Republic of Macedonia and the Central Electoral Commission of Bosnia and Herzegovina. The workshop addressed electoral complaints adjudication and electoral justice, as well as a discussion on a comparative perspective of electoral systems, electoral authorities and democratic governance, voting from abroad, electoral materials during its organization, logistics, and voting mechanisms, civic education, electoral training and civil service in electoral bodies, and modernization and electoral technology.

Though resources are often an issue in electoral reform, financial resources are usually not a constraint for the Electoral Court. The TEPJF is well-resourced to implement these international trainings and also shares costs with the OAS, UNDP and the actors requesting training. Moreover, all training sessions take place in Mexico, where there is an extensive infrastructure for training in electoral matters. Of course, these trainings provide the Electoral Court and the Mexican government with benefits as well. International trainings on electoral justice and electoral

complaints adjudication strengthen the TEPJF's cooperative links while contributing to the development of electoral projects in other countries. They encourage the sharing and exchange of experience and knowledge with counterparts in areas of common interest, and thus the TEPJF benefits both from the development of democracy in the world and the increased harmonization of internal and international law in electoral complaints adjudication decisions. Meanwhile, electoral judges, arbiters or other election officials working to improve and/or update their electoral complaints adjudication system can indeed find great support and guidance in the Mexican experience itself, not just in the Electoral Court's international work.

ii. Other types of training required by electoral tribunals

Although there is no doubt that an electoral tribunal first and foremost requires training in electoral justice and complaints adjudication, a strong institution serving a modern democracy requires knowledge of a variety of different areas. Under this premise, the Electoral Court of Mexico has provided assistance to several electoral institutions in areas of a supportive nature.

The OAS and the TEPJF signed a Memorandum of Understanding in 2009,[2] and have worked together on five technical assistance missions since then. Three of the missions have been in the field of communications strategies, one was devoted to information technology (IT) and one focused on auditing and challenging voter registration lists.

The first two missions were conducted in February 2009 for the National Electoral Council and the Electoral Tribunal of Ecuador. Both institutions were reorganized and acquired new functions after a constitutional reform in 2008. This created a huge challenge in public recognition and confidence, and the first mission focused on producing a communications strategy to make the institutions more well-known and to increase public confidence. The second mission functioned to implement all of the IT requirements needed by the newly created institutions. The IT and Communications Directors of the Electoral Court of Mexico traveled to Ecuador, funded by

[2] The MOU was signed between the Electoral Court of the Federal Judiciary and the General Secretariat of the OAS on June 26, 2009.

the OAS, and designed strategies in both of these areas. The Task Team on South-South Cooperation later labeled the experience a "success story."

The TEPJF held a third technical assistance mission in San José, Costa Rica in January 2010 for the Costa Rican Supreme Electoral Tribunal. This assessment mission also had, as a central theme, the design of a communications strategy. The strategy was completely different in Costa Rica, since the Supreme Electoral Tribunal was a well established institution but had been accused by some observers of being partial to the political party in office.

The next mission's objective was the normative design and implementation of an audit process of the voter registration system for the High Court of Electoral Justice of Paraguay. This mission consisted of sending a law clerk specialized in voter registration complaints to help Paraguayan legislators design a system that would allow political parties and individuals to challenge the voting lists.

Lastly, the OAS received a request for assistance in producing a communications strategy for the National Jury of Elections in Peru. Within the framework of the institutional collaboration agreement between that electoral body and the TEPJF, advice was provided by high ranking officials of the Court. The mission took place in April 2010.

The technical assistance provided by the TEPJF to different electoral bodies, at the request of the OAS, is an effective way to strengthen democracy in the region. As professionalism, knowledge and efficiency grow in these institutions, so does the public's confidence in their democracy's competency. The fact that support is provided not only in the field of electoral justice, but in supporting functions too, is indicative of how modern day electoral institutions must be well trained in diverse areas.

Aside from international trainings and the exchange of professional experience with other electoral institutions, the Court is also committed to familiarizing the electoral judges, electoral officials and general public of Mexico with their nation's own electoral complaints adjudication process.

B. National training

Domestically, the TEPJF provides training through the Electoral Judicial Training Center (*Centro de Capacitación Judicial Electoral*, CCJE), whose mission is to contribute to the continuous improvement of the administration of electoral justice. The training functions of the CCJE are separated into four divisions: external training (aimed at other electoral bodies and political parties); internal training (focused on the judicial personnel of the Electoral Court itself); management training (focused on developing technical and administrative expertise for the administrative staff of the TEPJF); and distance learning (through the use of educational technologies, addressed at officials and the general public). Each of these requires different levels of involvement by the CCJE, with internal and external trainings requiring the most in terms of resources and planning.

The following sections focus on how the CCJE fulfills its duties in internal and external training and how it develops trainings that optimize the performance of election officials internally and externally to the TEPJF. The projects discussed herein have been designed and executed since the restructuring of the CCJE in 2009. To provide contrast and facilitate an understanding of the developments in the field, the results of these most recent projects are presented in comparison with those in the years prior to the 2009 restructuring.

i. External training for local authorities

External training requires the most resources in terms of personnel and expertise. The CCJE provides specialized training in electoral matters to the courts and electoral institutes of the 32 local entities in charge of organizing elections in each state and in Mexico City, as well as to the Federal Electoral Institute (IFE), political parties, political groups, academic institutions and the general public. Due to the importance of the task, the diversity of the audience, and the high demand for knowledge, in 2009 the new administration of the CCJE began designing an innovative approach to external training that would improve results. This new approach required work in three areas: administration of courses; thematic organization; and training materials.

Administration of courses

Given the complex nature of training disparate external groups, effective course programming is of the utmost importance. The CCJE designed a database program to record each course offering from the time an institution requests it[3] until the diplomas for participation are delivered. The program tracks the availability of teachers, the profile of the public that will be trained and previous exchanges with each institution. Systematization of the process makes it possible to obtain prompt statistical reports for identifying students' present levels of knowledge, areas of training that require particular attention and other practical training information such as potential scheduling conflicts. Streamlining course programming also allows for more advanced notice of training dates, resulting in efficiencies such as lower transportation and material costs.

The method for evaluating instructors is also a key subject. Recently, evaluation forms were redesigned to include questions that better reflect the performance of trainers and the quality of course materials via a 0 to 5 scale, where 5 represents the best grade possible and 0 the worst. These forms are now incorporated into the database system in the file of each trainer, thus allowing the CCJE to assess trainer performance over time. For example, monthly and quarterly performance reports are generated and analyzed by the officials in charge of programming courses. These assessments can be used to select the best trainers for particular topics, suggest areas of improvement for individual trainers, and provide support for improvement by referring less proficient trainers to those who are successful.

Thematic organization

Improvement of the CCJE's programs also required the thematic organization of courses. Before 2009, courses were taught based on the demands of each institution without offering a consistent systematic progression. Therefore, since 2009, and based on the competence and duties of the Electoral Court, the CCJE has designed a catalog of 26 subjects divided into three levels: general; advanced; and specialized.

[3] The CCJE accepts applications for training courses through their website, http://www.te.gob.mx/ccje/capacitacion_externa/Intro.html.

General subjects are designed for the broader public that is simply interested in electoral issues, or those participants who have a basic knowledge of electoral law. Courses at this level address topics such as democratic regimes, electoral reform in Mexico, and democratic culture and the culture of electoral justice.[4] These subjects are meant to construct a strong base for future comprehension of more complex concepts in electoral law, and are taught by CCJE trainers.

Advanced subjects are designed for participants with strong knowledge of electoral issues, as well as electoral officers and party members. Students taking these courses learn about electoral complaints adjudication, electoral jurisprudence, and procedural electoral law. These courses are crucial to developing a full understanding of the electoral complaints adjudication process, and are also taught by CCJE trainers.[5]

The last thematic category is specialized subjects. These courses are directed at mid- and high-level electoral officials with the purpose of updating them in areas closely related to their duties. To take these courses, participants must demonstrate proficiency in general and advanced subjects. Specialized subjects are primarily taught through case studies so as to address both the theory and practice of the subject matter. These courses provide the necessary knowledge that an electoral judge or arbiter should possess. The curriculum includes electoral appeal, constitutional review in electoral matters, annulment of electoral results, analysis of grievances and legal/judicial writing in electoral law.[6] Due to the complexities of this thematic category, the courses are taught both by CCJE trainers and by law clerks.

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[4] General subjects: democratic regimes; Mexican electoral law; historic development of electoral institutions in Mexico; electoral reform in Mexico; electoral systems and party systems; political parties; electoral institutions in Mexico; democratic culture and the culture of electoral justice.

[5] Advanced subjects: electoral complaints adjudication; electoral jurisprudence; procedural electoral law; the electoral constitutional and legal reform 2007-2008; federal electoral process; indigenous rights in Mexican electoral law.

[6] Specialized subjects: electoral revision; electoral appeal; suits of non-conformity; electoral reconsideration; proceedings for the protection of citizen's political and electoral rights; constitutional review in electoral matters; labor complaint proceedings in federal electoral institutions; system of annulment of electoral results; sanctions in administrative electoral law; legal interpretation and argumentation in electoral matters; evidence in electoral law; analysis of grievances; and legal/judicial writing in electoral law.

The new thematic course progression was well received by the target population, and resulted in increased demand for courses by the courts and electoral institutions of the federal entities of Mexico.

Training materials

Improvements have been made in designing training materials as well. Before 2009, trainers faced few limitations since they decided for themselves how to present courses, both in terms of what aspects of a subject were taught and how much emphasis each aspect received. Materials were developed based on the trainer's knowledge of the subject, their particular training style and the material resources at their disposal. The result was a significant variation in the quality of support materials, both in form and content. The same course taught by different trainers could use completely different materials.

In response to these issues, the CCJE created consistent training materials. For each of the 26 subjects, the CCJE has developed three products: a syllabus, a PowerPoint presentation and a training manual for the participant. The syllabus contains a description of every topic discussed in each course and emphasizes which of those will be given greater importance. In addition, the syllabus includes the objectives to be achieved by the end of the course and a brief justification of why the topic in question is important. For subjects that can be offered as either a course or a workshop, the syllabus also lists the stages of the case study that will be developed during each class.

For PowerPoint presentations, a template was designed with a corporate image and minimum guidelines were established. In no more than 40 slides (anticipating that the classes will last an average of four hours), the presentations should illustrate the main ideas to be developed in each subject, thus affording the teacher the opportunity to explain and discuss topics with the participants of the course. Furthermore, the content should focus strictly on meeting the learning objectives outlined in the syllabus of the course. The CCJE also chose to encourage the use of charts, graphs, diagrams and bullets rather than long paragraphs and images, which tend to distract rather than enlighten the audience.

The final products in development for improving training materials are training manuals. These are designed to help participants gain insight into each topic beyond that which is necessarily covered in the classroom. The manuals develop in-depth ideas raised during presentation, and include relevant theses and case law relating to the subject. Although still in development, training materials are available on the Electoral Court website to be consulted by both those attending courses and the general public interested in electoral matters.[7]

ii. Internal Training of the Federal Court

Internal trainings, aimed at increasing the knowledge and skills of clerks and other court officials responsible for drafting judges' opinions, are also quite demanding. Internal training supports both the High Chamber and the five Regional Chambers of the Electoral Court. Efforts to improve these trainings since 2009 have focused on expanding the number of training topics, promoting open dialogue among election officials and leading academics and systematizing these activities so internal staff and the general public can easily access them.

Reflective of the Court's structure, all training activities are performed through sessions taking place at TEPJF and are transmitted to the regional chambers in real time. While the High Chamber staff interacts with a live presenter, the staff of the regional chambers can simultaneously exchange ideas via videoconference or by email; this way, all staff attending the course, both in person and remotely, can communicate with the training specialist in real time. Staff members who are unable to attend a particular event can consult the recording of the course and related materials on the website of the CCJE.[8]

The subjects of internal training are presented in a variety of formats and are not necessarily related to Electoral Law. The goal is to provide the staff of the Electoral Court with training that broadens their perspectives on both the administration of justice in a democratic regime and the defense

[7] Training materials are available at: http://www.te.gob.mx/ccje/unldad_capacitacion/materiales_capacitacion.html.

[8] Staff members can consult recordings and other course related materials through the following internet links: http://www.te.gob.mx/ccje/material_audiovisual/derechos_poli.html and http://www.te.gob.mx/ccje/capacitacion_interna/Intro.html.

of political rights. Internal trainings have included diplomas in political and strategic analysis, courses on judging with a gender perspective, seminars on addressing electoral theses and case law of the European Court of Human Rights, John Rawls' theory of justice and democracy and workshops on the new role of judges in Latin America.

In-house training projects also include postgraduate programs designed to train professionals in Electoral Law. In 2009, the CCJE offered Specialization in Electoral Law and Masters in Law programs jointly with the National Autonomous University of Mexico. The CCJE also provided a Specialty in Electoral Justice program through an in-house modality until 2009. From 2010 onwards it has been taught as a distance learning module to meet the demands of electoral officials throughout the country.

Much like in external training, all specialists involved in internal training as well as the courses themselves are evaluated by participants with standardized forms. The information obtained helps in deciding how to program future courses. CCJE also changed the format of delivery for most courses offered internally. Instead of podium lectures to an audience, most of the training activities for officials of the Electoral Court are given at conference tables so that both the speaker and the participants are at the same level, and can therefore keep an ongoing dialogue that encourages the interchange of knowledge.

Conclusion

Adequate training ensures that judges and arbiters possess the knowledge and skills required to efficiently adjudicate electoral challenges and complaints. Throughout its work as a trainer on electoral complaints adjudication, the TEPJF has acquired considerable experience in organizing seminars for both Mexican and foreign judges and arbiters. While developing and implementing these programs, the Electoral Court has learned both from its successes and its failures. Democracy has reached different levels of consolidation in every country; therefore training seminars must take a several factors into consideration.

One of the crucial elements that must be kept in mind in the creation of

all partnerships is that international training can only be carried out voluntarily. Neither a training center nor independent trainers should pressure an election commission or a tribunal to accept the assistance. Both sides should act as equal partners and must participate together in the design of the training program. The subjects taught in the training sessions should respond to the needs of each electoral institution, which is more a more useful approach than a general syllabus or handbook about election complaints adjudication processes. Some countries focus, for example, on voter registration and safeguarding Election Day, while other countries are facing problems with complaints adjudication, political campaign financing, and media law. These differing interests and issues give rise to the potential for narrowly targeted training programs that will ultimately prove to be more successful.

Training of tribunals should not only focus on electoral law, justice or complaints adjudication, but should widen the scope of the agenda and include, for example, the organization of a communications strategy in order to promote transparency and build further social confidence in the electoral processes. Institutions must be well-trained in other areas that support the core activity of the tribunal.

The new approach adopted by the CCJE's work, following its restructuring, led to substantive changes in the performance of their training functions. First, it significantly changed the work philosophy in terms of the final objective on the implementation of functions. Effort is now clearly focused on the transmission of knowledge. This change implies a major effort and commitment on the quality of and methodology by which academic tasks are executed.

The main improvement in the performance of the tasks of external and internal training of the Electoral Court is due to the attention given to three main elements: (1) clear definition of institutional objectives; (2) strategic planning; and (3) systematization of information and procedures. These elements are contained in each of the projects set out in the annual academic program of the CCJE, which can be accessed online.[9]

[9] Centro de Capacitación Judicial Electoral, Programa Académico 2010 (2010), *available at* http://www.te.gob.mx/ccje/Archivos/programa_académico_anuaL.pdf

The CCJE's external training methodology now includes a catalog of items ordered by their level of specialization and from which it is possible to design courses for different participants. Thus, it also encourages the effective transfer of knowledge on issues directly related to the purposes and competence of the Federal Court.

The statistics from the courses taught over the last several years are illuminating. In 2008, the CCJE taught 43 courses to local electoral courts, 31 to local electoral institutes, and 15 to political groups and parties. By 2009, the number of courses increased to 65 for courts, 56 for electoral institutes, and 63 for political groups and parties. During 2009 the CCJE trained over 30,000 people through the provision of external training.

It is necessary to clarify that the innovation process is still incomplete. On the one hand, the CCJE continues to improve and adapt the syllabi, presentations and manuals to fit the needs of attendees. At the same time, the CCJE continues the development of other projects to improve external training. Improvements continue in the ongoing preparation of the Electoral Judicial Training Center's academic staff, the design of special evaluations to measure learning gaps and the transformation of some manuals into textbooks. The latter improvement is to assist in teaching electoral matters while simultaneously extending the possibilities of study and specialized knowledge of electoral officials, political party activists and citizens concerned with electoral issues.

Case 2: The Philippines Experience

Background

It is said that no one loses in an election in the Philippines; either one wins or one is cheated. Hence, complaints relating to the conduct of elections are anticipated, and are generally accepted as part and parcel of the Philippine electoral process.

For more than a century,[10] the Philippines endured a cumbersome and crude election process that was widely perceived to be vulnerable to fraud and cheating. The manual voting, counting, and vote consolidation procedures used in the Philippines have bred a suspicious citizenry critical of election results. For candidates and parties with enough funds to support drawn-out and expensive litigation, suspicious incidents of fraud can become full-blown legal battles through an action called "election protest."[11]

As an election complaint adjudication mechanism, election protest provides a post-election remedy in the Philippines to those who question the results of elections. It seeks to determine the true will of the people[12] by re-examining the ballots, election returns, and the other documents and materials used in the election. It may affirm or reverse the results of the election, and thus, it can either confirm or cast doubt on the credibility of the whole electoral process.

The Philippines ventured into its first ever nationwide automated election on 10 May 2010 purportedly to rectify the flaws and vulnerabilities of the manual voting and counting election process. Automation of elections was

[10] The Philippines held its first ever elections in Baliuag, Bulacan under the supervision of American military governor general Arthur MacArthur on May 6, 1899.

[11] An election protest is a contest between the defeated and the winning candidates on the ground of frauds and irregularities in the casting and counting of the ballots, or in the preparation of the returns. It raises the questions of who actually obtained the plurality of the legal votes and therefore is entitled to hold the office. See Samad v. COMELEC, 224 S.C.R.A. 631 (July 16, 1993) (Phil.).

[12] The purpose of an election protest is to ascertain whether the candidate proclaimed elected by the board of canvassers is really the lawful choice of the electorate. See De Castro v. Ginete, 27 S.C.R.A. 623 (March 28, 1969) (Phil.).

expected to produce more credible and acceptable results, and thus, lessen, if not eliminate completely, the need for election protests.[13]

The automated system chosen by the Commission on Elections (COMELEC) involved the use of Precinct Count Optical Scanning (PCOS) machines, which scanned and recorded votes that were marked by voters in the appropriate spaces on the ballots. The results in each precinct were then electronically transmitted to a canvassing center where they were consolidated with other precinct results. The final election tallies were generated during canvass proceedings by an electronic canvassing and consolidation system (CCS).

This automated process was an abrupt departure from the usual system. Prior elections used a "write-in" system of voting whereby voters wrote the names of their chosen candidates on the ballots. After the voting period,[14] the votes on the ballots were then read aloud at each polling place, and manually tallied on election returns. The election returns from the different election precincts were, in turn, read and tallied on another paper document called the statement of votes (SOV) by precinct during municipal or city canvass. The votes reflected on the SOV were added up manually to determine the winning candidates.

How election adjudicators conduct recounts or re-appreciation of ballots during protest proceedings in either the automated or manual system is evident from the procedures briefly outlined above. As stated, the manual election process has always bred suspicion as to the integrity of the vote count. However, the automated election also generated valid questions that ripened into election protests. For one, the vice-presidential candidate who lost in the recent election initiated a high profile election protest against the proclaimed winner.[15]

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[13] It is interesting to note that initial reports from the Commission on Elections and the House of Representatives Electoral Tribunal show that there were more election protests initiated under the automated election than there were under the manual system. There was also a substantial number of election contests filed before the regular trial courts, although the data has yet to be completed.

[14] In most cases, the voting period on Election Day is between 7:00 am to 3:00 pm.

[15] Vice-Presidential candidate Manuel Roxas, the running mate of President Benigno Aquino III, filed an election protest against the proclaimed winner, Jejomar Binay, alleging essentially that the vote tallies were questionable owing to what Roxas observed as an unusually large number of "null" votes (votes that were not credited to any candidate) in areas where Binay won.

Nevertheless, with COMELEC relying on the touted benefits of automated elections, insufficient preparation was made for a complaints adjudication system that would have provided adequate, transparent, credible, and timely remedies for those who questioned the results of the election. In the belief that the introduction of an automated election system would eliminate election cheating, the adoption of new rules of procedure on election contests suited to the newly introduced system was not prioritized. Thus, the amendments to the rules of procedures incorporating the requirements for an automated election system were released barely a month before the elections. There was, therefore, insufficient time to train adjudicators on handling and resolving election complaints under the new election procedure. However, as will be discussed later in this section, seminars for judges were conducted to at least familiarize them with the basic features of the automated election system.

In order to sufficiently understand the preparation done in the Philippines to equip judges with the necessary competence to handle election complaint adjudication, it is essential to first appreciate the Philippine election environment.

A. Elections in the Philippines

Elective positions in the Philippines include: president; vice president; 24 senators (for the upper house of the bicameral legislature); one representative for each of the 222 legislative districts in the country; one party for the party-list system of representation in the Philippine Congress;[16] provincial governor; vice governor; board members; city and municipal mayors; vice mayors and councilors; and *Barangay* (Village) chair and council members.

With the exception of the village posts, all of these positions are elected at the same time in "synchronized elections." Elections are held every three years, although the president, vice president and senators are elected for six-year terms. Twelve of the senators complete their six-year term every three years alternately with the other 12. Because of synchronized elections, up to 33 positions are up for election on a single ballot.

[16] Also known as the House of Representatives.

Consolidation of election results for national positions passes through a multi-stage canvassing process. Polling station or precinct results are first consolidated at the municipal and city vote canvass. The municipal and city results are in turn consolidated at the provincial level. The national canvass, finally, is the result of the consolidation of provincial tallies.[17] This multi-stage canvassing is mandatory even under the automated election system.

Election winners must obtain a plurality; a majority vote is not necessary. Thus, a single vote can theoretically result in an election victory in any of the elective positions.

B. The Philippine Commission on Elections (COMELEC)

COMELEC serves as the election management body (EMB) in the Philippines. A creation of the Philippine Constitution, COMELEC is vested with the power to enforce and administer all laws and regulations relative to the conduct of elections and other allied electoral exercises.[18] It has the mandate to decide all questions affecting elections, including registration of political parties, but not questions involving the right to vote.[19] It has the authority to choose an appropriate automated election system in every election.[20]

Aside from its administrative power to run elections, COMELEC is also endowed with judicial power to hear and decide all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and to take appellate jurisdiction over all contests involving elective municipal and village officials.[21]

COMELEC is composed of a chairman and six commissioners who are appointed by the President for a term of seven years without reappointment.[22] When adjudicating election complaints, it may sit *en banc*, or in two divisions of three members each.[23] The Constitution allows at most

[17] Results from cities consIdered as highly urbanized are transmitted directly to the national canvassers and do not pass through any provincial canvass.

[18] Const., Art. IX-C, sec. 2(1) (Phil.).

[19] Const., Art. IX-C, sec. 2(3) (Phil.).

[20] An Act Amending the Election Modernization Act, Rep. Act 9369 (2007) (Phil.).

[21] Const., Art. IX-C, sec. 2(2) (Phil.).

[22] Const., Art. IX-C sec. 1 (Phil.).

[23] Const., Art. IX-C, sec. 3 (Phil.).

three members of COMELEC to be non-lawyers, but in practice only lawyers are appointed. All of the present member of COMELEC are lawyers, three of whom are retired jurists.

COMELEC operates from its central office in Manila, but it has offices in all municipalities, cities and provinces. Notwithstanding its nationwide presence, COMELEC decides election matters centrally at its Manila office.

C. Types of Election Complaints in the Philippines

Election protests are not the only election complaints that occur in the Philippines. Election complaints in the Philippines may be classified into: (1) those relating to the right to vote and voter registration; (2) those relating to the qualification of candidates and of political parties; (3) those relating to the conduct of an election; (4) those involving criminal violations of election laws; and (5) those relating to the integrity of election results.

Complaints related to the right to vote are considered judicial issues and hence taken cognizance of, and resolved, by judicial authorities. Under the Philippine Voter Registration Law,[24] the first level courts hear petitions for inclusion or exclusion of voters in the registry list of voters. A citizen's application for registration as a voter is actually heard at the first instance by a body in each municipality called the Election Registration Board (ERB).[25] As it is the action of the ERB which can be questioned before the courts,[26] the cause of action for inclusion or exclusion of voter arises only after an applicant for registration is either wrongly included or wrongly excluded in the voters' registry list.

COMELEC, on the other hand, has jurisdiction over issues concerning candidate qualification and political party registration, as well as those related to the conduct of elections.[27] COMELEC's jurisdiction under these types of complaints includes deciding whether a candidate should be disqualified for violation of conduct required of a candidate.[28]

[24] Voter Registration Act, Rep. Act 8189 (1996).

[25] *Id.*, §§ 32-35.

[26] *Id.*, § 17.

[27] Const., Art. IX-C, sec. 2(3) (Phil.).

[28] For instance, the acts enumerated in Section 68 of the Batas Pambansa Blg. 881 (Omnibus Election Code) can lead to the administrative disqualification of a candidate from continuing his or her candidacy, without prejudice to possible criminal prosecution.

COMELEC is also endowed with the authority to take cognizance of "pre-proclamation controversies." The substance of the vote count is not in issue in pre-proclamation controversies; the issues are limited to the validity of the canvass procedure and the genuineness of election documents presented for canvass.[29] Thus, as long as the canvass proceedings are done in accordance with the prescribed procedures, and documents presented for canvass appear ostensibly genuine and authentic, certification of the results or proclamation of the winning candidate will follow as a matter of course. The remedy for those who would allege fraud in the vote count would only be a post-proclamation election protest.

Criminal violation of election laws is investigated and prosecuted by COMELEC and by the prosecutorial arm of the government.[30] However, when probable cause is established that a respondent committed an election offense after an investigation either by COMELEC or by government prosecutors, the respondent is tried before second level courts (Regional Trial Courts) just like in the criminal prosecution system.[31]

Candidate qualification complaints, political party registration issues, and pre-proclamation controversies are within the administrative jurisdiction of COMELEC to resolve.

D. Election Protests

As discussed in the introductory section, an election protest is a contest between the defeated and the winning candidates on the grounds of fraud and irregularities in the casting and counting of the ballots, or in the preparation of the returns.[32] It raises the question of who actually obtained the plurality of the legal votes and therefore is entitled to hold the office.[33] In election protest, the proceedings are essentially judicial in character, as distinguished from the administrative nature of the other proceedings before COMELEC. Moreover, a proclaimed winner, notwithstanding the pendency of the protest proceedings, is allowed to discharge the powers

[29] Omnibus Election Code, B.P.Blg. 881, § 68 (1985) (Phil.).
[30] An Act Amending the Election Modernization Act, Rep. Act 9369 § 42 (2007) (Phil.).
[31] B.P.Blg. 881, § 268 (1985) (Phil.).
[32] Samad v. COMELEC, 224 S.C.R.A. 631 (July 16, 1993) (Phil.).
[33] *Id.*

and functions of his office as presumptive winner, and may be removed should the protest determine that someone else obtained the highest number of votes.

Protests are handled by different adjudicative bodies depending on the positions contested. Those involving the positions of president and vice president are within the exclusive jurisdiction of the Philippine Supreme Court sitting as the Presidential Electoral Tribunal (PET).[34] Protests involving senators (from the upper house of Congress) and representatives (from the lower house of Congress) are cognizable by the Senate Electoral Tribunal (SET) and the House of Representatives Electoral Tribunal (HRET), respectively.[35] COMELEC exercises exclusive original jurisdiction over election protests involving regional, provincial and city positions,[36] and appellate jurisdiction over contests involving municipal elective officials and village elective officials which are decided, at the first instance, by the second level courts (Regional Trial Courts), and first level courts (Municipal or Metropolitan Trial Courts), respectively.[37]

The decisions of COMELEC (for both original and appealed cases) and of the electoral tribunals are final and are not appealable. However, the Supreme Court can take cognizance of petitions questioning the decision of COMELEC or the tribunals on a petition alleging error of jurisdiction or grave abuse of discretion.

Under the "manual" process of elections, an election protest usually involves recount of the votes of the protestant (the party who initiated the protest petition) and the protestee (the party proclaimed as winner or who obtained a greater number of votes than the protestant), and a re-appreciation of the votes as written on the ballots. With the synchronized election and the "write-in" voting process, adjudicators are required not only to count the votes at each precinct, but to decipher handwriting on the contested ballots. Because of this tedious process, most protests are decided, if at all, near the end of the term of office for the position contested.

[34] Const., Art. VII, sec. 4., par. 7 (Phil.).
[35] Const., Art. VI, sec. 17 (Phil.).
[36] Const., Art. IX-C, sec. 2 (2) (Phil.).
[37] *Id.*

The "automated election system," as implemented in the recent election, poses new challenges for adjudicators. Unlike in the manual system, ballots under the new system already contain printed names of candidates. The voter only needs to shade the oval opposite the name of his or her preferred candidate. Thus, voter intent complaints requiring interpretation of handwriting on the ballot would no longer occur. Instead, new sets of voter intent determination rules govern.

Furthermore, unlike in the manual election process where ballots are accepted as presumptively genuine documents, the PCOS machines may reject ballots, even though they are genuine and filled by legitimate voters, under a host of circumstances. These may include the existence of moisture, improper handling of the ballot, and accidental perforation or tears in the ballot, among other issues. These types of rejected ballots are among the grounds raised in questioning some of the results in the 2010 election.

The greatest challenge under the new system stems from the relative lack of transparency in the counting and vote consolidation processes. Under the manual election process, parties may be able to observe the reading and counting of the votes cast at the precinct level. Vote consolidation at the various canvassing levels is likewise observable. With the PCOS machines doing vote "appreciation" and counting of the votes and the CCS performing the consolidation of election results, candidates and observers used to the relatively transparent manual process understandably cannot easily accept election results generated by machines.

Therefore, a paradigm shift, both on the part of the litigants and of the adjudicators, is inevitable. For one, the procedural and substantive issues that may be raised in the context of an automated election may radically depart from the issues that may be raised in a manual election. The evidence needed to support allegations of fraud or even of an innocent miscounting would necessarily vary, and familiarity with the rules on electronic evidence would be an imperative. To be sure, the re-appreciation of votes, if warranted, would take on a different complexion.

Past and Current Practice in Training Election Adjudicators

As noted above, different tribunals handle election protests in the Philippines depending on the contested positions. However, there really are no specific training programs in COMELEC, the PET, the SET, and the HRET that are intended to prepare adjudicators to handle election complaints. In COMELEC, Commissioners are presumed to be experts on the laws and procedures of election. The same is true for the PET, the SET, and the HRET.[38] Thus it is believed that no training is necessary. The heads of the secretariat of both SET and HRET, however, have shared that they nevertheless conduct short briefings for the new members of their respective bodies to familiarize them with protest rules and procedures.

Only the regular courts undergo standardized training. Organizationally, the courts are under the supervision of the Philippine Supreme Court. Their procedures are dictated by rules promulgated by the Supreme Court, and the bulk of their caseload consists of ordinary civil and criminal suits. They are not expected to be experienced in the specialized subject of election law, and therefore are thought to require the most specific training on advances in election laws and procedures.

Judges in the Philippines are prepared and trained by a government agency created for that purpose, the Philippine Judicial Academy or PHILJA.[39] It is mandated by its charter to provide initial training for aspirants to judicial positions. To prepare judges to handle election litigation PHILJA has a special training module on election law, but it has not been consistently used in all pre-judicature trainings.[40]

Starting in early 2007 and in preparation for the then-upcoming general election on 14 May of that year, the Supreme Court, under the leader-

[38] The PET is actually the Supreme Court. The SET and the HRET are each composed of three Supreme Court Justices and six Senators, or six Representatives, respectively.

[39] The Academy was originally created by the Supreme Court (Administrative Order No. 35-96 on March 12, 1996), and finally mandated by R.A. 8557 on February 26, 1998. This law institutionalized PHILJA as a "training school for justices, judges, court personnel, lawyers and aspirants to judicial posts."

[40] Pre-judicature trainings are the trainings of judges before they assume office and discharge the functions of a judge.

ship of Chief Justice Reynato S. Puno, began a series of reforms for an "expeditious, inexpensive, and just determination of election cases before the courts." First, it promulgated Administrative Matter No. 07-4-15-SC, otherwise known as the Rules on Procedure Involving Elective Municipal and Barangay Officials.[41] In addition, the High Court passed Administrative Order No. 54-2007[42] designating 111 special election courts among Regional Trial Courts (RTC) nationwide to hear, try, and decide contests involving elective municipal officials in the May elections. The High Court thereafter issued Administrative Order No. 129-2007[43] designating 76 first level courts to hear, try, and decide election contests involving elective village officials relative to the 29 October 2007 barangay elections. Previously, there were no such special election courts. According to Chief Justice Puno, the Rules proposed "radical change[s]" that "addressed two main problems — first, the problem of eliminating cases that lack merit, and second, the problem of streamlining the system so that the resolution of these kinds of cases would be fast-tracked."[44]

Complementing these initiatives, the Supreme Court tasked PHILJA to conduct special training for trial court judges on these rules. PHILJA[45] conducted a series of one-day training sessions for special election court judges. The second level trial courts were divided into five groups and a full day seminar was conducted.[46] Meanwhile, for first level court judges and clerks of court, a seminar was held on a single day, 8 January 2008, in Manila.[47]

In these seminars, the judges were given an overview of the laws and jurisprudence of election contests, including a discussion on: (1) the 2007 Rules of Procedure in Election Contests before the Courts involving Municipal and Barangay Officials; (2) the COMELEC Rules of Procedure; (3)

[41] The new rules took effect on May 15, 2007.

[42] Promulgated by the Supreme Court on May 11, 2007.

[43] Promulgated by the Supreme Court on August 15, 2007.

[44] Jay B. Rempillo, SC to Create Special Election Courts, http://sc.judiciary.gov.ph/news/court-news percent20flash/2007/04/04200701.php, (last visited January 3, 2011).

[45] With the support from the International Foundation on Electoral Systems (IFES) and the United States Agency for International Development (USAID)

[46] April 30, 2007 (Baguio City); May 2, 2007 (Manila); May 3, 2007 (Cebu); May 4, 2007 (Davao); August 2, 2007 (Manila).The election was held in May 2007.

[47] The village election was held in October 2007.

COMELEC Issuances; (4) Supreme Court Jurisprudence; and (5) jurisdiction of RTC and First Level Courts. They were also instructed on rules concerning the review and appreciation of ballots. Workshops were also held to equip the participants with the skills to identify: (1) marked ballots; (2) fake or spurious ballots; (3) stray votes; (4) pairs or groups of ballots written on by one person or individual ballots written on by two or more persons; and (5) ballots wrongly not credited to a candidate.

Considering that the training sessions were concentrated on the 111 designated second level and 76 first level election courts, many of the courts that were actually assigned election cases after the May 2007 national and local election and the October 2007 village election were not able to participate in the PHILJA trainings.[48] Data gathered from the Office of the Court Administrator of the Supreme Court revealed that of the 135 second level courts that handled election protests relative to the May 2007 elections,[49] only around 59 (or 44 percent) were special election courts.[50] Insofar as the 312 first level courts that handled election protests related to the 29 October 2007 village elections are concerned,[51] only 36 (or 12 percent) were designated election courts.[52] The fact that non-election courts were assigned election cases may be attributed to a lack of foresight concerning the location of election complaints. However, this is a subject beyond the scope of this paper.

An Effective Complaints Adjudication Mechanism for Automated Elections

As stated above, the adoption of the new automated election system posed new challenges for election complaints adjudication in the Philippines. The method for determining voter intent has changed, since the write-in system of voting was replaced by the use of ballots with preprinted names of all candidates, with the voters registering their votes by

[48] Libertas Adjudication of Election Contests Before the Trial Courts: A Second Look at A.M. No. 07-4-15-SC and the Designation of Election Courts 30 (2008).

[49] There were a total of 263 cases filed before the second level courts relative to the May 2007 election.

[50] Libertas, *supra* note 48, at 26.

[51] 811 contests were filed before the first level courts relative to the October 2007 village election.

[52] Libertas, *supra* note 48, at 26.

marking the appropriate spaces. Pre-proclamation controversies have also taken a new form, as the remedy has been substantially eliminated by the new rules adopted by COMELEC.

Moreover, the new election system required the enactment of new rules of procedure to govern pre-proclamation controversies and election protests. Considering, however, that each of the different election tribunals possesses the power to promulgate its own rules of procedure governing election contests before it, and considering further that the revised election law failed to provide guideposts on how election protests under the new system should be resolved, the adjudicative bodies could potentially adopt rules vastly different from each other. There can be as many rules, or even voter intent principles, as there are tribunals.

Mindful of the need to prepare an adjudicatory framework that would be responsive to the automated election system as conceived by COMELEC, and to prepare election adjudicators to handle election complaints under the new system using uniform standards, Libertás took the initiative in advocating for COMELEC and other election tribunals to prepare for election complaints. With support from IFES and the American Bar Association - Rule of Law Initiative (ABA-ROLI),[53] Libertás partnered with PHILJA[54] to conceptualize a training program for trial court judges to equip them with the necessary knowledge and skill in handling election complaints.

Taking note of earlier observations regarding the viability of such training, Libertás proposed a training program for second level courts for the 10 May 2010 elections and committed to help design the training curriculum and develop training modules for each of the sessions. All second level trial courts underwent the training, with no more than about 30 to 40 participants per training group to allow for more interactive sessions and to better ensure retention. The idea was that the training would not only introduce the new election system to the judges but also enhance their complaints adjudication skills.

[53] The United States Agency for International Development (USAID) provIded the funding support

[54] PHILJA is an agency under the Philippine Supreme Court, composed of eminent retired jurists and law professors, mandated to train and provIde continuing education to trial court judges.

Libertás also emphasized the early adoption of new rules of procedure suited for an automated election so that adequate and effective remedies for complaints were available and accessible. About a year before the May 2010 elections, round table discussions were organized by Libertás, bringing together representatives from COMELEC, the court system, the SET, the HRET and election lawyers to discuss issues like determining voter intent, weighing evidence — including the differences between electronic evidence and paper documentary evidence — and pre-proclamation controversies under the automated system. The discussions were also intended to gather input from election stakeholders that might prove useful in the process of drafting appropriate rules. In October 2009, six months before the elections, Libertás submitted to COMELEC a working draft of Rules of Procedure for pre-proclamation controversies and election protests under a PCOS automated election system so that COMELEC could have a starting point to work on a final set of Rules that would actually be promulgated and implemented.

It was expected that the other tribunals would take the cue from COMELEC regarding the need for their own revised rules. However, it was only on 22 March 2010, approximately one month before the Election Day, that COMELEC adopted Resolution No. 8804 (Rules of Procedure on Complaints in an Automated Election System in Connection with the 10 May 2010 Elections).[55] Adopting the basic features of COMELEC Resolution No. 8804, the Supreme Court[56] issued A.M. No. 10-4-1-SC (2010 Rules of Procedure in Election Contests before the Trial Courts Involving Elective Municipal Officials) on 27 April 2010. The PET, for its part, came out with its amended Rules, A.M. No. 10-4-29-SC, on 4 May 2010. To date, however, both the HRET and SET have yet to amend their old rules of procedures, which are still based on a manual election process.

The delay in the adoption of new rules to govern election complaints in an automated election also delayed the planned trainings for the judges. In

[55] It needs to be emphasized that the implementing guldelines for the conduct of the automated election came out rather late, thereby, delaying also the conceptualization and adoption of the appropriate rules for election complaint.

[56] Under the Philippine Constitution, the Supreme Court supervises the entire court system in the country and it is empowered to promulgate rules that will govern court proceedings. See Const., Art. VIII, sec. 5 (5) (Phil.).

the Libertás-initiated PHILJA training program, the judges' trainings were initially targeted to be implemented in January 2010, but the actual training was pushed back to the second week of April 2010.

Training for Automated Elections

Prior to the actual training, Libertás conducted a Training Needs Analysis (TNA) by distributing a survey questionnaire to approximately 100 second level court judges. The TNA questionnaire sought to determine: (1) the experiences of the judges in handling election cases and the types of complaints they have handled; (2) the judges' general awareness and familiarity with the PCOS automated election system (AES); (3) the seminars/training that the judges have attended on the AES; (4) judges' familiarity with particular subject matters related to the AES; and (5) the judges' need for training on specific matters that would help them efficiently and credibly resolve complaints under the AES.

The results of the survey showed that 74 percent of the judges surveyed had previously handled election cases either as judges, as election practitioners, or in another capacity. Most of the cases handled by these judges pertained to election protests.

While 72 percent of the judges had heard of the PCOS AES, only 10 percent had previously attended a training or seminar on the automated election system. Thus, on a scale of 1 to 5 (1 being the lowest and 5 the highest), the judges rated their understanding of the new election system at 1.78.

Using the same scale, the judges rated their understanding of particular subject matters relating to the AES, as follows:

Subject Matter	Rating
Legal Framework of the PCOS AES	**1.58**
How the PCOS AES Works	**1.52**
Documents under the PCOS AES	**1.50**
Handling Election Protests under the PCOS AES	**1.45**
Rules on Electronic Evidence	**2.39**

The judges strongly expressed the need to be trained on those subject matters, and 94 percent stated that they prefer that their Clerks of Court attend the training as well. From the data culled from the TNA, Libertás drafted a proposed training design and prepared the modules for each session, as follows:

- Session 1: Election Automation Legal Framework
- Session 2: Precinct Count Optical Scan (PCOS), Automated Election System (AES) and Simulation of Voting Day
- Session 3: Handling of Election Contests Under the PCOS AES
- Session 4: Rules on Electronic Evidence
- Session 5: Election Offenses

On 15 April 2010, Libertás presented the proposed training design and curriculum modules to a group of PHILJA lecturers and election law experts. The activity also served as the orientation for the prospective trainers. In addition to a COMELEC overview and demonstration of the PCOS system, the training included a mock election. In the end, the experts substantially adopted the training modules developed by Libertás as the PHILJA module for election law. Ultimately, for scheduling reasons, the judges were clustered into five groups, with each group comprising between 130 to 200 participants, and five batches of seminars were held, covering around 900 regional trial courts judges from all the judicial regions in the country.[57]

Assessment and Evaluation of the Training

While the trainings conducted have given the trial courts basic knowledge on the new AES, it was not enough to adequately prepare them to handle the issues and challenges posed by the new system. In part this was because the Supreme Court had not yet promulgated its rules, instead relying on a draft document.

[57] Training were held as follows: on April 19, 2010 in Cebu City covering judges from Regions 6, 7 and 8; on April 23, 2010 in Baguio City covering judges from Regions 1, 2 and 3; on April 27, 2010 in Davao City covering judges from Regions 9, 10, 11 and 12; on May 3, 2010 in Pasay City covering judges from Regions 4 and 5; and on May 4, 2010 in Pasay City covering judges from the National Capital Region.

There were still many unsettled issues when the trainings were conducted. These included the methods of authenticating contested ballots to be re-examined. Recount procedure questions and voter intent issues were raised, but no definitive policies had yet been adopted. At the time of this writing there are even election protest proceedings that are suspended because certain procedural issues, particularly regarding ballot authentication, have not yet been resolved.

Libertás is presently in the process of evaluating the efficacy of the newly adopted rules and of the trainings conducted for the judges. It has organized post-election round table discussions among judges and election practitioners to elicit their opinions. With the blessings of the Supreme Court, survey questionnaires were distributed to the judges handling election complaints to obtain their own thoughts on the effectiveness of the new rules and of the trainings they attended in relation to the cases they have handled or are still handling. The result of the evaluation will be included in the report to be finalized by Libertás and submitted to IFES, ABA, and PHILJA, as well as to the policy makers, COMELEC, the Supreme Court and the electoral tribunals, in the first quarter of 2011.

Initial feedback gathered from the round table discussions revealed that the judges would have preferred to learn about practical solutions to problems through case studies, rather than lectures. Nevertheless, they appreciated the opportunity to have learned about the basics of the PCOS election process, which they would certainly not have had the opportunity of learning had there been no such PHILJA training (for more information on basic principles of training, see Chapter 3: Complaints Adjudication Training for Election Management Bodies and Political Parties).

The circumstances of the training, along with the fact that the AES was a novelty in the country in 2010, substantially limited the capacity of the training program to anticipate all of the election complaint problems that arose. As mentioned above, policy makers, including COMELEC, did not expect a substantial number of election protests to arise, and therefore did not adequately prepare for them, as they considered the AES to be a panacea for all election problems.

Contrary to this expectation, there were more election protests at COMELEC and HRET under the automated election system than there were in recent elections using the manual election process. At COMELEC, there were 95 election protests filed relative to the 2010 elections, compared with 72 in 2007, 65 in 2004, 65 in 2001, and 101 in 1998. In HRET, there were 40 election protests filed in 2010, compared with 28 in 2007, 16 in 2004, 33 in 2001, 27 in 1998, 27 in 1995, 22 in 1992, and 40 in 1987.

The available data from the Supreme Court's Administrator's Office indicates that policy makers made faulty assumptions about the ease of implementation of the new system. These faulty assumptions, in turn, led policy-makers to de-prioritize preparations for a sound complaints adjudication system.

Conclusion

A. Lessons Learned

The effectiveness of the trainings conducted in the Philippines to prepare judges to handle election protests in an automated election system was substantially limited by the lack of preparation and foresight on the part of the policy makers. It is evident that the problems are more fundamental than just mere issues of training methodology and procedures. Therefore, to improve the system, it is necessary to review these basic problems and address them accordingly.

B. Policy and Practical Considerations

As stated at the outset, understanding the Philippine experience requires knowledge of the unique elections context. However, there are some general principles that can be culled from the Philippine experience that may be useful in other jurisdictions.

- The legal framework that defines the type of election system should likewise consider how complaints can be resolved. It should, at a minimum, contain clear standards on: (1) jurisdiction issues; (2) recount procedures; (3) ballot authentication procedures; (4) voter intent determination issues; (5) the appeals process and availability of judicial review; and (6) the nec-

essary competencies of election complaint adjudicators and arbiters. These standards should incorporate the internationally acknowledged standards for a sound and effective election complaint adjudication system. Moreover, the legal framework should also consider allowing resort to alternative dispute resolution (ADR) methods (for more information on electoral ADR, see Chapter 6: Alternative Dispute Resolution Mechanisms).

- EMBs (or the body that promulgates election regulations) must decide on the kind of system early enough to enable all stakeholders — including voters, candidates, political parties, and adjudicators — sufficient opportunity to become familiar with the system.
- Electoral tribunals should adopt their rules of procedures and the amendments thereto well in advance of elections.
- Training of adjudicators should be a regular activity and should involve interactive and practical exercises. Furthermore, trainers should also be trained to conduct their training beyond mere lectures and must have the capacity and skills to manage their training using other training methodologies. Training needs analyses as well as post-training evaluations should always be required to effect better training preparation.

Finally, regardless of what may be said about the outcome of the training program utilized in the last election in the Philippines, what cannot be denied was the important and vital role played by civil society in the effort. The relevant government institutions, particularly COMELEC and the Supreme Court, adopted a *laissez-faire* approach towards preparations for a complaint adjudication system suited to the newly introduced automated election system. It was the Libertás initiative that provided the impetus to policy makers for them to fast track actions on the matter. It was a demonstration of how far a government-citizen partnership and cooperation can go in implementing successful projects. If only for this, the whole project can be considered a success and serve as a basis and an example for future collaborations.

Recommendation Checklist

Below are important recommendations for practitioners to consider when designing judicial training programs. It is important to note that training projects should always be designed considering the ultimate goal of imparting knowledge to a targeted audience. The aforementioned subjects should be applied uniformly to any strategy or design chosen for the training. As the reader will note, many of the principles included in this checklist are applicable to adult-training programs in general, and are similar to the issues raised in Chapter 3.

Organization and Development

√ **Advance preparation:** Training programs should be developed well in advance of Election Day. Ideally, the programs will be created in tandem with the drafting of new or revised electoral statutes, in order to ensure training is up to date and available promptly after the law is enacted. Poorly thought-out or ad hoc training programs run the risk of failing to provide the judges and arbiters the necessary level of expertise.

√ **Integration:** The training program for judges can be seen as a subset of the training programs for parties and the public discussed in Chapter 3. While "general" and "advanced" training are adequate to familiarize parties and the public with the complaint adjudication process, the expertise required of judges and arbiters demands "specialized" training in addition to that available to other segments of society.

√ **Systematization and efficient use of resources:** In order to maximize potentially limited or restricted resources, it is important to systematize procedures and properly plan activities. A properly organized and repeatable training program or series of programs is ultimately a more efficient use of time and money than poorly planned individual sessions.

√ **Goals:** To avoid the pitfall of setting unattainable objectives, concrete learning objectives should be designed in order to give certainty to participants about the specific themes and subjects they will learn.

√ **Cultural and legal traditions:** In addition to being customized to the specific legal system in question, training should also keep a local focus and take into consideration the country's history, culture, legal traditions and customs. The procedures and goals should also consider whether the training is taking place in an emerging democracy, is part of an ongoing refinement in a consolidated democracy, or is designed to handle "fine tuning" problems in a mature democracy.

√ **Inclusion of partners:** Whether the training is organized internally or externally, including input from partner organizations can assist in covering relevant topics that might otherwise be omitted by an isolated judicial training program. The training examples included in this chapter from TEPJF demonstrate how transnational organizations and representatives from foreign governments can cooperate to create effective programs, while Libertás' experience demonstrates how domestic public-private partnerships can drive the judicial training process.

√ **Understanding the audience:** Training is often restricted to electoral issues only. Highly specialized electoral officials do not necessarily need training on topics directly related to electoral or judicial subjects. Instead, broader issues can offer them a deeper perspective when analyzing specific cases (courses in strategic policy analysis, communication strategies, common law, rational choice and game theory, among others).

Content and Evaluation

√ **Participation:** In order to ensure a proper internalization of the material discussed during the training session, reliance on a series

of lectures should be avoided. Lectures followed by question-and-answer periods or smaller breakout groups are preferable to resolve ambiguities. Even stronger trainings can result from holding most or all of the session in the form of a roundtable discussion, including the judges to be trained in the "lecture" from the beginning.

√ **Transmission of knowledge:** In many cases, participants will lack the "basics" of the subjects that are being taught. Training program design should consider including basics covering a minimum level of knowledge that can prepare participants for more complex issues.

√ **Training materials:** Scheduling might require sessions that are quite short and do not include reviews of the knowledge gained. Therefore, the materials provided to participants should serve as a guide for the courses, as well as a reference for further review at the participants' preferred pace. Manuals should be thorough and useful as a reference after the session. To avoid providing excessive amounts of information, the use of PowerPoint presentations as material support for training should be minimalistic. The design must communicate the content and not become a distraction.

√ **Evaluation:** In order to maintain a high level of quality in an ongoing training program, the trainers should conclude by seeking feedback from the trainees. This can take the form of reaction essays or a simple numeric survey. Regardless of format, the feedback should be used to revise and improve the training program for the next election cycle.

5

APPROACHES TO VOTER EDUCATION AND THE ROLE OF CIVIL SOCIETY

By Catherine Barnes and Grant Kippen

Prior to the Afghan parliamentary elections on 18 September 2005, IFES worked to educate the country's citizens on the fundamentals of democracy through face-to-face workshops throughout Kabul and the central provinces. Using posters, brochures, a radio series and outreach to women, IFES tried to reach as many Afghans as possible.

Introduction

Absent adequate public information efforts to educate election stakeholders and voters about their rights, rules governing political and electoral processes, what constitutes a violation, and the mechanisms and procedures for seeking redress, complaints adjudication systems are likely to be poorly understood, underutilized, or subject to manipulation. In such circumstances, adjudication systems may be vulnerable to politically motivated disinformation, or purposeful misuse of the process to gain an advantage in the "court of public opinion" or to delay the official announcement of results with the intent of raising doubts about the credibility of the electoral process and the legitimacy of its outcome.

As noted in the first chapter of this book, if eligible complainants are unaware of their rights to file a case or of how to do so properly, or if adjudicatory bodies are overwhelmed and undermined by frivolous and vexatious litigation by a select few, then compliance with international standards and best practices will break down regardless of the *prima facie* quality of the system. Yet, public information, training, and voter education programs on complaints adjudication are too often treated — if at all — as afterthoughts by responsible institutions, the international donor community, and implementing organizations.

This chapter elaborates upon some existing efforts to treat voter education on complaints adjudication in a proactive and more thorough manner by official bodies and civil society. The discussion identifies best practices to be replicated, lessons that can be drawn, and pitfalls to be avoided.

Efforts by Official Bodies

A. Overview

Broad participation by voters in the electoral process is an important goal for any democracy. As custodians of the election process, it is extremely important for election management bodies (EMBs) not only to administer the process in a transparent and professional manner, but also to ensure that various stakeholder groups — voters, candidates, political parties,

media, observer groups, and other civil society actors — have the requisite knowledge to fully and properly participate in that process. This responsibility also extends to what may be the most contentious aspect of any electoral contest: complaints adjudication.

The electoral process naturally produces more losers than winners and, thus, such a situation virtually guarantees that there will be complaints over both the manner in which the electoral process was conducted and the final outcome. Few losing candidates seem inclined to believe the inevitable. And, while complaints over election results represent perhaps the most high-profile cases, they are just one source of complaints during the election cycle. Complaints over the eligibility criteria faced by candidates, the conduct of candidates and political parties throughout the campaign period and on Election Day, inclusion or exclusion of voters from the voter registry, and campaign finance issues are also typical sources of complaints.

While election laws usually define with some precision what constitutes an electoral violation, there also needs to be a trusted and transparent process in place for the ultimate resolution of complaints. The approach to complaints adjudication varies considerably among countries and responsibility may rest with the court system, a combination of election commissions and the courts, election commissions only, or separate election adjudication bodies.

Regardless of where the responsibility for electoral complaints adjudication is placed or how it is structured, all of these systems have an obligation to inform election stakeholders of their political and electoral rights, the rules of the game, and how they can seek redress if those rights and/or rules are violated. The proceeding discussion looks at how various types of complaints adjudication systems — whether in fragile states, conflict settings, or established democracies — approach public information and voter education. Case studies include the Election Commission of Pakistan (ECP), the Electoral Complaints Commission (ECC) of the Islamic Republic of Afghanistan, and the Federal Electoral Court of Mexico (TEPJF), which was also discussed in more detail in Chapter 4 of this book.

The experiences of these three countries are distinct:

- In Pakistan, there is a hybrid system of complaint resolution whereby the ECP and the courts have specific responsibilities depending upon the nature of the alleged violation and at what juncture in the process a complaint is filed.
- In Afghanistan, the ECC is a completely independent electoral institution, separate from the Independent Election Commission (IEC). It has the sole mandate to investigate and adjudicate electoral challenges and complaints, although it operates on a temporary basis. The courts play no role in complaints adjudication.
- In Mexico, a separate electoral court is responsible for handling election complaints and has been so successful that it now provides technical assistance — including the design and implementation of communications and outreach strategies — to other electoral tribunals in Latin America.

Each of these models is discussed in greater detail below.

B. The Election Commission of Pakistan

Prior to the 2007 elections, the ECP was confronted with the challenge of improving election complaints adjudication in an environment of extensive public criticism and skepticism on its handling of complaints. Although the ECP tried to ensure that it followed the law, the election adjudication process was often described as confusing, lacking in transparency, and falling short of international standards.

In its attempt to overcome this crisis of confidence, the ECP, with assistance from IFES, undertook several specific initiatives directed at enhancing the knowledge and understanding of the complaints adjudication process among key internal and external stakeholder groups. These groups included candidates, political parties, civil society, observer groups, the media, and voters, as well as ECP officials at headquarters and at the provincial level.

The objective of these efforts was to: increase information, knowledge, and responsibility for filing a valid complaint; and improve transparency

and credibility of complaints adjudication, particularly during the campaign period. To achieve these objectives, the ECP undertook a multi-faceted public information effort, including:

- The development of manuals explaining relevant processes and procedures. The manuals highlighted applicable provisions of the election law and featured simple and straightforward language that would be easily understood by users. Manuals were distributed free of charge to candidates, political parties, election observers, and civil society groups. The ECP provided thousands of hard copies in Urdu, Sindhi, and English and posted the manual on its website.
- The production of public service announcements (PSAs) for radio. The PSAs were directed at a wider audience and played throughout the campaign period. The PSAs were designed to raise awareness of the general electorate about types of electoral offenses and what actions voters could take if they observed irregularities. The PSAs were also intended to overcome public perceptions of bias by demonstrating that the ECP was an independent, professional organization committed to taking a proactive approach to the proper and transparent resolution of complaints.
- Improved use of the ECP website to profile its complaints adjudication work. In addition to making available the tri-lingual complaint manual reference above, the ECP also posted the downloadable, official complaint form. The website also featured timely summaries of the numbers and types of complaints submitted to the ECP. Complainants had the ability to look up the status of their case on the website. This use of the ECP website increased the transparency of the process, while providing a degree of credibility and professionalism that had not existed previously.
- The introduction of information workshops and briefing packages for domestic media. These first-ever information workshops were intended to prepare journalists to provide more accurate and informed coverage of complaints adjudication and to raise the profile of this process among their

> audiences. The feedback and evaluation received from media representatives in reference to the workshops was extremely positive and an analysis of subsequent media coverage of complaints adjudication demonstrated the value and impact of this undertaking.

Overall, the ECP's public information approach was well received by candidates, political parties, media, observer and civil society groups. Through this effort the ECP was able to demonstrate tangible and positive steps toward a more transparent and credible complaints process. The European Union (EU) observer mission made note of this progress, specifically referencing in their final report the ECP's public information efforts vis-à-vis complaints adjudication.

C. The Afghan Electoral Complaints Commission

The ECC is an independent complaints adjudication body established under the Election Law of the Islamic Republic of Afghanistan. Unlike its counterpart, the IEC, the ECC is a temporary electoral institution whose mandate lasts until 30 days after the certification of the final election results by the IEC. For both the 2005 and 2009 elections, the ECC was established very late in the lead-up to the electoral cycle. This left the ECC facing a number of significant operational challenges, including the inability to conduct an adequate and comprehensive public and voter information campaign *prior* to the start of the electoral calendar.

The ECC was first established before the 2005 Parliamentary and Provincial Council elections. As such, there was very little, if any, understanding of its mandate among election stakeholders prior to the start of the campaign. This meant that the ECC faced multiple challenges. First, the ECC had to develop a public information campaign to provide a basic level of information about its role and responsibilities in the process so that all stakeholder groups would have a basic level of confidence in the complaint process. Second, it had to educate those stakeholders about the complaint process so that they could avail themselves of it should they witness an electoral violation. Consequently, the ECC made a concerted effort to reach the broadest possible audience of stakeholders during the brief period of time before the election.

The ECC used a number of media and communications products, including a PSA campaign for radio, print ads in several national newspapers and magazines, and posters. It also communicated its messages through interviews with the media. In addition, the ECC developed its own website, which proved to be an effective tool among elite groups although its broader application was limited by low Internet usage rates in the country.

Based upon its experience in 2005, the ECC, in its final report, acknowledged that its public information efforts had fallen short of what would have been ideal and recommended that in future election cycles, the ECC be established as far in advance of the election campaign as possible to provide for a proper public and voter information campaign.

Unfortunately, the lessons of 2005 were not fully applied in 2009. Once again, the ECC was established very late in the electoral cycle and so lost the opportunity to get a jump-start on a comprehensive public information campaign in advance of the presidential and provincial council elections. Based on the experience gained in the 2005 elections, however, the ECC did manage to develop a much more sophisticated public information campaign and was able to implement it despite a very limited timeframe.

The 2009 public information campaign was comprised of the following components:

- The ECC began with targeted media outreach that included the conduct of regular press conferences and the designation of commissioners to participate in interviews either with the national or the international media. It also assigned a two-person public/media relations team (one national and one international) with the requisite skills and contacts to generate interest in and reporting on ECC related issues. These were essential first steps as the development of the national media (particularly private media) since 2005 had a huge impact on coverage of elections around the country. This positively affected the ECC's efforts to inform the voting population about its role and mandate in the electoral process.

- The ECC developed PSAs both for radio and television and distributed these throughout the country. Due to the late formation of the ECC, however, these aired only after the campaign period had already commenced.
- The Commission also printed brochures and distributed them throughout the country. The brochures were effectively distributed mostly in urban areas due to limited literacy in rural and remote villages.
- In an innovation since 2005, the ECC Commissioners traveled to a number of the provincial/regional centers throughout the country during the 2009 election campaign. Through these visits, the ECC sought to: (1) increase its media profile in local markets (through press conferences and interviews); (2) undertake outreach to Provincial Council candidates to explain the complaints process and how it could be accessed if needed; and (3) to meet with Provincial ECC staff. These visits proved to be a huge success, particularly from a media perspective, and also reinforced the perception that the ECC was an independent, transparent organization committed to treating all complaints in a professional and impartial manner.

Given that an audit and recount process was conducted for the presidential election after Election Day and that serious instances of fraud were uncovered, the public information work of the ECC, particularly the regional visits, played a key role in ensuring that the ECC was perceived as having sufficient credibility and legitimacy among a broad range of election stakeholders. Had the ECC not been able to implement its multi-faceted public information efforts despite the time constraints, it would have been difficult to persuade the electorate and the candidates that the ECC could carry out its work in a nonpartisan, open and competent manner.

D. The Federal Electoral Court of Mexico

Special electoral tribunals have been established in several countries in Latin America with the Electoral Court of the Federal Judiciary in Mexico (*Tribunal Electoral del Poder Judicial de la Federación,* TEPJF) serving not only as a model but also as a source of technical leadership and assistance in the region and beyond. TEPJF is a permanent electoral tribunal separate

from the election management body, with a national headquarters and five regional chambers. It has a comprehensive communications strategy that is based on regular public opinion surveys and addresses both federal elections, held every three years, and local elections, which occur annually.

The components of this strategy include the provision of accurate and understandable information to the mass media and institutional publicity and confidence building directed at the electorate and election stakeholders.

In addition to press announcements, conferences, and briefings for and interviews with the mass media, TEPJF also conducts regular trainings for journalists. In addition, it conveys information via:

- Public service announcements (PSAs) for radio and television;
- A variety of television programs including Different Points of View, where politicians, academics, and journalists discuss public policy and law (*Entre Argumentos*); Debating Decisions, where legal experts analyze judicial decisions (*Sentencias a Debate*); and election specific programming such as Decision 2010, where officials and politicians examine the electoral context;
- The Tribunal's official website[1] where judgments are posted within 24 hours and where summary information is available about the numbers and types of cases, the status of those cases, who is filing complaints or appealing decisions, and who is representing cases;
- New media and social networking sites including Facebook and Twitter; and
- Public sessions transmitted on a public service channel (*Canal Judicial*), similar to C-SPAN, dedicated to judicial processes, and also via the Internet. Sessions of the five regional chambers are also broadcast via the Internet (only).

In addition to these communications mechanisms and products directed at a broad audience, TEPJF also engages in internal communications and information provision directed at legal and administrative person-

[1] Tribunal Electoral del Poder Judicial de la Federación, www.te.gob.mx (last visited January 3, 2011).

nel. Through regular publications at the federal and state level, TEPJF provides updates on political reforms and legal and regulatory modifications as well as legal commentaries and articles on select complaints adjudication themes.

To continually assess awareness and confidence levels and information needs as well as to evaluate the effectiveness and impact of its communications strategy, TEPJF conducts public opinion surveys every quarter.

In light of the sophistication of TEPJF's public information and voter education efforts, the Organization for American States (OAS) has begun to engage it in advising other electoral tribunals and EMBs. TEPJF has provided assistance to Ecuador, Costa Rica, and Peru. It initiates such assistance with a needs diagnostic that takes into account the specific characteristics of the complaints adjudication system. For example, the needs diagnostic determines whether the responsible body is new or pre-existing, temporary or permanent, independent of or a component of the election management body, as well as the information needs of election stakeholders and voters. Based on this assessment, TEPJF then works with its counterpart to design a specially tailored communications strategy and advises on its implementation. This outreach and training work is outlined in more detail in Chapter 4 of this book.

Civil Society Engagement

A. Overview

The beginning of this chapter explored public information and voter education activities by official bodies relating to the resolution of election complaints. Civil society can also play an important role in a variety of areas, for example:

- Assessment and monitoring of the complaints adjudication process;
- Issue advocacy directed at reform of the complaints adjudication process, electoral violations, and the system of penalties;
- Legal education and training activities for judges, attorneys, election officials and staff;

- Voter education on voting rights, the complaints adjudication process, and legal remedies;
- Pro bono legal support to aggrieved voters;
- Preparation of case files in support of election management bodies; and
- Media training on complaints adjudication issues and processes.

This section of the chapter takes a closer look at these approaches by a variety of civil society actors, including professional associations of lawyers and judges, law schools, observer groups, advocacy groups, and other NGOs, whether in cooperation with — or independent of — official bodies.

The Philippines serves as the primary example for the remainder of this chapter because it provides multi-faceted, on-going examples of civil society engagement on complaints adjudication issues and processes that cover many of the approaches outlined above. It also serves to showcase the outcomes that can be achieved through effective cooperation between civil society and official bodies. Its experience during the 2010 presidential election cycle is also of particular value given that civil society has sought to address complaints adjudication within the context of significant electoral reforms aimed at modernization.[2] Specifically, the Lawyers League for Liberty (Libertás) undertook a number of activities to address the ramifications of the new automated election system (AES) for oversight and adjudication.[3] The AES was used on a nationwide basis for the first time during the May 2010 elections.

Various activities in the Philippines are presented below along with some discussion of comparative approaches from other contexts (for a fuller discussion of the complaints adjudication system in the Philippines, see Chapter 4: Cases Studies Related to Training of Arbiters in Election Complaints).

[2] Activities presented in this case study were made possible via sub-grants to Libertás from IFES through its program funded by USAID/Philippines.

[3] For more information on Libertás and its role in the Philippine electoral system, see Chapter 4.

B. Taking a Proactive Approach: The Experience of Libertás in the Philippines

i. Assessment and monitoring of the complaints adjudication process

An essential component of complaints adjudication monitoring — as well as efforts to evaluate the impact of related advocacy efforts, reform initiatives, and capacity building — is the establishment of a baseline. In advance of the 2007 election cycle, Libertás undertook a baseline study of the state of election adjudication in the Philippines. The study was based on 20 years of election experience (1987-2007) for various offices and at different levels. The study involved a review of all relevant laws, processes, and procedures applied to the settling of election complaints. It also employed focus group discussions to gauge factors impacting public perceptions of the credibility of various election adjudication bodies.[4]

The assessment utilized several key indicators, which are detailed in the text box below.

Libertás Election Assessment (1987-2007)
Key indicators

Independence and Impartiality
The study assessed: (a) operational and fiscal independence; (b) composition; (c) manner of selecting and appointing officials; (d) level of exposure to politics; and (e) mechanisms to check the conduct of officials.

Accessibility
Accessibility issues included: (a) the location of hearings or proceedings; and (b) the costs associated with pursuing election complaints

Efficiency
The study took into account (a) rules of procedure; (b) the volume of complaints; (c) the amount of time required to adjudicate complaints; and (d) the number of election related cases resolved prior to the expiration of mandates being contested.

Acceptability and Soundness of Decisions
For example, the study looked at (a) the percentage of complaints appealed; and (b) the win/loss ratio of appeals.

[4] Including trial courts, the Commission on Elections (COMELEC), the House of Representatives Electoral Tribunal (HRET), the Senate Electoral Tribunal (SET), the Presidential Electoral Tribunal (PET), and the Supreme Court.

Transparency of Proceedings and Records
The study considered (a) procedures and practices to provide for the transparency of adjudicative proceedings; and (b) mechanisms to ensure the preservation of records.

Integrity of Evidence
Integrity of evidence included: (a) the rules and procedures to protect the integrity of evidence; and (b) the capacity of adjudicative bodies to identify when evidence has been compromised.

Libertás followed up on the baseline study by carrying out ongoing monitoring of the progress and performance of the Commission on Elections (COMELEC), special election tribunals (House, Senate, and President) and municipal level trial courts and their handling and resolution of election related cases during the 2007 electoral cycle. Libertás posted its assessment studies, reviews, and observation reports on its election adjudication website[5] and distributed copies to election arbiters, policy-makers, and advocacy and watchdog groups. The findings and recommendations presented in these publications also informed subsequent advocacy, legal reform, capacity building, and public information efforts as well as domestic monitoring by other civil society groups.

ii. Legal education and training

Libertás has long served as an education and training resource on election law and election adjudication for judges, election lawyers, election workers, and leading advocacy and watchdog groups on issues relating to voting rights, election law, and the justice system. Beginning in 2009, in cooperation with COMELEC and several prominent law schools, it conducted a series of events dedicated to the theme *The Future of Election Adjudication in an Automated Election System (AES).* Training segments dedicated to the AES included an overview of new processes, procedures, and issues related to automation and a discussion of the types of complaints that might arise under the new system. Experts also shared insights and experience gained as well as lessons drawn from the pilot testing of the AES in the Autonomous Region of Muslim Mindanao (ARMM) and past, unsuccessful attempts at election automation. In addition to their coopera-

[5] Libertás ELECTION ADJUDICATION Project, http://www.libertas-election-adjudication.blogspot.com/ (last visited January 3, 2011).

tion with Libertás on legal education and training, IFES and the American Bar Association (ABA) also partnered with the Philippine Supreme Court's Judicial Academy to train regional court judges on handling election cases under the AES.

iii. Advocacy on the complaints adjudication system, rules and remedies

As a result of the legal education and training activities referenced above and discussions about how to handle complaints stemming from the AES, it became clear that specific adjustments to the rules in the Philippines were required to effectively move forward the election dispute resolution process. It was also evident that new rules of adjudication needed to be crafted and published as soon as possible to create a clear arena for legal challenges and preclude a free-for-all scenario in the post election period that could undermine the credibility of the process and/or the legitimacy of the outcome.

Libertás' attorneys and election experts worked with COMELEC to draft a working paper on *Proposed Interim Rules of Procedure of COMELEC Governing Election Complaints in a PCOS-Automated Election System*. The draft was presented during focus group and roundtable discussions with members and field officers of COMELEC, election tribunals, members of the judiciary, and election lawyers to solicit further input. Separate discussions were also conducted with the Chief Justice of the Supreme Court and the Joint Congressional Oversight Committee on the Automation of Elections. These discussions also featured experts from IFES and the ABA who stressed that both in manual and automated election systems, the standards of rule of law, such as due process, equal protection, and fairness, should be of primary consideration. They also emphasized the importance of voter education and the watchdog's role in monitoring the election and preventing fraud at various stages of the automated election process that could potentially lead to election complaints.

On the basis of these discussions, Libertás revised the working paper and resubmitted it to COMELEC. Ultimately the Commission en banc adopted it as the working draft in the preparation of its *General Instructions on the Adjudication of Election Complaints*. The final product is

Resolution No. 8804 *COMELEC Rules of Procedure on Complaints in an Automated Election System in Connection with the May 10, 2010 elections*, which incorporated the majority of recommendations presented in the working paper.

iv. Public information and voter education

To facilitate better understanding of voting rights and the right to redress, Libertás prepared a manual on voting rights and remedies entitled *A Quick Guide on Your Right to Vote*. The manual focused specifically on the voter registration process and on legal processes and remedies that could be used to enforce or challenge the right to vote. It included guidance on inclusion and exclusion proceedings related to the voter registry and how to challenge decisions of the Election Registration Board (ERD). The manual was presented in a user-friendly question and answer format that addressed such questions as:

- Are there legal remedies available to applicants who disagree with the finding of the ERB on their application?
- Why do municipal courts have jurisdiction over these proceedings and not the election commission?
- What rules govern petitions for inclusion and exclusion?
- Who can file a petition?
- What are the steps I should take if I want to file a petition?
- How long should the court take to make my decision?
- What happens if my petition is approved?
- What can I do if my petition is denied?
- Can the decision of the court be appealed?

In addition to the provision of answers and step-by-step instructions, the manual also provided flow charts of the petitions and appeals processes and all necessary forms to be completed by complainants.

The manual was distributed through the COMELEC and civil society partners and on-line via Libertás' election adjudication website. As part of its voter education activities, Libertás also published two other manuals entitled the "Primer on Disqualification of Electoral Candidates" and the "Primer on Pre-Proclamation Controversy and Election Protests" that are avail-

able on their website.[6] The website was created to highlight the activities, findings, and results of the Election Adjudication Reform Project and grew to include information and reference materials outlining and explaining the various election courts, news coverage featuring election cases, and the basic laws and rules of procedures governing different adjudication bodies.

C. Other Approaches

i. Legal support services

In Ukraine, during the 2004 presidential election cycle, the ABA Central European and Eurasian Law Initiative (CEELI) facilitated the establishment of student legal clinics that provided pro bono legal services to voters filing complaints with the courts or territorial election commissions (TECs). Many of these cases dealt with voter registration problems that occurred during the three rounds of voting. It also assisted voters through a network of election advocacy centers affiliated with leading NGOs including the Committee of Voters of Ukraine. NGOs in the network came to the aid of voters, election commissioners, and candidate representatives and several groups were involved in high level court cases.

In addition to legal advice and assistance provided through the clinics and a number of advocacy NGOs, CEELI also established a toll-free hotline that responded to citizen inquiries, many of them election related. The hotlines dealt with a range of violations related to absentee voting, voter registration and quality of the Voters' List (VL), the work of election commissions, appeals of decisions by polling boards, the removal of election commissioners, involvement of the military in the voting process, vote-buying, coercion by employers, multiple-voting, and destruction or disappearance of election materials.

Given the problems with voter registration during the 2004 elections, CEELI, in cooperation with the OSCE, facilitated same-day corrections to the VL by staffing the courts and TECs with lawyers, student clinicians, and NGO activists, in order to assist voters who were having difficulties resolving discrepancies. Everyone providing assistance was trained and given reference materials approved by the Central Election Commission.

[6] *Id.*

Through these various interventions, tens of thousands of aggrieved voters received assistance.

Conclusion

The intent of this chapter was to address the importance of public information and voter education to the electoral complaints adjudication process. Voter education and public information approaches used by various EMBs, complaint adjudication bodies, and civil society groups in several different countries were highlighted for illustrative and comparative purposes. It bears noting that public information, voter education, and civil society activities specifically directed at EDR appear to be less common, less proactive, and relatively under-resourced when compared to other electoral activities and forms of democracy assistance, such as those directed at election administration, get-out-the-vote campaigns, general voter education, and domestic monitoring.[7] Too often, a full appreciation of the need for greater public information and voter education on EDR comes only once election results are cast into doubt and a smooth, swift, or peaceful transition of power is in jeopardy. To better ensure legitimate electoral outcomes and effective transitions of power as well as to meet the letter and intent of international standards addressed through legal or procedural reforms, efforts in support of EDR — including adequate public information, training, and voter education — should be incorporated and integrated into broader technical election assistance programs from the outset.

A. Lessons Learned

While each election and the context in which it takes place have unique implications for public information needs and challenges, it is possible to develop a basic set of lessons learned and issues for consideration from which other providers in the field could benefit when developing their own strategies and plans. These lessons include, but are not limited to:

- The legal and technical aspects of EDR often overshadow the importance of ensuring a proper public information and voter

[7] The exceptions to this tend to be in countries with special electoral tribunals or complaints commissions, e.g. in Latin America, or in conflict settings/failed states where election complaints and the manner in which they are adjudicated and resolved may serve as a trigger for violence. In these cases, significant resources have been directed at voter education on EDR.

education campaign about the complaints process. These aspects are not mutually exclusive and, in fact, complement one another, particularly with respect to transparency.

- The provision of relevant and timely information presented in simple and straight-forward language and in user-friendly formats is key to ensuring that the EDR process functions in an orderly and efficient manner in keeping with legal requirements as well as international standards and democratic norms.
- A primary goal of the public information strategy and related training and voter education efforts should be to ensure that all stakeholder groups and voters have sufficient awareness and knowledge to understand their rights and participate in the process. Such an approach greatly increases transparency, which in turn contributes to greater public trust and confidence in the system.
- It is important to establish a qualified public/media relations team or office within responsible institutions, designating who should speak on EDR issues and to what audiences. The development of clear messaging is also extremely useful in guaranteeing consistent and effective communication from the public/media relations team.
- Delays in initiating public information and voter education on EDR until after the election campaign period has begun likely means that stakeholders will not have the information that they need to understand and utilize EDR mechanisms and processes for complaints arising early in the campaign period. This may also result in voters not acquiring an adequate level of awareness and knowledge by the time complaints arise on Election Day or after the release of results.
- Advance planning and proper resourcing are essential. Some activities (including training) that may be done on a cascade basis, as well as direct contact programs, are resource intensive and require longer development cycles for operational and logistical reasons.
- Communications strategies and implementation plans based on concrete information as collected during diagnostics/assessments and specially tailored and targeted to the specific needs of various stakeholder groups and the electorate (or

Policy and Practical Considerations for Public Information Campaigns				
Programming Context	Assistance Needs/Options			
	Assessment of EDR Information Needs/ Capacities	Advocacy on EDR Reform (legal, structural, procedural)	Build Communications Capacity of EDR Bodies	Training of Judges/ Arbiters
Election is occurring in a post-conflict setting or failed state where election complaints could be a trigger for violence.	√		√	
Electorate is highly polarized where a close election is expected and the final result may be determined by the courts.			√	
There are concerns that the loser(s) will not concede and will use excessive and vexatious litigation to delay the finalization of results.			√	
There a crisis of confidence in the fairness of the EDR process and/or the neutrality/independence of the arbiters.	√	√	√	√
There is a history of fraudulent elections or biased election complaints adjudication.		√		√
Voting rights have been expanded to include previously disenfranchised segments of the population.	√			√
There are access to justice/equity before the law issues that could undermine the legitimacy of the EDR process.	√	√	√	√
There have been major changes to the election law/ electoral process that might lead to new types of complaints or challenges.	√		√	√
The EDR system itself has been recently reformed, e.g. new mechanisms, rules, or procedures or changes to violations/penalties.	√		√	√
A special election complaints commission or electoral tribunal has been recently created.	√		√	√
Judges, Election Commission members, lawyers, and/ or investigators are ill-informed of election law(s) and applicable criminal/administrative codes.	√		√	√
Election stakeholders have little or no understanding of their rights to receive legal/administrative remedy or how the process works.	√		√	
Arbiters of election complaints have a mandate to conduct voter education on EDR.	√		√	
Arbiters of election complaints lack the resources/ capacity to dedicate to voter education on EDR.	√		√	
Election observers have the right to monitor the EDR phase of the process and receive information.				
There is a bar association or lawyer's group that could provide legal support to aggrieved voters or other legal education or legal services.				
There are civil society partners that are qualified to conduct EDR advocacy, voter education, or oversight.	√	√		
The mass media has failed to cover EDR processes and outcomes in an accurate and neutral manner.				
The media sector (including private media) has greatly expanded since the last election with ramifications for coverage of EDR.				

Assistance Needs/Options							
Training of Election Officials/Staff on EDR	Training for Campaign/ Party Attorneys	Training/Briefings for Media	Legal Support Services	Official Public Information/ Voter Education Programs	Civil Society Voter Education Programs	Training for Observers on EDR Issues	Oversight/Monitoring of EDR Process
	√	√		√			√
	√	√		√			√
	√	√					√
√							√
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		√					

segments thereof) increase the effectiveness and impact of public information and voter education efforts.

- Multi-faceted public information programs that utilize various communications outlets and products, engage a range of actors and user groups, and that leverage other election activities and programs contribute to getting the message out to as broad an audience of stakeholders and voters as possible. Repeating messages and reinforcing them through multiple sources aids in retention and application.
- With respect to civil society partners and voter education on EDR, it is essential to involve the right mix of creative and legal/technical talent. Communications firms and education-oriented NGOs have been instrumental in crafting messages that are understandable to the general electorate. The involvement of lawyers' associations or law-oriented NGOs has provided a comprehensive understanding of the election law and all relevant provisions of the criminal and administrative code and judicial procedure. This expertise contributes to accurate and relevant guidance and can help to facilitate constructive cooperation with the courts, EMBs, or complaints commissions.
- Monitoring and evaluation of all public information initiatives is central to determining the effectiveness and impact of such efforts and to refining them in subsequent elections. Providing for two-way communication allows for the collection of feedback and the application of lessons learned about steps that should be taken to improve the process for the next election cycle.
- Placing responsibility on all election stakeholders is also very important as they need to recognize that their statements and actions have an impact on the credibility of the electoral process — including EDR — and the legitimacy of election outcomes.

Where efforts are made to improve the knowledge, transparency and awareness of the EDR process, there is less opportunity for elections stakeholders, particularly losing parties or candidates, to claim that the process was flawed or manipulated.

B. Policy and Practical Considerations

Prior to the development of a strategy and implementation plan for EDR activities, some consideration should be given to the programming context and assistance needs and options when dealing with public information, voter education, and civil society engagement. Several policy and practical considerations are presented in the table on the previous pages.

Ideally, a thorough diagnostic/assessment should be undertaken to develop a strategy and implementation plan that is best tailored to specific characteristics of the EDR system, the capacities of various actors, and the information needs of the full range of election stakeholders and voters.

Recommendation Checklist

While there is no "one size fits all" approach to conducting voter education on complaints adjudication systems, there are certain fundamentals that practitioners can apply when developing public information and voter education strategies. These fundamentals are universal in their importance and applicability across strategies. The following checklist includes the main fundamentals that should be considered by practitioners:

√ **Communications strategy:** The communications strategy should include both public information and voter education, and an implementation plan is an essential component of any electoral complaints adjudication process. Practitioners should ensure that they take the time to properly develop the strategy and implementation plan, and then identify the resources (people, money, and timelines) needed to implement the plan. Regular communication with stakeholder groups is an important component to building trust and ensuring that the process is a transparent one. Practitioners should ensure that their approach reinforces the messages throughout all stages of the electoral cycle, not just once or twice.

√ **Needs assessment:** Both the strategy and implementation plan should be tailored to the specific characteristics of the EDR system

in a given country and reflect the information needs of key election stakeholders and the electorate. Ideally, the plan should be based on a needs assessment.

√ **Information provision:** Bodies responsible for EDR should take a proactive approach to information provision vis-à-vis voter education requirements. For example, the timely posting of complaint-related information and updates on the status and resolution of cases on the adjudicatory body's website is helpful. Pertinent procedure manuals, talking points, and other guidance should also be posted for on-line viewing or downloading.

√ **Stakeholder input:** When developing the plan, practitioners should look for opportunities to leverage the work of other groups, such as lawyers' associations, election observers and party agents, campaign attorneys, academics, and the mass media.

√ **Timing:** Start early (well in advance of the start of the election campaign) to ensure that the informational needs of all stakeholder groups are fully considered and to anticipate complaints that may happen early in the process, such as those pertaining to constituency delimitation, candidate registration, voter registration, campaign financing, and campaign activities.

√ **Campaign style:** Public information and voter education campaigns should be developed from a user perspective. The strategy and implementation plan should utilize a full spectrum of communications mediums, products, and activities. Messages should be simplified into discrete and easily understandable information bites.

√ **Monitoring and evaluation:** Feedback and monitoring and evaluation are essential to determining the effectiveness of messaging and various communication channels relative to each target audience including key stakeholders and the electorate at large. Similarly, these evaluations will allow for the application of les-

sons learned to future public information and voter education programs. Focus groups and public opinion polling are of particular use in this regard.

√ **Building partnerships:** The responsibility for a credible and transparent complaints adjudication process rests with all the partners, not just the complaint adjudication body. Cooperation between official institutions and civil society and mutually reinforcing public information and voter education efforts are likely to yield the best results.

6

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

By David Kovick and John Hardin Young

Voters wait in line at the polls in the Kibera neighborhood of Nairobi, Kenya on 27 December 2007. Kibera was the scene of some of the worst violence following the announcement of election results.

Introduction

This chapter discusses the potential role and use of Alternative Dispute Resolution (ADR) mechanisms as part of a complaints adjudication framework. Specifically, it describes different ADR mechanisms common in civil law systems, and explores the ways in which ADR can supplement formal electoral complaints adjudication mechanisms. This is followed by several examples of actual electoral ADR mechanisms in use in different countries.

In brief, ADR refers to any method that parties to a dispute might use to reach an agreement, short of formal adjudication through the courts. This can include both formal administrative law systems, in which regulatory agencies establish special rules and procedures for resolving disputes and complaints, and case-specific, ad hoc processes of negotiation and mediation, in which parties seek to reach voluntary agreements to resolve their disputes, often with the assistance of an impartial third party.

Using ADR to resolve election complaints is something of a novelty in much of the world. In large part, this is because ADR mechanisms are usually seen as a method for potential litigants to reach a mutually acceptable (or "close enough to correct") settlement, instead of the more rigid all-or-nothing results common in court. Elections, on the other hand, should have definite winners and losers in order to serve as a source of public confidence in the legitimacy of the resulting government. These objectives can be difficult to reconcile, but as this chapter will demonstrate, there are circumstances when introducing ADR into the election complaint system can be both appropriate and effective. The key task for the practitioner is to ensure that the ADR system supports the realization of the seven international standards for complaints adjudication proposed in the first chapter of this guide.

Various contextual factors will be key to determining whether ADR mechanisms are appropriate for a given country and situation. The analyses and case studies in this chapter will allow technical assistance providers to evaluate the appropriateness of the system for the country in which they work, and to determine what should be included in the design of an effective system.

A. Overview

The election complaints adjudication field is not new. Election recounts and contests, as well as adjudication concerning participation and voting rights, have a long history in the development of democratic institutions.[1] While the development of rights to universal suffrage and to participate in the electoral process are guaranteed by international conventions,[2] the enforcement of these rights is the responsibility of each individual state,[3] which can, where appropriate and consistent with national and international norms, implement alternative avenues to judicial resolution.

State application of the processes to resolve disputes are as varied as the legal and political systems within those states. Despite this variety of approaches, several common features appear. Primarily, most complaints adjudication systems invoke a loosely defined concept of the "rule of law," which attempts to provide "predictable rules, derived from established principles for determining election outcomes."[4] Other standards used to implement complaints adjudication include: the establishment of rules prior to the election event and the predictability of their application; transparency and openness of the process; timely resolution of complaints by an impartial arbiter; and the creation of enforceable remedies as an outcome of the process.[5] These standards, and others, are outlined in greater detail in Chapter 1: International Standards.

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1 *See, e.g.*, International Election Principles: Democracy and the Rule of Law (John Hardin Young ed., 2009) [hereinafter IEP].

2 *See generally* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR], *available at* http://www.un.org/en/documents/udhr/; International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 25, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1996) [hereinafter ICCPR], *available at* http://www2.ohchr.org/english/law/ccpr.htm.

3 ICCPR, *supra* note 2, arts. 2(2) & (3); Vienna Convention on the Law of Treaties art. 26, *entered into force* Jan 27, 1980, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"); see Benjamin E. Griffith & Michael S. Carr, Effective, Timely, Appropriate, and Enforceable Remedies, in IEP, *supra* note 1, 374-381. See also UN Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

4 John Hardin Young, *Recounts, in* IEP, *supra* note 1, 285 & nn. 6-9.

5 UDHR, supra note 2, art. 10 (right to a "fair and public hearing'); ICCPR, supra note 2, art. 2.3 (access to an impartial tribunal). UDHR, supra note 2, art. 8. The ICCPR and the Universal Declaration of Human Rights require that in order to ensure "genuine election[s]," the processes of election recounts must include transparency and timely resolution by impartial arbiters who provIde effective and enforceable remedies.

Formal complaints adjudication is closely tied to the rule of law. It is most appropriate in countries with relatively high levels of formal education and literacy, and where there is a relatively long tradition of separation of powers between the judiciary, legislature and executive. The system's effectiveness relies on the public's perception of the judiciary as an instrument of regulation in civil and criminal affairs that any citizen can access without fear. Historically, complaints adjudication works best in "complete democracies" such as in Western Europe, North America, Australia and New Zealand, in stable democracies like Brazil, India, Mexico and parts of Eastern Europe, and certain African countries including South Africa, Mauritius, and Botswana.

The situation is different when it comes to post-conflict states, fragile or "new" democracies, and "non-democratic" countries where any court evokes in the mind of ordinary citizen fears or memories of unjust imprisonment, torture, bribery and corruption. The legacy of decades of tyranny, dictatorship, absence of the rule of law, abuse of human rights, and war can lead to a fundamental mistrust of the legal system by citizens. In these situations, the judiciary is weak and perceived as not being independent. Furthermore, the potentially high cost of legal actions often makes them prohibitive to most citizens. Not only is the judiciary perceived as repressive, it often lacks the necessary structure, skills and means to administer justice across the country in response to citizens' needs and demands.

Given the potential for election-related violence and other challenges confronting countries emerging from conflict or in transition, alternative mechanisms for resolving election conflict need to be considered. ADR mechanisms can create opportunities for stakeholders to engage in the electoral process when they would be excluded by a traditional complaints adjudication model. Though complaints adjudication is vital to promote the rule of law, it may be more crucial for post-conflict and fragile states to focus on resolving disputed elections quickly and fairly in order to defuse potentially dangerous situations.

The United Nations Human Rights Committee asserts that principles of non-discrimination and equality require equal access to the courts.[6] As

[6] General Comment No. 32 ¶¶ 8 & 9; ICCPR, *supra* note 2, art. 14.

highlighted below in documents such as General Comment No. 32, the Human Rights Committee interprets this right to mean that everyone is entitled to access to a competent, impartial and independent tribunal at some point in the process.[7] This statement does not, however, mean that ADR methods do not foster the just and efficient resolution of disputes. While many ADR processes, or even the decisions of election management bodies (EMBs), may not meet the criteria of General Comment No. 32, or the requirements of a "competent, independent and impartial tribunal" under article 14 of the ICCPR, most ADR processes are intended to avoid conflict through means agreed to by the parties. Where fundamental rights are involved, ADR processes may be helpful in avoiding actual conflict, as long as disappointed parties who do not reach agreement have a right to seek judicial resolution to address fundamental rights issues.

United Nations Human Rights Committee
General Comment No. 32

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights….

B. ADR Mechanisms as a Complement to Formal Complaints Adjudication Mechanisms

While formal, national judicial or administrative systems can and should remain the primary avenue for resolving election complaints and disputes, ADR approaches can play a key complementary role in enhancing the legitimacy of the electoral process.

For instance, what if in a transitional context, the legitimacy of state institutions is still in question, or those institutions are weak and ineffective? What if the national judicial system is perceived as biased or corrupt, particularly in favor of one of the contending political parties? What if the majority of disputes are happening at the local level, while access to the courts is centralized in

[7] General Comment No. 32 ¶ 18.

national or provincial capitals? What if the courts take weeks, months or longer to bring cases to a point of decision, where elections may require more expeditious timeframes? What if the remedy really required in a given case is not something the court has the authority to grant, because it requires reciprocal commitments from two parties? What if an election system sought ways to prevent, rather than simply to resolve, election complaints — before they arose?

In each of these instances, the formal judicial or administrative system may be challenged to provide the full range of dispute resolution functions required by the standards identified above. ADR approaches can be specifically designed for such electoral contexts to help fill the gaps and enhance the credibility of elections (requirements of such an ADR approach will be outlined below.) While this is also true in more mature legal contexts, it is particularly relevant in developing democracies, where full stakeholder commitment to the rule of law through state institutions is still developing.

C. When and Where is ADR Appropriate?

As the discussion below will highlight, there are several threshold questions that can point to whether and how ADR might be useful and appropriate in a given election context. Importantly, however, we note that it is often less a question of *whether* ADR might be appropriate, and more importantly a *question of design*. Each ADR system functions within a national electoral context with its own specific design elements, including scope of the ADR mechanism, who has standing to bring claims, the transparency of decisions taken or made, and importantly, whether right to formal judicial appeal is included. ADR can be used in almost any context, to address almost any question, if it is designed appropriately. At the same time, getting the design wrong could make ADR entirely inappropriate.

Some of the important threshold questions for consideration when determining the feasibility of an ADR mechanism include:

- **Are fundamental rights, which are guaranteed under international law, implicated?** If so, ADR may not be appropriate unless the ADR approach is a voluntary one in which

parties retain full control over the outcome and judicial appeal is available.

- **Is a binding legal precedent desired?** Does the dispute in question raise issues for which, as a matter of public policy, a clear and unambiguous statement of legal interpretation is required? If so, ADR may not be appropriate.

- **Can the court system provide a timely, credible decision on questions raised during the electoral process?** Are the courts perceived by society at-large as credible actors? Can the court process produce efficient, appropriate results? Are the courts accessible to the majority of electoral stakeholders? If not, then ADR might help to enhance the credibility of the electoral process.

- **Can the parties affected by the outcome be represented effectively in an ADR process?** While courts have an obligation to look at the broader public impact of individual decisions, ADR approaches may not. If resolution to a specific dispute might have broad public implications, but not all affected parties can be represented effectively, it may be more appropriate to allow the courts to address the claim.

- **Is enforcement or implementation of decisions a question in this context?** If implementation or enforcement of decisions is at question, ADR mechanisms (correctly designed) could help to encourage greater self-enforcement by parties, through voluntary commitments.

- **Is there an existing tradition or institution of negotiation and mediation outside of the legal institutions?** In countries with no meaningful history of ADR, implementing such a system in a situation as controversial as elections could result in too much resistance to be effective.[8]

[8] Examples of existing institutions include the Grande Médiature in France and the Office of the Ombudsman in many African countries.

- **Is the overall current social and political environment tense or quiet?** A country in conflict might have difficulty implementing radical changes like a new ADR system, while a peaceful country might not need an ADR mechanism at all.

- **Are there trusted state or non-state parties who can carry out the ADR?** Given the mistrust of the judiciary that plagues many post-conflict states, a lack of well-respected persons to staff the ADR body can prove just as disastrous as trying to get the public to trust the courts in the first place.

The process of determining the suitability of electoral ADR in a given context is not an exact science, and the decision to implement such a system must take into account the cultural and political realities in a country to a degree not required by traditional complaints adjudication systems. Assuming ADR is deemed suitable, it is then necessary to determine what method of ADR is the best fit for that country's electoral needs.

Alternative Dispute Resolution in the Elections Context

A. Approaches to Alternative Dispute Resolution

ADR refers to a range of approaches — from negotiation, to mediation, to fact-finding mechanisms, to semi-private decision-making forums such as binding arbitration — that are intended to help parties reach agreements. They supplement and enhance a country's formal judicial processes, by providing an alternative avenue for parties to resolve their disputes.

As was discussed at the beginning of this chapter, ADR refers to all extra-judicial mechanisms used to resolve disputes and complaints. It is therefore important to differentiate among a range of ADR approaches that are used in different contexts. In a broad sense, ADR programs can be differentiated by the basis upon which claims are brought and resolved, and who retains decision-making power in the determination of those claims.

For example, one type of ADR approach focuses on the *determination of rights*, much like the formal court system:

- In *formal arbitration processes*, parties consent to the binding authority of a neutral third party, who will play the role of fact-finder and adjudicator, essentially as a privately-selected judge. Like the court process, the primary question before the decision-maker is which party, as a matter of right or law, is entitled to have a certain position fulfilled. In such cases, parties often waive rights to adjudication through the courts, although appeal through the courts may be maintained.[9] The primary advantage of this type of approach is efficiency: parties can apply evidence and decision rules similar to court processes, but avoid the delays that often accompany judicial decision-making.
- In *non-binding arbitration*, parties are not required to adhere to the ruling. The purpose of non-binding arbitration is to help the parties make more informed decisions about whether and how to proceed with their claims — either through settlement discussions or continuing along a path of judicial determination — by understanding how their case is likely to result. Parties are still free to pursue their claims, but they do so with the additional knowledge of how a third party might be likely to rule on their claims.

A second set of ADR approaches focus on *fact-finding processes*:

- In *fact-finding*, the parties to a dispute may appoint an impartial third party — sometimes an expert — simply to make determinations on factual questions involved in a case, without asking the third party to provide any opinion on who is right, how a dispute should be resolved, or the possible outcomes. Resolving questions of fact can help to expedite judicial proceedings, by reducing the case to a determination of legal right or remedy, and by helping the parties to understand the relative strengths and weaknesses of their cases.

[9] ICCPR, supra note 2, art. 14, § 5; General Comment No.32, ¶¶ 47- 50. International human rights conventions all recognize, implicitly or explicitly, the fundamental value of an appeal mechanism. Article 14 § 5 of the ICCPR provIdes for such a right in criminal matters and the Human Rights Committee underlined that the guarantee for an appeal is not confined only to the most serious offenses.

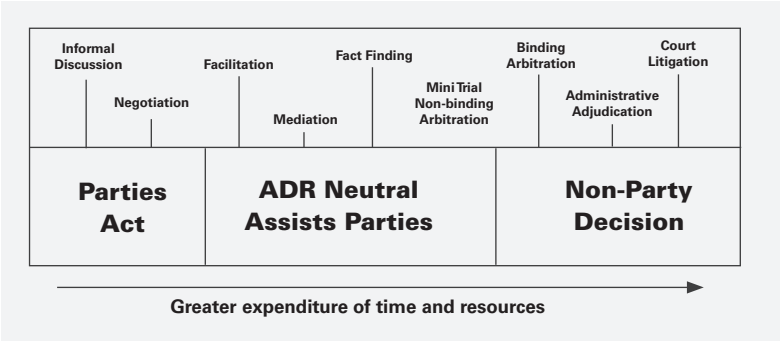
A third set of ADR mechanisms focuses on *interest-based approaches*, in which the process works to achieve the underlying needs of each of the parties, regardless of the entitlements derived from specific rights or as a matter of law. The goal of such processes is to seek outcomes that work better for all concerned parties than their perceived alternatives:

- In *interest-based negotiation*, parties seek to reach voluntary agreements through reciprocal commitments, by focusing on what each party cares most about. These approaches often lead to greater commitment to implementation because the parties have willingly undertaken commitments in exchange for, and in addition to, having their needs met. These approaches can allow parties to broaden the scope of issues, enabling them to address the critical issues that may be at the root of disputes or complaints, even if those issues do not raise a credible legal claim.
- In *mediation*, an impartial third party assists the disputing parties to reach a voluntary resolution; however, unlike arbitration, the disputants retain full decision-making control, and any decision reached is only by the consent of the parties. The mediators use facilitation and problem-solving skills to help the disputing parties better understand the key interests of each party and undertake joint problem solving. In other instances, the mediator acts as a positive force for settlement, encouraging the parties to narrow their differences and reach agreement. Some negotiations may also include an impartial third party called a *neutral* who serves to facilitate communication and keep the negotiators focused without taking as active a role as a full mediator.
- In *consensus building*, several parties come together to reach a joint decision or to take joint action on a set of pre-defined issues. Often, there are more parties involved, a greater number of issues, and a higher degree of complexity to those issues. In regulatory negotiations, for instance, administrative bodies often undertake consensus building processes as a way to bring all relevant stakeholders together in the process of developing administrative regulations. Through a structured

approach, the process seeks consensus-based regulations that have greater degrees of buy-in from all relevant stakeholders and are therefore subjected to fewer judicial challenges.

- In *conciliation* (or *good offices*), a neutral third party with some convening power over the parties is used to help broker dialogue among the disputants.

The following chart presents another way of visualizing how ADR relates to traditional adjudicatory methods. ADR methods are arrayed on a continuum of the time and resources necessary for resolving the dispute, with methods becoming more involved as the chart proceeds from left to right. As the investment of time and resources increases, the power of the parties in the process decreases, from the parties reaching their own decision to having a decision imposed by an outside authority.



B. Institutionalizing Dispute Management Systems

Regardless of the purpose of the ADR approach, and whether it is rights-based, fact-finding or interest-based, a dispute system can be designed to identify, prevent and manage potential disputes. In the elections context, this might mean a dispute management program, meeting under the auspices of an NGO or the election management institution, which brings together key stakeholders in a regular forum to facilitate communication and problem-solving. Alternatively, it might mean a code of conduct among political candidates or parties, with structures in place to facilitate communication and resolve disputes that may arise in the implementation of election rules and regulations.

C. The Appropriate Scope for ADR in Elections Context

In the global elections arena, there has been only limited experience by national election institutions with the formal inclusion of ADR approaches. However, such approaches are increasingly being integrated into national electoral frameworks. In particular, this is occurring in transitional contexts, where the legitimacy of national institutions may be in question, or access to those institutions across a country may provide challenges. As such approaches become more common, it becomes that much more important to identify some boundaries of appropriate scope for ADR in elections contexts.

For instance, it may be inappropriate to use ADR where fundamental rights, established in international and state law, are in question. These might include:

- The right to political association;[10]
- The right to peaceful assembly,[11] and to move freely to campaign;[12]
- The right to be free from coercion or threats of violence during the political process;[13]
- The right to the freedom of expression;[14]
- The universal right to vote and to be elected at genuine periodic elections; and[15]
- The right to have access to public service.[16]

Many of these rights must be guaranteed by judicial intervention. It would therefore be inappropriate to require that issues implicating these rights be resolved through ADR, if judicial appeal were not guaranteed as part of the ADR approach.

However, while these rights themselves cannot be negotiated away, the implementation of these rights must indeed be negotiated by parties to an election, which may be a suitable subject for ADR mechanisms. For

[10] UDHR, *supra* note 2, art. 20; ICCPR, *supra* note 2, art. 21.
[11] UDHR, *supra* note 2, art. 20; ICCPR, *supra* note 2, art. 22.
[12] UDHR, *supra* note 2, art. 13; ICCPR, *supra* note 2, art. 12.
[13] UDHR, *supra* note 2, arts. 3, 7 & 21(1); ICCPR, *supra* note 2, arts. 9, 17 & 25.
[14] UDHR, *supra* note 2, arts. 19 & 21; ICCPR, *supra* note 2, arts. 19 & 25
[15] ICCPR, *supra* note 2, art. 25(2).
[16] ICCPR, *supra* note 2, art. 25(3).

instance, political parties may through a negotiated code of conduct agree to voluntary limitations on their right to assemble or campaign. For example, at one time, parties in the Democratic Republic of the Congo (DRC) actively prevented citizens from attending meetings of their opposing parties. Mediators helped arrange an agreement among the parties to allow people to attend the rally or rallies of their choice and to guarantee safe passage for supporters of opposing parties. Similarly, in South Africa in 1999, mediators were able to get opposing groups to agree that their supporters would not interfere with the campaign efforts of other parties. In countries lacking healthy democratic institutions (e.g., in Swaziland, where political parties are not recognized and cannot be formed) there would be no place for ADR or other forms of extrajudicial dispute resolution, but if there is a move to a democratic society, ADR may be an effective mechanism to avoid conflict, clashes, and intimidation.

ADR may be appropriate for many facets of the electoral process in which there is a possibility of a dispute, the law is unsettled or leaves the matter to an EMB or to governmental discretion, and there is the need for a quick decision that will be agreeable to the parties. Potential uses for ADR include the following situations/issues:

- The recognition of the right of political parties and candidates to stand for election where there is a need for interested parties to come to agreement and the law is not well settled;
- The resolution by interest groups as to barriers to voter registration including registration processes, maintenance of lists, voter verification, suspension, reinstatement in a timely manner without unnecessary administrative or judicial burdens;
- The determination on the use of absentee ballots, if they are to be used, as well as the procedures for issuance and counting;
- The setting of early voting and remote voting rules;
- The agreement on certain rules on the conduct of the election itself, including the resolution of disputes on how officials are trained and qualified, and how poll workers are qualified and used;
- The resolution at the polls of individual issues, particularly regarding a voter's qualification to vote in that particular jurisdic-

tion for an election (these polling place resolutions should be subject to judicial review);

- Questions about ballots, ballots design, machinery, pre-vote verification, the observation of that process so that it is transparent, ballot collection, computerized and other mechanical voting systems, ballot audits, physical security, and the availability of election day remedies; and
- The settlement of procedures for recounts, what standards will be used to determine the availability of recounts, and the methods to be used to assure that the vote is representative of the vote cast on Election Day and is not manipulated by any government official, political entity or candidate.

Establishing ADR Procedures in Election Processes: Tools for Implementation

A. Appropriate Goals for ADR

A threshold question in designing any ADR system — whether it is in the realm of election complaints adjudication, or any other sector — is to determine what goal(s) the ADR processes are intended to serve. Or, said differently, what problem or shortcoming in existing dispute resolution processes would an ADR system seek to address?

In election complaints adjudication, the traditional path for resolution of disputes often involves the country's formal legal adjudication system, generally the courts. ADR processes could be used to achieve a number of different goals, which might not be as well-served by the court system, for any number of reasons. For instance:

- **More timely resolution:** ADR processes could promote more timely resolution of potential electoral complaints, as complaints or issues arise, if the court system is perceived as slow or cumbersome.
- **Greater local access:** ADR mechanisms could be designed for the purpose of providing greater local access or for complaints arising in the field and at polling stations, where relevant parties are available for investigation and resolution.

- **Dialogue and reciprocal commitments:** Alternatively, ADR could be utilized to provide more tailored and potentially sustainable resolutions, and provide the opportunity for constructive dialogue and/or reciprocal commitments among affected stakeholders, where such commitments are desired or necessary for sustainable resolution. This might be the case where the issue in question is the campaigning conduct of two contending political parties.
- **Enhanced legitimacy:** In many transitional contexts, ADR processes could be used as a confidence-building measure to improve the credibility of the electoral process. This might be the case in contexts in which contending parties challenge the legitimacy or perceived impartiality of formal state institutions. In such instances, ADR processes could be designed to allow for a neutral third party that all stakeholders perceive as legitimate and credible.

Each of these, and probably others, are potentially valid goals of an ADR system in election complaints adjudication. However, to be effective and appropriate, the design of the ADR system must be driven by the specific goals dictated by stakeholder needs and national context. Moreover, relevant stakeholders must make explicit and agree upon those goals, in order to ensure that all stakeholders will find the ADR processes legitimate and credible.

The first step is to determine what goals the ADR system is intended to serve, and ensure that those goals drive the design of ADR processes.

B. Establishing ADR Processes as Part of Election Complaints Adjudication

As with any provision of a country's electoral infrastructure, ADR processes would need to be enacted by the country's formal law-making body (often through an act of Parliament or Congress, or sometimes by executive decree). However, this may be problematic in transitional contexts, where the credibility, impartiality or legitimacy of those law-making institutions may themselves be challenged. In such contexts, ADR processes may not only be necessary for the adjudication of complaints, but may also be nec-

essary for the establishment of the electoral regulations themselves. For instance, regulations may need to be developed and endorsed by a forum perceived by all contending stakeholders as credible and representative — even if that forum is ad hoc or interim. The resolutions proposed by such a forum would still need to be formally adopted by a country's law-making body, but it might first need the consensus of all relevant stakeholders.

C. Who Are the Stakeholders?

The effectiveness of ADR systems often depends on their perceived credibility and legitimacy, particularly as compared with traditional dispute resolution options (often, the formal court system). In the ADR world, stakeholders are often defined as: (1) those with the power to make decisions; (2) those with the power to block or unblock decisions (formally or informally); (3) those whose resources are necessary for implementation (whether those resources are organizational, financial, technical, or political); (4) those most directly affected by the outcome; and (5) those who are the most trusted and and perceived as impartial (institutions or individuals) among others to drive the ADR process.

So, who are these stakeholders in election complaints adjudication? At a minimum, they likely include the state's relevant law-making bodies, the courts which interpret those laws (and often play the role of final arbiter), and the state's election administration bodies. They also likely include the major contending political parties. Depending on the context, they may also include relevant civil-society organizations (such as domestic election monitors). They may include individual voters affected by electoral regulations, whose rights (and ability to claim those rights) may be affected by revisions to the complaints adjudication processes. And, potentially, they may include international organizations that might either observe electoral processes or help to finance national elections, contingent upon certain electoral safeguards. How to define the stakeholders will depend entirely upon the national context and the issues under discussion.

D. Who Convenes the Stakeholders?

If the process for establishing ADR systems as part of an election complaints adjudication framework is intended to be a participatory one, that dialogue needs to be convened by some entity or organization. Often,

this may be a state body with responsibility for these issues. However, where the credibility or impartiality of state bodies is at issue, a multi-party dialogue may need to be convened by some non-state actor. The convener might be a domestic NGO, a university, a local leader, a tribal chief, a religious leader, a former top politician, a renowned high rank civil servant or businessman or an international actor. The key criterion for a convener is simply that the required parties perceive the convener as legitimate in calling for a dialogue. In some instances, it may be necessary to have co-conveners of such a dialogue, in order to achieve the necessary legitimacy across the spectrum of involved stakeholders.

Importantly, this role of convening a dialogue is separate and distinct from the role of facilitating a dialogue. The facilitator of a dialogue must be perceived as neutral by all parties, with the necessary consensus-building skills to help the stakeholders reach an agreement (i.e., a professional, neutral party). The convener may not be perceived as neutral, but must be perceived as legitimate to play that role. For instance, an opposition party is not likely to be perceived as a legitimate convener for a dialogue on electoral reforms by a ruling party or government. However, a state election commission might be perceived as a credible convener of such a dialogue. At the same time, an opposition party might not perceive that state body as neutral or impartial. They could be credible for convening the dialogue, but not for facilitating the dialogue. In highly-politicized contexts, it may be necessary for international bodies (such as the United Nations or other international NGOs) to serve as conveners and/or facilitators. However, even their legitimacy to play these roles may be challenged by a sovereign government.

E. Stakeholder Assessment

The preceding sections raise a number of questions that must be addressed correctly in order to build consensus around reforms to election regulations, including the role that ADR might play in election complaints adjudication. What should the goals of an ADR system be? Who needs to be consulted? Who can convene and/or facilitate a dialogue? What is the scope of issues on the table? What might the stakeholders find acceptable? How will decisions reached by an informal group be formally adopted into law?

These issues need to be addressed in advance, or a dialogue process with even the best of intentions can run into substantial roadblocks. For instance, one stakeholder may refuse to participate if another stakeholder is invited. Another stakeholder may refuse to participate if a particular entity acts as convener and/or facilitator. Some stakeholders might come to the table, only to learn that a pivotal stakeholder is unwilling to participate. Stakeholders may have different understandings of what issues are up for discussion. Stakeholders might reach agreement, only to learn later that follow-up actions are necessary by others not at the table in order to enact their agreement into binding regulations or law.

One way these issues are effectively addressed is through a tool known as a stakeholder assessment or situation assessment. In this process, a neutral party confidentially interviews all of the key stakeholders, to explore the various perspectives on these issues of both process and substance. The neutral party then prepares a summary report for all stakeholders, summarizing perspectives without attribution of comments to individual stakeholders, as a basis for dialogue. In short, the point of such a stakeholder assessment — whether done informally or formally — is to set the table for constructive dialogue, which may be necessary for the establishment of ADR processes for election complaints.

F. Design Considerations for ADR in Election Complaints Adjudication

All ADR systems must answer certain design questions in terms of how they will function, all of which will have direct bearing on the extent to which potential "users" of the system will find it to be an effective alternative to traditional dispute resolution through the courts.

In the arena of election complaints adjudication, several specific questions arise, regardless of the type of ADR system adopted as part of the electoral framework. Many of these revolve around the fact that every individual voter is, in some ways, directly affected by the outcome of any complaint, even simply in forms of minimal dilution of the weight of their individual vote. Thus, if a sub-set of stakeholders reaches agreement on a specific election complaint, that resolution may affect parties not represented in the ADR process. This may be compared with the formal court system,

which issues decisions within the context of the broader public impact and the precedent-setting nature of legal decisions.

Implementation of an electoral ADR system brings up many of the same challenges that arise when devising a formal complaint adjudication system that complies with the seven international standards described in Chapter 1: International Standards. While these standards are generally most relevant when applied to formal adjudication systems, the fundamental rights they serve to protect are just as important under an ADR system.[17] Care must be taken when implementing an ADR system to make sure that the standards are met to the fullest extent possible.

To that end, some of the design questions that may need to be addressed include:

- **Parties with standing:** Who has the right to bring a claim through the ADR procedure? Political parties? Domestic election monitors? Individual voters? The answer will largely depend on what specific set of issues the ADR process is attempting to address.[18]
- **Unrepresented parties:** For non-adjudicative ADR procedures (i.e., procedures other than binding arbitration), resolution often takes the form of voluntary agreements among parties. However, if not all affected parties are represented in the ADR process, their rights may be affected by the resolution without their consent.
- **Transparency of decisions:** Often, ADR processes take place in confidential settings, in order to enable a frank exchange among parties of priorities and interests. For a public process such as an election, this confidentiality may not be appropriate.
- **Precedent-setting nature of outcomes:** Often, ADR processes do not set binding precedent. Indeed, that is often one of their perceived advantages. However, in an election context, where consistency in how similar complaints are handled may be important, this may not be appropriate.

[17] See *supra* notes 10-16 and accompanying text.
[18] See Chapter 1 of this guide for more information on standing.

- **Interaction with the formal legal system:** ADR systems often provide recourse to the court system as a forum for final appeal. Under such instances, what would be the standard for review? Would the agreements reached by two stakeholders on a particular complaint be subject to a challenge by another party?
- **Selection of mediators or neutrals:** The role of a neutral or a mediator is distinct from that of a judge or arbitrator, since the former is tasked with facilitating communication and assisting the parties to a dispute in reaching their own acceptable solution, while the latter is expected to impose a decision based on the arguments and evidence presented. Nonetheless, steps should be taken to ensure that a mediator or neutral is properly impartial, since any bias can still lead to an unfair negotiation or mediation.
- **Remedies and enforcement:** The ADR process should allow for some mechanism to enforce the decision reached. While negotiation and mediation often rely on voluntary compliance from both sides, stricter methods like arbitration might require the formation of a contract or entry of a court order to compel compliance. Even if the process and results are confidential or otherwise sealed, agreement to publish the resolution could allow the participants to rely on social rather than governmental pressure to encourage both sides to comply.
- **Burden of proof and standard of evidence:** The judicial process requires for its administration of an adversary system the allocation of the burdens each party must carry in order to prevail under that system of evidence. The judicial determination of an election contest, for example, may require substantial pleading of the facts supporting a charge of "fraud" or "voting irregularities."[19] Similarly, judicial proceedings require that evidence meet certain requirements for admissibility.[20] Except for the most formal types of trial-like arbitration, informal complaints adjudication processes do not involve formal burdens of proof or strict adherence to the rules of evidence, including most impor-

[19] See Steve Bickerstaff, Contesting the Outcome of Elections, in IEP, *supra* note 1, 315-317.

[20] *Id.* See also Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles That Control Election Challenges (2006).

tantly the rule against hearsay unless an expressed exception exists in the law.

Complaints in an informal process, nonetheless, must be well-grounded and supported by facts. While formal rules of evidence may not be required, a complainant must produce facts that show that an event "more likely than not occurred." In addition, the interests being asserted in any of the informal processes must be genuine for the process to attempt to resolve an issue. This requirement includes the use of administrative commissions and tribunals involved in the resolution of disputes. The importance of determining the correct factual record impacts not only the ADR process but also judicial review.

Advantages and Disadvantages of ADR

Ultimately, there are many reasons to use ADR, but several make it particularly useful in resolving disputes. These factors include: an ongoing relationship between disputing parties; the influence a neutral party may exert on either disputant's view of the conflict; the degree to which the governing law is well settled and established; and the ability of an outside party to defuse any animosity that may exist between disputants. Moreover, where a dispute is largely a disagreement over the underlying facts, ADR can be helpful in providing a third party to discern the true facts governing the dispute.

ADR is of course not always ideal as a method of resolving disputes. Several factors, when present, will make the use of ADR less advantageous. The first factor to consider is whether a resolution of the dispute is needed in order to establish a precedent for future similar disputes. Because ADR is often a non precedent-setting mechanism, it is less suitable for this situation. Second, where the dispute is of a recurring nature and there is a particular need for consistency among like disputes, ADR may be undesirable. Third, ADR is less valuable as a tool where the dispute or its resolution will affect parties outside the process to a substantial degree. Finally, ADR may be inadvisable where there is a special need for a record, available for public review, of the resolution of the dispute. However, in the elections context accommodations can be made for the

Advantages of ADR Systems	Disadvantages of ADR Systems
Efficiency	
Lower costs for disputants to bring a claim	Costs play an important screening role, filtering out frivolous claims
Reduced delay in resolving disputes	Assumes access to qualified ADR resource persons
Flexible: no strict rules, can adapt to local conditions and norms	Raises concerns about the predictable and consistent application of laws
Increased Access to Justice	
Can bypass courts perceived as ineffective, partisan or corrupt	Non-court decision-makers may also face legitimacy challenges
Allows greater access to local communities	Lack of consistency of decision-making
Accessible to lay persons who may be intimidated by formal courts	Formal court rules can protect parties from social power imbalances
Increased Satisfaction with Process and Outcomes	
Basis in equity makes decisions understandable to lay persons	Decisions based on equity, rather than law, can undermine rule of law
Can ease tensions and conflict by facilitating dialogue and reciprocal commitments between stakeholders	Lack power to compel participation, which traditional courts have
Increases likelihood of voluntary compliance with decisions	Decisions may lack authority to be enforced
Complements and Supports the Traditional Complaints Adjudication Process and Reform Efforts	
Can be used to resolve volatile disputes that might otherwise collapse the entire system (i.e. mediation between imminently militant political parties)	Hurts reform efforts when ADR programs siphon off money, talent, and attention from the traditional complaints adjudication body
Can keep complaints adjudication at the local level, maintaining the relevance of local community in the growth of democratic civil society	Decisions at the local level for problems faced nationwide can lead to inconsistencies.
Broad Social Benefits	
Can support broader social efforts (i.e., inter-group dialogue or conflict resolution)	Cannot address pervasive systemic injustice (only functions on a case by case basis)
Can increase participation in the electoral process	Undermines the will of the people by putting outcomes in the hands of parties instead of the law
Can increase the confidence of the public in the electoral process, and by extension can strengthen the legitimacy of the elected government	Often lacks the educational, punitive, and deterrent effect of traditional courts

provision of a public record, making this consideration less important for determining whether ADR is an appropriate resolution mechanism.

The table on the previous page details the advantages and disadvantages of ADR systems in resolving election complaints.

Examples of ADR Programs

Various forms of dispute resolution are in use in legal systems worldwide, but as a mechanism to resolve election conflict ADR is historically uncommon outside of Sub-Saharan Africa. Examples of the African experience with ADR demonstrate that similar systems might be possible, and even desirable, in other post-conflict and transitional states. ADR mechanisms in the transitional or post-conflict context are framed according to the "danger" that the situation poses, or the potential for violence, however. As a result, ADR is not usually a stand-alone mechanism, instead complementing other conflict resolution mechanisms. It is rare to find an ADR mechanism that targets both the top political elite and the grassroots levels in the same process. In addition, none of these examples are a direct implementation of the various ADR systems discussed earlier in this chapter; rather, each can be seen as integrating elements of these types of ADR mechanisms into a unique resolution process tailored for that country's electoral system.

A. Top Level Electoral ADR

In countries emerging from conflict, the action of the international community and its support towards the electoral process is often necessary. This support can take the shape of financial, technical, material and other assistance of organizations such as the United Nations, the African Union, the European Union, regional organizations, individual countries acting bilaterally and international institutions and organizations. The international mechanism of prevention and management of electoral conflicts can also take the form of a voluntary action, committee of specially selected representatives from different countries, or an ad hoc group of former or current heads of state.

i. UN Coordinated International Committees

These bodies are formed in the wake of a particular political or military crisis, and represent a gathering of all countries and international institutions that have an interest in the resolution of the crisis and in the electoral process that will follow. Some examples of these include the Democratic Republic of the Congo *Comité International d'Appui à la Transition* (CIAT), which included 14 different countries. More recently, a similarly named committee was formed to deal with the crisis in Côte d'Ivoire in 2004-06.

ii. UN Special Observer Missions

These missions are put in place to enhance the credibility of elections and to allow dialogue among the UN Electoral Division that supports an electoral process, the government, and the national election management body. An example of these missions is in Sudan, where the UN observed the January 2011 secession referendum.

iii. Panels or Committees of the Wise

Groups like this are particularly common in Sub-Saharan Africa, and include special envoys that supervise elections and enable dialogue between political leaders and candidates. Generally these panels or committees are composed of former heads of state. Panels were involved in South Africa in 1994, in Burundi in 2005, in the Central African Republic in 2005, in Liberia in 2005-06, in the Democratic Republic of the Congo in 2006, in Sudan in 2009-10, and in Côte d'Ivoire in 2010.

iv. U.S. Federal Election Commission ADR Program

The United States Federal Election Commission (FEC) has established a domestic ADR system in which alleged violations of federal election law are frequently resolved. Parties whose cases are referred by various offices within the Commission are given the opportunity to resolve their dispute through ADR. If the party chooses to engage in ADR, they agree to participate in good faith, toll the statute of limitations during the process,[21] and participate in interest-based negotiations and media-

21 To "stop the clock" counting down to the deadline to file a formal challenge in court. Tolling the statute of limitations during the ADR process prevents one party to the dispute from using ADR as a delaying tactic to keep the other sIde from filing its lawsuit within the time limit required by law. If the ADR process fails to reach a result acceptable to both sIdes, the countdown to the filing deadline begins once again.

The Burundian Experience

Burundi offers a unique view of the potential for ADR in resolving election disputes. Burundi has a strong tradition of revered local "wise men" called the *Bashingantah* who are looked upon to resolve disputes and maintain peace within the community. Despite the similarity of the concepts, *Bashingantah* differ from a top-level "panel of the wise" by being focused on influential local individuals, keeping the resolution of disputes focused on the municipality rather than imposed from the central government.

While the tradition of the *Bashingantah* began in the 17th century, it had fallen away when the country came under colonial rule and remained dormant during the period of civil war. Recently efforts have been made to revive this institution and to endow it with a limited judicial authority. As an ADR mechanism, the *Bashingantah* is a mixture of mediation and arbitration. As in mediation, the *Bashingantah's* main objective is to work with parties to come to a peaceful and mutually agreed upon outcome. Unlike mediation, the *Bashingantah* often interject their own "wisdom" into the process and attempt to persuade parties to come to a particular resolution. In the event of a stalemate it is suggested the *Bashingantah* be given authority to render a judgment that would be binding on the parties to the dispute much like in a traditional arbitration. Similar traditional conflict resolution groups are present in the neighboring countries of Rwanda and the Democratic Republic of the Congo.

tion. ADR begins with negotiations, in which the party and an ADR Specialist with the Commission discuss the dispute and attempt to fashion a settlement. The focus of the settlement is corrective and the goal of the process is to ensure future compliance with federal election law. If the Specialist and the party reach a settlement, the matter is closed upon Commission approval. If they are unable to reach a settlement, then some cases proceed to mediation.

Mediation entails an impartial person facilitating further negotiations between a representative of the Commission and the respondent. The Commission prepares a list of proposed mediators and the respondent is permitted to choose one. The mediation itself typically lasts a day and entails the mediator conferring with the respondent and the Commission ADR Specialist individually and/or jointly. If either side refuses mediation, then the case is referred back for the traditional enforcement process. Importantly, any information disclosed by the respondent during either the negotiation or the mediation sessions cannot be used against

it in a future proceeding. Any settlement reached becomes a matter of public record and is non-precedential.

B. Grassroots Level Electoral ADR

A number of alternative conflict resolution and management mechanisms exist, besides mediation, that can be effectively introduced at the grassroots level to contribute to a credible and peaceful election outcome.

i. Party Liaison Committees (PLC)

In many countries, public bodies are established to increase the flow of communication among parties, and between parties and the election management bodies. They provide space for political parties to resolve election-related disputes. It is important to note that PLCs are just consultative and the final decision-making powers remain with the EMB, which is often an independent body and officially independent from influence by political parties. Countries like South Africa, Burundi and DRC use this tool.

ii. The Electoral Institute for the Sustainability of Democracy in Africa (EISA) Conflict Management Panel

The Conflict Management Panel (CMP) is a grassroots conflict prevention tool in which community leaders, women, youth and religious and traditional authority leaders are trained in conflict management skills to enable them to prevent, resolve and manage conflicts. The choice of mediators involves a consultative process with election stakeholders. In certain instances, political parties appoint or approve the people chosen. The EMB coordinates the CMP while giving mediators the independence to implement the program. Mediators are effective election prevention "watchdogs" as their feedback on conflicts or potential conflicts allows the EMB to anticipate or to immediately respond to risks of potential conflict.

Mediators are deployed before, during and after the election, and in particular are available on Election Day to move between polling stations as well as in public places such as markets to intervene in potential conflicts. Mediators use mediation, negotiation, and facilitation techniques to resolve conflict. Using mediation at the grassroots level requires a creative approach and a sensitization of the public to the benefits of a peaceful environment within which an election can be held. The use of technology, including tele-

phones or mobile phones, SMS text messages, written or verbal reports, faxes, emails and radio enables mediators to respond to election conflicts immediately. Mediators also map and analyze ongoing conflicts, which assists in identifying potential hot spots. The CMP is a combination of conflict prevention, conflict management and an early warning system.

This model has been widely and successfully implemented in South Africa, Lesotho, DRC, Burundi, and Somaliland and is currently underway in Kenya. In the post-election period, mediators are also trained and ready to take part in more mundane social disputes including land disputes, household conflicts and local development issues.

Conclusion

A. Lessons Learned

In post-conflict countries, the gradual replacement of ADR by formal complaints adjudication will contribute to the deepening of democratic processes. While there is always a place for ADR, a society that values differences of opinion will make use of the judicial system rather than relying on mediation at either the top or the grassroots level. ADR complements the judicial system, and in certain instances in fragile states it compensates for the failure or widespread mistrust of the judicial process. An eventual decrease in the necessity of electoral ADR will not only show that the political context is less violent but that the society is moving towards normalcy in terms of creating the space for different viewpoints and that the democratic institutions resolving conflict through complaints adjudication are stronger.

B. Policy and Practical Considerations

As discussed in this chapter, not all disputes are appropriate for resolution via ADR mechanisms. The resolution of guaranteed rights must always be subject to independent adjudication and appeal. The extra-judicial nature of ADR can also make it suspect to those persons and institutions that are not involved in the process. It can be subject to deals and bargains that exclude non-parties. When, however, the ADR system is transparent, accountable and allows for the maximum participation, these disadvantages can be sufficiently overcome.

Appropriateness of Electoral ADR Systems

Factors Supporting ADR

- The election is occurring in a post-conflict setting or failed state where election disputes could be a trigger for violence. This is especially true in elections involving political parties that align predominantly along ethnic, religious or linguistic rather than ideological lines.
- There is a strong rural/urban or regional/national political or cultural divide in the country.
- There is strong popular mistrust of the judiciary, or there are access issues that undermine the legitimacy of the court system.
- There is an existing tradition of some form of ADR in the country to deal with largely non-political disputes such as land use, familial conflicts, inheritance, or petty crime.
- The election is for a single office or uses a winner-take-all model in which the losing party or parties will be largely or completely unrepresented. Similarly, there are known issues involving apportionment and delineation.
- The major risk of disenfranchisement, fraud or voter intimidation comes from the actions of private individuals or political parties rather than through the actions of government officials, administrators or bureaucrats.
- Enforcement of the ADR result is to be by voluntary action of the parties to the dispute.

Factors Opposing ADR

- The country has a strong, credible and independent judiciary or administrative system that can be relied upon to hear and resolve election complaints in a fair and timely manner.
- The parties to any dispute would prefer to have a binding formal legal precedent. Most ADR methods look on precedent as persuasive rather than binding, and treat their own results accordingly.
- Disputes implicate fundamental political or human rights that are being violated by the actions of the government or establishment.
- The parties will need to rely on the government to enforce the decision administratively or through use of its police powers. This includes relying on the government to voluntarily enforce decisions.
- The parties to the dispute cannot be adequately represented in the ADR process.

Recommendation Checklist

The following checklist will allow technical assistance providers to understand what factors should be included in the design of an effective ADR system.

√ **Stakeholder identification:** It is necessary to first determine who may participate in the ADR process and how stakeholders may convene an ADR session.

√ **Identifying and training mediators:** It is important to determine who will be qualified to oversee the ADR process, and what training they will receive in advance of the election. Will mediators or conflict neutrals be appointed by the national government, chosen by local governments, or hired from private mediation firms?

√ **Stakeholder assessment:** A system should be created to evaluate the results of the ADR process in order to improve, expand, or if necessary, eliminate the ADR framework completely.

√ **Rules of procedures:** Policymakers should establish rules of procedure for the ADR session so the stakeholders know what to expect prior to the session and so the mediator or neutral will not have to make ad hoc rules and rulings. ADR need not have as strict or formal rules as a court, but it should have some structure in order to give the process meaning and legitimacy.

√ **Scope:** Policymakers should determine which topics, materials, witnesses and subject matter will be allowed in an ADR session, and which will be omitted.

√ **Standing:** It is important to determine which stakeholders will be able to invoke the ADR system (political parties, domestic election monitors and officials, or individual voters), as well as if the media, international observers, or third parties are permitted to initiate an ADR session between two other stakeholders.

√ **Unrepresented parties:** In non-adjudicative ADR procedures (i.e., procedures other than binding arbitration), resolution often takes the form of voluntary agreements among parties. If not all affected parties are represented in the ADR process, then their rights may be affected by the resolution without their consent.

√ **Transparency:** ADR processes often take place in confidential settings in order to enable a frank exchange of priorities and interests among parties to the dispute. For a public process such as an election, this confidentiality may not be appropriate.

√ **Precedents:** ADR processes typically do not set a binding precedent. In fact, this is often one of their perceived advantages. However, in an election context this may not be appropriate, since part of the establishment of the rule of law may include ensuring that similar complaints will be handled in the same way in the future.

√ **Interaction with the courts:** ADR systems often provide recourse to the court system as a forum for final appeal. Under such instances, it is important to determine what would be the standard for review, and whether the agreements reached by two stakeholders on a particular complaint are subject to a challenge by another party.

√ **Burden of proof and standard of evidence:** ADR processes usually do not feature detailed rules of evidence or place a particular burden of proof on either party to the dispute. If there is an appeals process to the formal court system, determining how the lack of these concepts will translate over can be very important.

A

Appendix

Excerpts from international and regional treaties and conventions

United Nations Treaties and Declarations

Universal Declaration of Human Rights[1]

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government;

[1] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/.

this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

International Covenant on Civil and Political Rights[2]

Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

[2] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1996), *available at* http://www2.ohchr.org/english/law/ccpr.htm.

Article 9

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 10

(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(2)

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

(3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 14

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 22

(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a dem-

ocratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

(3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

International Convention on the Elimination of All Forms of Racial Discrimination[3]

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

[3] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), *available at* http://www2.ohchr.org/english/law/cerd.htm.

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

International Covenant on Economic, Social and Cultural Rights[4]

Article 2

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

U.N. Convention on the Elimination of All Forms of Discrimination against Women[5]

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

[4] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* http://www2.ohchr.org/English/law/cescr.htm.

[5] U.N. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979), *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

(1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

(2) States Parties shall grant women equal rights with men with respect to the nationality of their children.

United Nations General Comments on ICCPR

United Nations Human Rights Committee, General Comment No. 13 on Article 14[6]

11. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

[6] U.N. Human Rights Comm., CCPR General Comment No. 13, Art. 14: Equality Before The Courts And The Right To A Fair And Public Hearing By An Independent Court Established By Law, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) (April 13, 1984) (replaced and superseded by General Comment No. 32), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f-264c12563ed0049dfbd.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

United Nations Human Rights Committee, General Comment No. 25 on Article 25[7]

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

[7] UN Human Rights Comm., Covenant on Civil and Political Rights (CCPR) General Comment No. 25, Art. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, CCPR/C/21/Rev.1/Add.7 (July 12, 1996), *available at* http://www.unhcr.org/refworld/docid/453883fc22.html.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

25. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

United Nations Human Rights Committee, General Comment No. 31 on Article 2[8]

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mecha-

[8] U.N. Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 26, 2004, CCPR/C/21/Rev.1/Add.13., *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En.

nisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. 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. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

United Nations Human Rights Committee, General Comment No. 32 on Article 14[9]

47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an ap-

[9] CCPR General Comment No. 32, Art. 14: Right To Equality Before Courts And Tribunals And To A Fair Trial, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) (footnotes omitted), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf.

peal court97 or a court of final instance,98 following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant. However, article 14, paragraph 5 does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.105 The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.

50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested

by the convicted person or is dependent on the discretionary power of a judge or prosecutor.

Regional Treaties and Charters

European Convention for the Protection of Human Rights and Fundamental Freedoms[10]

Article 6 – Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5 (entered into force Sept. 3, 1953), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

Article 8 – Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[11]

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the opinion of the people in the choice of the legislature.

[11] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, C.E.T.S. No. 9 (entered into force May 18, 1954), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[12]

Article 2 – Right of appeal in criminal matters

(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

(2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Inter-American Convention on Human Rights[13]

Article 1

(1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

(2) For the purposes of this Convention, "person" means every human being.

Article 2

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[12] Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, C.E.T.S. No. 117 (entered into force Nov. 1, 1988), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm.

[13] Inter-American Convention on Human Rights, art.23, Nov. 22, 1969, O.A.S.T.S. No. 36, *available at* http://www.oas.org/jurldico/English/treaties/b-32.html.

Article 8

(1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

(2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

(b) prior notification in detail to the accused of the charges against him;

(c) adequate time and means for the preparation of his defense;

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty; and

(h) the right to appeal the judgment to a higher court.

(3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

(4) An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

(5) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 23

(1) Every citizen shall enjoy the following rights and opportunities:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
(c) to have access, under general conditions of equality, to the public service of his country.

(2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 25

(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake:
(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
(b) to develop the possibilities of judicial remedy; and
(c) to ensure that the competent authorities shall enforce such remedies when granted.

African Charter on Human and Peoples' Rights[14]

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

[14] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986), *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm.

Article 7

(1) Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defense, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

(2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 13

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

(2) Every citizen shall have the right of equal access to the public service of his country.

(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Inter-Parliamentary Union, Declaration on Criteria for Free and Fair Elections[15]

Article 3 – Candidature, Party and Campaign Rights and Responsibilities

(1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.

(2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.

(3) Everyone individually and together with others has the right:

- To express political opinions without interference;
- To seek, receive and impart information and to make an informed choice;
- To move freely within the country in order to campaign for election;
- To campaign on an equal basis with other political parties, including the party forming the existing government.

(4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.

(5) The right of candidates to security with respect to their lives and property shall be recognized and protected.

(6) Every individual and every political party has the right to the protection of the law and to a remedy for violation of political and electoral rights.

(7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign

[15] Inter-Parliamentary Council (now called Governing Council), Declaration on Criteria for Free and Fair Elections, 54th Sess., C.P. 330 (March 26, 1994), *available at* http://www.ipu.org/cnl-e/154-free.htm.

rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

(9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.

(10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.

(11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

Article 4 – The Rights and Responsibilities of States

(1) States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. In particular, States should:

- Establish an effective, impartial and non-discriminatory procedure for the registration of voters;
- Establish clear criteria for the registration of voters, such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind;
- Provide for the formation and free functioning of political parties, possibly regulate the funding of political parties and electoral campaigns, ensure the separation of party and State, and establish the conditions for competition in legislative elections on an equitable basis;
- Initiate or facilitate national programmes of civic education, to ensure that the population are familiar with election procedures and issues;

(2) In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections.

In so doing, they should, among other matters:

- Ensure that those responsible for the various aspects of the election are trained and act impartially, and that coherent voting procedures are established and made known to the voting public;
- Ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers as appropriate;
- Encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period;
- Ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto;
- Ensure the integrity of the process for counting votes.

(3) States shall respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction. In time of elections, the State and its organs should therefore ensure:

- That freedom of movement, assembly, association and expression are respected, particularly in the context of political rallies and meetings;
- That parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media;
- That the necessary steps are taken to guarantee non-partisan coverage in State and public-service media.

(4) In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.

(5) States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected, and that voters are able to cast their ballots freely, without fear or intimidation.

(6) Furthermore, State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.

(7) States should take all necessary and appropriate measures to ensure the transparency of the entire electoral process including, for example, through the presence of party agents and duly accredited observers.

(8) States should take the necessary measures to ensure that parties, candidates and supporters enjoy equal security, and that State authorities take the necessary steps to prevent electoral violence.

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

Declaration on the Principles Governing Democratic Elections in Africa[16]

Article II – Principles of Democratic Elections

(1) Democratic elections are the basis of the authority of any representative government;

(2) Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development;

(3) The holding of democratic elections is an important dimension in conflict prevention, management and resolution;

(4) Democratic elections should be conducted:

(a) freely and fairly;

(b) under democratic constitutions and in compliance with supportive legal instruments;

(c) under a system of separation of powers that ensures in particular, the independence of the judiciary;

(d) at regular intervals, as provided for in National Constitutions;

(e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics;

[16] Organization of African Unity, Declaration on the Principles Governing Democratic Elections in Africa, 38th Ordinary Sess., AHG/decl. 1 (xxxviii) (July 8, 2002), *available at* http://www.au2002.gov.za/docs/summit_council/oaudec2.htm.

Article III – Responsibilities of the Member States

We commit our Governments to:

(a) take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of our respective countries;

(b) establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters, compilation of voters' registers, etc would be addressed;

(c) establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;

(d) safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes;

(e) promote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;

(f) take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security,;

(g) ensure the availability of adequate logistics and resources for carrying out democratic elections, as well as ensure that adequate provision of funding for all registered political parties to enable them organise their work, including participation in electoral process.;

(h) ensure that adequate security is provided to all parties participating in elections;

(i) ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/other observers/monitors;

(j) encourage the participation of African women in all aspects of the electoral process in accordance with the national laws.

Article VI – Role and Mandate of the General Secretariat

Further request the OAU Secretary General to take all necessary measures to ensure the implementation of this Declaration by undertaking, in particular, the following activities:

(a) Strengthen its role in the observation and monitoring of elections within the legal framework of the host country, in accordance with the memorandum of understanding reached with that country;

(b) Mobilize extra-budgetary funds to augment the General Secretariat resource base so as to facilitate the implementation of this Declaration;

(c) Undertake a feasibility study on the establishment of a Democratization and Electoral Assistance Fund, to facilitate a successful implementation of this Declaration.

(d) Undertake a feasibility study on the establishment within the OAU General Secretariat of a Democratization and Election Monitoring Unit that will also discharge issues on good governance;

(e) Compile and maintain a roster of African Experts in the filed of election observation and monitoring and democratization in general in order to deploy competent and professional observers and to avails itself of their services whenever necessary. Member States on their part are requested to assist by making the names of their experts available to the General Secretariat;

(f) Work out better standards of procedures, preparations and treatment for personnel selected to serve on OAU observer missions.

(g) Promote cooperation and work in partnership with African Organizations and International Organizations, as well as national institutions, non-governmental Organizations and civil society groups involved in the elected monitoring and observation work.

(h) Publish and make the General Secretariat Reports on the observation/monitoring of elections and other related activities open to all Member States and the public at large, as a means of consolidating electoral and democratic processes on the continent.

Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States[17]

Article 7 – Open and Transparent Elections

(1) The preparation and conduct of elections shall be executed openly and publicly.

(2) Decisions of electoral bodies, state authorities and local self-governments, made within the framework of their competence related to setting of the term, preparation to and conducting of elections, to provision of and protection of the citizen's voting rights and freedoms, are, in a obligatory manner, subject to an official publishing, or they are publicised in another way, in accordance with the procedure and in terms stipulated by the laws.

(3) Legal acts and decisions relating to the citizen's voting rights, freedoms and obligations cannot be applied if they are not officially communicated to the public.

(4) The electoral body within the time-period fixed by the legislation on elections shall, in their press means or in other mass media, publish the information on results of voting as well as the data on all the persons elected.

(5) Observance of the principle of openness and publicity of elections should provide for establishment of conditions for execution of election monitoring by public and international bodies.

Article 10 – Fair Elections

(1) The observance of the principle of fair elections should provide for establishment of equal legal conditions for all participants of the election process.

(2) While conducting fair elections, there are assured:

(a) the universal and equal suffrage;

(b) equal possibilities for every candidate or every political party (coali-

[17] European Commission for Democracy Through Law ("Venice Commission"), Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States, Opinion No. 399/2006 (Jan. 22, 2007), *available at* http://www.venice.coe.int/docs/2006/CDL-EL(2006)031rev-e.pdf.

tion) to participate in the election campaign, including the access to mass media and means of telecommunications;

(c) a fair and open financing of elections, election campaign of candidates, political parties (coalitions);

(d) honesty when voting and counting of votes, full and swift communicating of the results of voting with an official publishing of all results;

(e) organisation of the election process by impartial electoral bodies, working openly and publicly under an effective monitoring by public and international bodies;

(f) a quick and effective examination by courts and other bodies invested with the power to do so of complaints about violations of voting rights and freedoms of citizens, candidates, political parties (coalitions) within the time-period framework of relevant stages of the election process, provision for the citizen's right to apply to international judicial bodies for protection and restitution of their voting rights and freedoms in accordance with the procedure stipulated by the norms of the international law.

(3) The candidates may be put forward by voters of a relevant electoral district and/or by way of self-nomination for election. Candidates and/or lists of candidates may also be put forward by political parties (coalitions), other public formations and subjects who have the right to put forward candidates and/or lists of candidates, mentioned in the Constitution, laws.

Article 15 – Status and Powers of International Observers

(1) The Parties hereto proceed from the assumption that the presence of international observers promotes openness and transparency of elections and ensures the observance of international commitments of the states. They will strive to facilitate the access of international observers to election processes being conducted on a lower level than the national one, including the municipal (local) level.

(2) Activities of international observers are regulated by the laws of the country of presence, by this Convention and other international documents.

(3) International observers shall receive the permission to enter the territory of the state in accordance with the procedure stipulated by the law, and they are accredited by a relevant electoral body upon presentation of a relevant invitation. Invitations may be sent by the bodies

authorised by the law upon an official publication of the decision on setting of election. Proposals to send invitations may be submitted by charter bodies of the Member States of the Commonwealth of Independent States.

(4) A central electoral body shall issue a certification of accreditation of the established pattern to an international observer. Such a certification gives the international observer the right to exercise monitoring in the period of preparation to and conducting of elections.

(5) An international observer shall, while staying in the territory of the state of presence, be under the protection of a given state. The electoral bodies, governmental bodies, local selfgovernments are obliged to render them a necessary assistance within their scope of competence.

(6) An international observer shall perform his activities on their own and independently. Material and financial provision of international observer's activities is executed at the expense of the party that has seconded the observer, or at their own expense.

(7) The international observers may not use their status to carry out activities not connected with observing of election campaign. The Parties hereto reserve their right to deprive of accreditation those international observers who are breaching the laws, generally accepted principles and the international law standards.

(8) The international observers have the right:

(a) to have an access to all the documents (not infringing upon interests of national security) regulating the election process, to receive from the electoral bodies necessary information and copies of the election documents stated in national laws;

(b) to contact the political parties, coalitions, candidates, individuals, workers of electoral bodies;

(c) to visit freely all polling stations places of voting, also on the election day;

(d) to observe voting, vote count and tabulation of the election results under the conditions providing for transparency of ballot counting;

(e) to get acquainted with the results of consideration of complaints (statements) and claims related to breach of the laws on elections;

(f) to inform the representatives of electoral bodies about their observations, recommendations without interference in work of the bodies executing elections;

(g) to present their opinion publicly on preparation and conducting of elections after voting was conducted;
(h) to submit their observation conclusions to the election officials, governmental bodies and other relevant officials.

(9) The international observers are obliged:
(a) to observe the provisions of this Convention, constitution and laws of the country of residence and other international documents;
(b) to have with them the accreditation card of international observer, being issued in accordance with the procedure stipulated by the country of presence, and to show it on request of the election officials;
(c) to fulfil their functions being guided by the principles of political neutrality, impartiality, non-expression of any preferences or appraisals of the electoral bodies, governmental and other bodies, officials, participants of the election process;
(d) not to interfere in the election process;
(e) to formulate all their conclusions on the basis of observation and factual material.

Article 19 – Rights and Obligations of the Convention Signatory States

(1) The States party to the Convention commit themselves to undertake legislative and other steps in order to consolidate the guarantees of voting rights and freedoms with the purpose to prepare and conduct democratic elections, to execute the provisions of the Convention. The standards of democratic elections, the citizen's voting rights and freedoms proclaimed above may be assured by way of their inclusion in the constitutions, legislative acts.

(2) The States party to the Convention commit themselves to:
(a) guarantee protection of democratic principles and standards of the voting right within the framework of generally accepted principles and standards of the international law, a democratic nature of elections, free expression of will by citizens during elections, justification of the requirements regarding recognition of election as taking place, real and legitimate;
(b) undertake necessary measures aimed at adoption of the entire election legal framework by the national legislative body and that

the legal norms ensuring conducting of election should not be introduced by the executive power's decrees;

(c) aim that all or part of deputy mandates of the second chamber of the national legislative body be the object of a free competition of candidates and/or lists of candidates in the course of nation-wide elections stipulated by the laws

(d) strive for creation of a system of legal, organisational, information guarantees for assurance of citizens' voting rights and freedoms in the course of preparation and conducting of elections of any level, to undertake necessary legislative measures aimed at provision of women with fair and real, equally with men, possibilities to execute the right to elect and be elected to the elective bodies, to elective posts both individually and as part of political parties (coalitions) on the terms and in accordance to the procedure stipulated by the Constitution, laws and aimed at establishment of additional guarantees and conditions for participation in voting by people with physical impairment (invalids, etc.);

(e) conduct voter registration on the basis of a legislatively established non-discriminatory and effective procedure that envisage such parameters of registration as age, citizenship, place of residence, basic document certifying citizen's identity;

(f) stipulate in the law responsibility of persons providing information on voters for authenticity of information, completeness of relevant information and timeliness of submission of such information, securing, in accordance with the legislation, of a confidential nature of personal data;

(g) facilitate formation of political parties and their free legal activity, to regulate in terms of legislation financing of political parties and the election process, to assure that the law and governmental policy provide for separation between the party and state, for conducting election campaigns in the atmosphere of freedom and fairness that allow parties and candidates to exercise a free expression of their views and assessments, election programmes (platforms), and allow voters to get acquainted with them, to discuss them and to vote for or against them freely, nor being afraid of penalty or any prosecution whatsoever;

(h) ensure undertaking measures providing for impartiality in covering

the election campaign by mass media, including Internet, impossibility to set up legal or administrative obstacles preventing the access to mass media on a non-discriminatory basis for political parties and candidates, to form an information data bank based on the results of public opinion surveys relating to elections, which data ought to be presented to the election process participants as well as to international observers on their requests to have information or to make a copy, to implement new information technologies providing for an open character of elections, increasing the degree of voters' confidence in outcome of voting and in election results;

(i) to adopt national and take part in developing and adoption of interstate programmes of civic education, to provide conditions for citizens and other participants of the election process to get acquainted and to be trained on election procedures and rules in order to upgrade their legal culture and to improve professional qualification of the election officials;

(j) to ensure establishment of independent, impartial electoral bodies to organise the conduct of democratic free and fair, authentic and periodical elections in accordance with the national legislation of the country and in line with international commitments of the state;

(k) to provide the candidates who received the necessary number of votes stipulated by the law with the possibility to adequately take their posts and to remain at their posts till expiration of the term of their powers or till their termination in another way that is regulated by the law;

(l) to undertake measures of introducing the legislative regulation of the list of breaches of citizens' voting rights and freedoms as well as the grounds and procedures of holding liable persons, who prevent by violence, cheat, threats, forgery or in another way citizen to exercise freely their right to elect and be elected to exercise other electoral rights and freedoms fixed in the constitutions and the laws, with criminal, administrative and other charges.

(m) facilitate establishment of the interstate unified data (information) bank on the national election legislation, election process participants (taking into account the fact that personal data have a confidential nature), law enforcement and judicial practice, legislative proposals on developing electoral system, as well as another infor-

mation related to organisation of election process for the purposes of exchange of information and joint use;

(n) promote co-operation between the electoral bodies of the States party to the Conventions, including formation and/or expanding of the mandates of the existing interstate associations of electoral bodies.

B

Appendix

Excerpts from selected national constitutions, statutes and regulations

National Constitutions

Brazil[1]

Electoral Courts and Judges

Article 118.

The following are the bodies of Electoral Justice:

I - the Superior Electoral Court;

II - the Regional Electoral Courts;

III - the Electoral Judges;

IV - the Electoral Boards.

Article 119.

The Superior Electoral Court shall be composed of a minimum of seven members chosen:

I - through election, by secret vote:

a) three judges from among the Justices of the Supreme Federal Court;

b) two judges from among the Justices of the Superior Court of Justice;

II - through appointment by the President of the Republic, two judges from among six lawyers of notable juridical learning and good moral repute, nominated by the Supreme Federal Court.

Sole Paragraph - The Superior Electoral Court shall elect its President and Vice-President from among the Justices of the Supreme Federal Court, and its Electoral Corregidor from among the Justices of the Superior Court of Justice.

Article 120.

There shall be a Regional Electoral Court in the capital of each state and in the Federal District.

§ 1 - The Regional Electoral Courts shall be composed:

I - through election, by secret vote:

a) of two judges chosen from among the judges of the Court of Justice;

[1] Constituição Federal [C.F.] [Constitution] art. 121, § 1 (Braz. 1988) (as amended).

b) of two judges chosen by the Court of Justice from among court judges;

II - of a judge of the Federal Regional Court with its seat in the capital of a state or in the Federal District, or, in the absence thereof, of a federal judge chosen in any case by the respective Federal Regional Court;

III - through appointment by the President of the Republic, of two judges nominated by the Court of Justice from among six lawyers of notable juridical learning and good moral repute.

§ 2 - The Regional Electoral Court shall elect its President and Vice-President from among its judges.

Article 121.

A supplementary law shall provide for the organization and competence of the electoral courts, judges and boards.

§ 1 - The members of the courts, the court judges and the members of the electoral boards, while in office and insofar as applicable to them, shall enjoy full guarantees and shall be non-removable.

§ 2 - The Judges of the Electoral Courts, except for a justified reason, shall serve for a minimum of two years, and never for more than two consecutive two-year periods, and their substitutes shall be chosen at the same time and through the same procedure, in equal numbers for each category.

§ 3 - The decisions of the Superior Electoral Court are unappealable, save those which are contrary to this Constitution and those denying habeas corpus or writs of mandamus.

§ 4 - Decisions of the Regional Electoral Courts may only be appealed against when:

I - they are rendered against an express provision of this Constitution or of a law;

II - there is a divergence in the interpretation of a law between two or more electoral courts;

III - they relate to ineligibility or issuance of certificates of electoral victory in federal or state elections;

IV - they annul certificates of electoral victory or decree the loss of federal or state elective offices;

V - they deny habeas corpus, writs of mandamus, habeas data or writs of injunction.

Costa Rica[2]

The Supreme Electoral Tribunal

Article 99.

The organization, direction, and supervision of acts pertaining to suffrage are the exclusive function of the Supreme Electoral Tribunal, which does enjoy independence in the performance of its duties. All other electoral organs are subordinate to the Tribunal.

Article 100.

The Supreme Electoral Tribunal shall be ordinarily composed of three regular members and six alternates, appointed by the Supreme Court of Justice by a vote of no less than two thirds of its members. They shall have the same qualifications and be subject to the same responsibilities established for the justices that compose the Supreme Court.

From one year prior to and six months after the holding of general elections to elect the President of the Republic or the members of the Legislative Assembly, the Supreme Electoral Tribunal shall increase the number of its members with two of its alternates in order to become a tribunal of five members to serve during that period of time.

When applicable, the members of the Supreme Electoral Tribunal shall be subject to the working conditions and the minimum working day established by the Structural Law of the Judicial Branch for justices of the Appellate Chamber. They shall also receive the same compensation fixed for those justices.

Article 101.

The members of the Supreme Electoral Tribunal shall hold office for a term of six years. The term in office of one regular member and two alternates shall be renewed every two years, but they may be reelected.

The justices of the Supreme Electoral Tribunal shall enjoy the same immunities and prerogatives that members of the Supreme Branches have.

[2] Political Constitution of the Republic of Costa Rica (1949) (as amended).

Article 102.

The Supreme Electoral Tribunal has the following functions:

1. To convoke popular elections;
2. To appoint the members of the Electoral Boards, in accordance with the law;
3. To interpret, with exclusive and compulsory effect, all constitutional and legal provisions on electoral matters;
4. To hear the appeals against resolutions issued by the Civil Registry and the Electoral Boards;
5. To investigate on its own or through delegates and render decisions on any claims made by parties as to political partiality of State officials in the performance of their duties or about the political activities conducted by officials who are prohibited to engage in them. A verdict of guilty rendered by the Tribunal shall be compulsory grounds for removal and shall disqualify the wrongdoer to hold public offices for a term of no less than two years, without prejudice of any criminal liability that may be established. However, if the investigation conducted includes charges against the President of the Republic, Cabinet Ministers, Diplomatic Ministers, the Comptroller General or the Assistant Comptroller of the Republic, or the justices of the Supreme Court, the Tribunal shall report the findings of its investigation to the Legislative Assembly;
6. To adopt, with respect to the public force, pertinent measures to assure that the elections are carried out under conditions of unrestricted freedom and guarantees. In case that military recruitment is ordered, the Tribunal may also adopt suitable measures to assure that the electoral process may not be disturbed, in order that all citizens may freely cast their votes. The Tribunal may enforce these measures on its own or through its designated delegates;
7. To conduct the official count of the votes cast in the elections for President and Vice Presidents of the Republic, members of the Legislative Assembly, members of Municipal Governments and Representatives to Constitutional Assemblies;
8. To issue the official declaration of the election of the President and Vice Presidents of the Republic within thirty days following the date of the election, and that of the other officials mentioned in the foregoing subsection within the period established by law;

9. Any other functions entrusted to it by this Constitution or by the laws.

Article 103.

There is no appeal against the decisions of the Supreme Electoral Tribunal, except for actions on the grounds of breach of public duty.

Article 104.

The Civil Registry shall be exclusively under the jurisdiction of the Supreme Electoral Tribunal, and its functions are:

1. To keep the Main Register of Marital Status and prepare the lists of voters;
2. To decide on applications to acquire or recover Costa Rican citizenship, as well as cases of loss of nationality (*); to enforce Court resolutions suspending citizenship and to issue a resolution on proceedings conducted to recover it. The decisions rendered by the Civil Registry, in accordance with the powers vested upon it by this subsection, may be appealed to the Supreme Electoral Tribunal;
3. To issue identity cards;
4. Any other powers vested in it by this Constitution and the laws.

Jordan[3]

Article 71.

The Chamber of Deputies shall have the right to determine the validity of the election of its members. Any voter shall have the right to present a petition to the Secretariat of the Chamber within fifteen days of the announcement of the results of the election in his constituency setting out the legal grounds for invalidating the election of any deputy. No election may be considered invalid unless it has been declared as such by a majority of two-thirds of the members of the Chamber.

[3] Constitution of the Hashemite Kingdom of Jordan (1952) (as amended).

Liberia[4]

Political Parties and Elections

Article 77.

a) Since the essence of democracy is free competition of ideas expressed by political parties and political groups as well as by individual, parties may freely be established to advocate the political opinions of the people. Laws, regulations, decrees or measures which might have the effect of creating a one-party state shall be declared unconstitutional.
b) All elections shall be by secret ballot as may be determined by the Elections Commission, and every Liberian citizen not less than 18 years of age, shall have the right to be registered as a voter and to vote in public elections and referenda under this Constitution. The Legislature shall enact laws indicating the category of Liberians who shall not form or become members of political parties.

Article 78.

As used in this Chapter, unless the context otherwise requires, an "association" means a body of persons, corporate or other, which acts together for a common purpose, and includes a group of people organized for any ethnic, social, cultural, occupational or religious objectives; a "political party" shall be an association with a membership of not less than five hundred qualified voters in each of at least six counties, whose activities include canvassing for votes on any public issue or in support of a candidate for elective public office; and an "independent candidate" shall be a person seeking electoral post or office with or without his own organization, acting independently of a political party.

Article 79.

No association by whatever name called, shall function as a political party, nor shall any citizen be an independent candidate for election to public office, unless:

a) The association or independent candidate and his organization meet the minimum registration requirements laid down by the Elections

[4] Constitution of the Republic of Liberia (1986) (as amended).

Commission and are registered with it. Registration requirements shall include filing with the Elections Commission a copy of the constitution of the association and guidelines of the independent candidate and his organization, a detailed statement of the names and addresses of the association and its officers or of the independent candidate and the officers of his organization, and fulfillment of the provisions of sub-sections (b), (c), (da) and (3) hereof. Registration by the Elections Commission of any association or independent candidate and his organization shall vest in the entity or candidate and his organization so registered legal personality, with the capacity to own property, real, personal or mixed, to sue and be sued and to hold accounts. A denial of registration or failure by the Elections Commission to register any applicant may be challenged by the applicant in the Supreme Court;

b) The membership of the association or the independent candidate's organization is open to every citizen of Liberia, irrespective of sex, religion or ethnic background, except as otherwise provided in this Constitution.

c) The headquarters of the association or independent candidate and his organization is situated:
   (i) in the capital of the Republic where an association is involved or where an independent candidate seeks election to the office of President or Vice-President;
   (ii) in the headquarters of the county where an independent candidate seeks election as a Senator; and
   (iii) in the electoral center in the constituency where the candidate seeks election as s member of the House of Representatives or to any other public office;

d) The name, objective, emblem or motto of the organization is free from any religious connotations or divisive ethnic implications and that the activities of the association or independent candidate are not limited to a special group or, in the case of an association, limited to a particular geographic area of Liberia;

e) The constitution and rules of the political party shall conform to the provisions of this Constitution, provide for the democratic elections of officers and/or governing body at least once every six years, and ensure the election of officers from as many of the regions and

ethnic groupings in the country as possible. All amendments to the Constitution or rules of a political party shall be registered with the Elections commission no later than ten days from the effective dates of such amendments.

Article 80.

a) Parties or organizations which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic society of Liberia or to endanger the existence of the Republic shall be denied registration.
b) Parties or organizations which retain, organize, train or equip any person or group of persons for the use or display of physical force or coercion in promoting any political objective or interest, or arouse reasonable apprehension that they are so organized, trained or equipped, shall be denied registration, or if registered, shall have their registration revoked.
c) Every Liberian citizen shall have the right to be registered in a constituency, and to vote in public elections only in the constituency, and to vote in public elections only int he constituency where registered, either in person or by absentee ballot; provided that such citizen shall have the right to change his voting constituency as may be prescribed by the Legislature.
d) Each constituency shall have an approximately equal population of 20,000, or such number of citizens as the Legislature shall prescribe in keeping with population growth and movements as revealed by a national census; provided that the total number of electoral constituencies in the Republic shall not exceed one hundred.
e) Immediately following a national census and before the next elections, the Elections Commission shall reapportion the constituencies in accordance with the new population figures so that every constituency shall have as close to the same population as possible, provided, however, that a constituency must be solely within a county.

Article 81.

Any citizen, political party, organization or association, being resident in Liberia, of Liberian nationality or origin, and not otherwise disqualified

under the provisions of this Constitution and laws of the land, shall have the right to canvass for the votes for any political party or candidate at any election, provided that corporate and business organizations and labor unions are excluded from so canvassing directly or indirectly in whatsoever form.

Article 82.

a) Any citizen or citizens, political party association or organization, being of Liberian nationality or origin, shall have the right to contribute to the funds or election expenses of any political party or candidate; provided that corporate and business organizations and labor unions shall be excluded from making any contribution to the funds or expenses of any political party. The Legislature shall by law prescribe the guidelines under which such contributions may be made and the maximum amount which may be contributed.

b) No political party or organization may hold or possess any funds or other assets out side of Liberia; nor may they or any independent candidates retain any funds or assets remitted or sent to them from outside Liberia unless remitted or sent by Liberian citizens residing abroad. Any funds or other assets received directly or indirectly in contravention of this restriction shall be paid over or transferred to the Elections Commission within twenty-one days of receipt. Information on all funds received from abroad shall be filed promptly with the Elections Commission.

c) The Elections Commission shall have the power to examine into and order certified audits of the financial transactions of political parties and independent candidates and their organizations. The Commission shall prescribe the kinds of records to be kept and the manner in which they shall be kept. The certified audits shall be conducted by a certified chartered public accountant, not a member of any political party.

Article 83.

a) Voting for President, Vice-President, members of the Senate and members of the House of Representatives shall be conducted throughout the Republic on the second Tuesday in October of each election year.

b) All elections of public officers shall be determined by an absolute majority of the votes cast. If no candidate obtains an absolute majority in the first ballot, a second ballot shall be conducted on the second Tuesday following. The two candidates who received the greatest numbers of votes on the first ballot shall be designated to participate in the run-of election.

c) The returns of the elections shall be declared by the Elections Commission not later than fifteen days after the casting of ballots. Any party or candidate who complains about the manner in which the elections were conducted or who challenges the results thereof shall have the right to file a complaint with the Elections Commission. Such complaint must be filed not later than seven days after the announcement of the results of the elections.

   The Elections Commission shall, within thirty days of receipt of the complaint, conduct an impartial investigation and render a decision which may involve a dismissal of the complaint or a nullification of the election of a candidate. Any political party or independent candidate affected by such decision shall not later than seven days appeal against it to the Supreme Court.

   The Elections Commission shall within seven days of receipt of the notice of appeal, forward all the records in the case to the Supreme Court, which not later than seven days thereafter, shall hear and make its determination. If the Supreme Court nullifies or sustains the nullification of the election of any candidate, for whatever reasons, the Elections Commission shall within sixty days of the decision of the Court conduct new elections to fill the vacancy. If the court sustains the election of a candidate, the Elections Commission shall act to effectuate the mandate of the Court.

d) Every political party shall, on September 1 of each year, and every candidate of such political party and every independent candidate shall, not later than such political party and every independent candidate shall, not later than thirty days prior to the holding of an election in which he is a candidate, publish and submit to the Elections

Commission detailed statements of assets and liabilities. These shall include the enumeration of sources of funds and other assets, plus lists of expenditures. Where the filing of such statements is made in an election year, every political party and independent candidate shall be required to file with the Elections Commission additional detailed supplementary statements of all funds received and expenditures made by them from the date of filing of the original statements to the date of the elections. Any political party or independent candidate who ceases to function shall publish and submit a final financial statement to the Elections Commission.

Article 84.

The Legislature shall by law provide penalties for any violations of the relevant provisions of this Chapter, and shall enact laws and regulations in furtherance thereof not later than 1986; provided that such penalties, laws or regulations shall not be inconsistent with any provisions of this Constitution.

Nigeria[5]

Election Tribunals

Article 285.

(1) There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any or tribunal, have original jurisdiction to hear and determine petitions as to whether -
   (a) any person has been validly elected as a member of the National Assembly;
   (b) the term of office of any person under this Constitution has ceased;
   (c) the seat of a member of the Senate or a member of the House of Representatives has vacant; and
   (d) a question or petition brought before the election tribunal has been properly or improperly brought.

(2) There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legis-

[5] Constitution of the Federal Republic of Nigeria (1999), (as amended).

lative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

(3) The composition of the National Assembly election Tribunals, Governorship and Legislative Houses Election Tribunals shall be as set out I the Sixth Schedule to this Constitution.

(4) The quorum of an election tribunal established under this section shall be the Chairman and two other members.

National Statutes and Regulations

Afghanistan

Electoral Law of 2004

Elections During the Transitional Period

Article 61.

For the preparation, organization, conduct and oversight of the first electoral processes, which will mark the completion of the transitional period, the Islamic Transitional State of Afghanistan has requested the support of the United Nations inter alia through the establishment of the Joint Electoral Management Body (JEMB), with the participation of international experts appointed by the United Nations as provided for in Decree No 110 of 18 February 2004. Until the end of the transitional period, the JEMB shall exercise all the powers of the IEC as laid down in this law. The IEC, after its creation, will replace the Interim Electoral Commission within the JEMB. Upon completion of the transitional period, the IEC will assume all the powers of the IEC under the law. Until that time, decision-making in the JEMB and the voting rights of the international members will remain as defined in decree No 110.

Electoral Law of 2005

Article 50.

Fair and Neutral Publication and Dissemination of Ideas

(1) For the purpose of public information during the electoral campaign period, the mass media (radio, television, and the press) shall publish and disseminate the platforms, views and goals of the candidates in a fair and unbiased manner, in accordance with the Code of Conduct established by the Commission.

(2) Candidates shall have access, to the extent possible, to the media. For the purpose of public information during electoral campaign period, state-run media shall publish and disseminate, as agreed with Commission, the platforms, views, and goals of the candidates in a fair and unbiased manner.

(3) State-owned media shall institute, as necessary, goals, policies and procedures to ensure fair coverage of the elections and implement the provisions of sub articles (1) and (2).

Article 51.

Media Commission

(1) The Commission shall establish, at least 60 days prior to the election date, a Media Commission (MC). The MC shall monitor fair reporting and coverage of the electoral campaign period and shall deal with the complaints concerning any breaches of fair reporting or coverage of political campaign, or other violations of the Mass Media Code of Conduct. Appeals, may be lodged with the Commission.

(2) The composition, responsibilities, and authorities of the MC shall be determined by the Commission.

Rules of Procedure of the Electoral Complaints Commission (2009)

Article 7.

Decisions on Complaints

7.1 A PECC or the ECC may summarily dismiss a Complaint that does not establish a prima facie case or where the Complaint is manifestly

ill-founded, or that does not conform to the minimum requirements of a Complaint stated in Article 4.6 of these Rules of Procedure.

7.2 A PECC or the ECC shall examine all evidence submitted in a timely fashion. Based on this evidence and any other evidence of which the respective PECC or the ECC may choose to take notice, the respective PECC or the ECC shall uphold a Complaint:

(a) Where the evidence is clear and convincing that an action has occurred; and

(b) Where the alleged action violated the Constitution, the Electoral Law, a Regulation, decision, administrative direction, or any other electoral rule within the ECC's jurisdiction.

7.3 When a PECC or the ECC upholds a Complaint it may, taking into account the nature and gravity of the offence.

(a) Issue a warning to, or order, the offending individual or organization, to take remedial action.

(b) Impose a fine not to exceed 100,000 Afghanis.

(c) Prior to the certification of results, order a recount of ballots, or a repeat of the voting.

(d) Remove a candidate from the candidates list, if there are justified reasons;

(e) Invalidate ballot papers not meeting the conditions for validity, or order the count or recount of a ballot paper or a group of ballot papers.

(f) Prohibit an offending individual from serving in the electoral administration for a period not exceeding 10 years.

7.4 Where a PECC or ECC imposes a sanction on a political party or candidate for an Electoral Offence committed by its members or supporters, such decision shall take into consideration any evidence demonstrating that the political party or candidate made reasonable efforts to prevent its members and supporters from committing Electoral Offences.

7.5 When determining sanctions or penalties, each PECC and the ECC shall ensure that the sanction is commensurate with the nature and the gravity of the offence. All decisions made by the PECC shall be reviewed by the ECC.

7.6 Where a PECC or the ECC orders remedial action or issues a warning, such order shall take effect immediately unless otherwise stated in the Decision.

7.7 Where a PECC imposes a fine, strikes a candidate from the candidate list, orders a recount or repeat of polling or issues a prohibition against an individual from serving as an electoral officer, such decision shall not be enforced until reviewed by the ECC.

7.8 Each PECC or the ECC shall, when appropriate, use its best efforts in notifying its decision to the Complainant and to the Respondent in writing, specifying a deadline for compliance with any imposed sanction.

7.9 Each PECC or ECC decision shall be published in English, Dari and Pashto, and shall be made available to the public through the ECC website and in binders at each IECS Office. Decisions may also be published in any other language where the ECC deems doing so appropriate.

Article 17.

Decision on Responses to Challenges

17.1 The ECC may summarily dismiss a Challenge that does not establish a prima facie case or where the Challenge is manifestly ill-founded.

17.2 The ECC shall examine all evidence submitted in a timely fashion. Based on this evidence and any other evidence of which the ECC may choose to take notice, the ECC shall uphold a Challenge where the evidence is clear and convincing that a nominated candidates does not meet the qualifications and eligibility criteria for candidacy.

17.3 When the ECC upholds a Challenge against a nominated candidate, the ECC shall direct the IEC to remove the nominated candidate from the candidate list.

17.4 Upon adjudication of all Responses to Challenges, the ECC shall report the name of the nominated candidates definitively removed from the candidate list to the IEC, The ECC shall, when appropriate use its best efforts in notifying, in writing ,its decisions to the challenger and the candidate who is to be.

Armenia

Electoral Code of the Republic of Armenia (2005) (as amended)

Article 35.

Procedures for Formation of the Central Electoral Commission

1. The Central Electoral Commission shall be made up of:
   1) One member from each party or alliance with a faction in the National Assembly, appointed by a decision of the permanent body of that party or, in the case of alliances, the joint decision of permanent bodies of parties within the alliances, passed by majority vote. If parties (alliances) fail to nominate their candidates within the time period set by this law for forming the Central Electoral Commission, in accordance with the requirements of sub-paragraph 1 of this Paragraph, then the vacancy in the Commission shall be filled by the appropriate faction;
   2) One member appointed by the President of the Republic of Armenia;
   3) One member appointed by a decision of the parliamentary group announced as of the first session of the incumbent National Assembly. After National Assembly elections following the adoption of this law, as well as in the case of dissolution of the parliamentary group operating in the National Assembly, the power to appoint a Central Electoral Commission member under this sub-paragraph shall be transferred to the Board of Chairmen of the Republic of Armenia Courts, from among the judges of the Republic of Armenia courts of general jurisdiction.
   4) One judge from the Cassation Court appointed by the Cassation Court.
2. The information on the Central Electoral Commission members shall be submitted to the Staff of the President of the Republic of Armenia by 18:00, no earlier than 40 days, but no later 10 days before the expiration of the Central Electoral Commission's term. Entities mentioned in Paragraph 1 of this Article shall be notified about the expiration of the Central Electoral Commission's term by the Chairman of the Central Electoral Commission, no later than 50

days before the expiration date. The new Central Electoral Commission shall be formed and shall assume its powers on the 60th day after the opening of the new National Assembly's session. The new Central Electoral Commission shall be considered formed, if at least two thirds of the total number of its members have been appointed. If the minimum number of Commission members have not been appointed by the deadline for formation of the Central Electoral Commission, in accordance with requirements set out in Paragraph 1 of this Article, then they will be appointed by the President of the Republic of Armenia from among judges of the Cassation Court, until the minimum number is achieved.

3. The composition of the Central Electoral Commission shall be approved by a decree of the President of the Republic of Armenia on the basis of nominations made by the entities responsible for forming the Central Electoral Commission.
4. *(removed by 03.07.02 HO-406-N)*
5. *(removed by 03.07.02 HO-406-N)*
6. The Central Electoral Commission's activities shall be directed by the Commission Chairman or, as assigned by him/her, the Deputy Chairman. The Central Electoral Commission's Chairman, the Deputy Chairman and the Secretary shall be elected by the Central Electoral Commission during at its first session. The Central Electoral Commission's first session shall be held at 12:00 (noon) on the day the Commission is formed, and it may continue until 24:00. It shall be held in the Central Electoral Commission's administrative building. The first session shall be chaired by the Chairman of the former Central Electoral Commission.
7. The right to nominate candidates for the position of the Central Electoral Commission Chairman shall belong to members of the Central Electoral Commission.
8. If only one nominee for the position of the Central Electoral Commission Chairman is voted on, then he/she shall be considered elected, if he/she receives more than half of the votes cast.
9. If two nominees for the position of the Central Electoral Commission Chairman are voted on, then the nominee that receives more votes shall be considered elected to the post of the Central Electoral Commission Chairman.

10. If more than two nominees for the position of the Central Electoral Commission Chairman are voted on, and none of them receives more than half of the votes cast, then a second vote shall be held between nominees who received the most votes.
11. If the Central Electoral Commission fails to elect a Chairman during its first session, in accordance with the established procedures, then the Government shall appoint a Chairman, within three days, from among members of the Central Electoral Commission.
12. Elections of the Deputy Chairman and the Secretary of the Central Electoral Commission shall be held in accordance with procedures for election of the Central Electoral Commission, set out in this Article.
(amend. of 19.03.99 HO-286, 03.07.02 HO-406-N, 19.05.05 HO-101-N)

Article 36.

Procedures for Formation of Territorial Electoral Commissions

1. Members of Territorial Electoral Commissions shall be appointed by members of the Central Electoral Commission, based on the principle of "one member of Territorial Electoral Commission per one member of the Central Electoral Commission," from among persons who have participated in professional training and received appropriate qualifications, with the exception of Central Electoral Commission members appointed by the Cassation Court and the Board of Chairmen of the Republic of Armenia Courts, who shall appoint members of Territorial Electoral Commissions from among judges of courts of general jurisdiction. Territorial Electoral Commissions shall be formed and assume their powers 15 days after the Central Electoral Commission assumes powers. Territorial Electoral Commissions shall be considered formed if at least two thirds of the total number of their members have been appointed. If the minimum number of Commission members have not been appointed by the deadline for formation of Territorial Electoral Commissions, in accordance with requirements set out in Paragraph 1 of this Article, then they will be appointed by the President of the Republic of Armenia from among judges of the Republic of Armenia courts of general jurisdiction, until the minimum number is achieved. The

composition of Territorial Electoral Commissions shall be approved by a decree of the President of the Republic of Armenia on the basis of nominations made by the entities responsible for forming Territorial Electoral Commissions.

2. The information on members of Territorial Electoral Commissions shall be submitted to the Central Electoral Commission at least ten days before Territorial Electoral Commissions are formed; the Central Electoral Commission shall forward that information to the Staff of the President of the Republic of Armenia within two days.
3. Activities of Territorial Electoral Commissions shall be directed by Commission Chairmen or Deputy Chairmen, as assigned by the Chairmen.
4. The Chairmen, Deputy Chairmen and Secretaries of each Territorial Electoral Commission shall be elected by members of that Territorial Electoral Commission from among Commission members, at the fist session of Territorial Electoral Commission. The first session of Territorial Electoral Commission shall take place at 12:00 (noon) on the day the Territorial Electoral Commission is formed. The first session shall be chaired by the Chairman of the former Territorial Electoral Commission.
5. The right to nominate candidates for the position of Chairman of a Territorial Electoral Commission shall belong to members of that Territorial Electoral Commission.
6. Chairmen, Deputy Chairmen and Secretaries of Territorial Electoral Commissions shall be elected in accordance with procedures for electing the Chairman of the Central Electoral Commission.
7. If a Territorial Electoral Commission fails to elect a Chairman in accordance with the established procedures and within the required timeframe, then the Government shall appoint a Chairman, within three days, from among that Territorial Electoral Commission members.
8. *(removed by 03.07.02 HO-406-N)*
   (amend. of 03.07.02 HO-406-N, 19.05.05 HO-101-N)

Georgia

Unified Election Code (2001) (as amended)

Article 70.

Rights of Observers

1. An observer shall have the right to:
   a) Attend and observe session of election commissions:
   b) Be present in the polling place at any time on polling day, move on the precinct territory unrestrictedly and observe all stages of the polling process from any spot of the precinct; *(12.10.2004. N488)*
   c) Replace, at any time on polling day, another registered representative of the organization (in cases where such a representative exists);
   d) Take part in the inspection of ballot boxes, before they are sealed and after they are opened;
   e) Observe registration of voters on the voters' lists, issuance of ballot papers and special envelopes and their verification, without disrupting the polling process;
   f) Attend the procedures of counting of votes and of summing up of results;
   g) Observe the process of voting through mobile ballot box;
   h) Observe the counting of votes in such conditions which ensure visibility of the ballot papers;
   i) Observe the process of the election commission compiling the summary protocol of election results and other documents;
   j) Address the DEC Chairman with an application/complaint regarding issues related to the procedures of voting and polling, by which he/she demands reaction in case of identification of a particular violation;
   k) Request a voter to show how many ballot papers and special envelopes he/she holds *(14.08.2003. N 2965-rs);*
   l) Make appeals regarding actions of an election commission to a higher election commission, or court;
   m) Observe the ballot box, inserting of special envelopes into the

ballot box, opening of the ballot box, counting of ballot papers and compiling of protocols;

n) get acquainted with the summary protocols of voting and election results, compiled by election commissions.

2. An observer shall have no right to:
   a) Interfere in the functions and activities of election commissions;
   b) Exert influence upon the free expression of will of the voters;
   c) Agitate in favour or against an electoral subject;
   d) Wear symbols or signs of any electoral subject;
   d') Be without a badge at the polling place on the polling day. *(12.10.2004 488-IIs)*
   e) breach other requirements of this law.
3. Responsibility for violations of rights given by the present law to a domestic/international observer, electoral subject and mass media representatives or interference in their activities is defined in compliance with the rule established by election, administrative and/or criminal legislation of Georgia. *(28.12.2009. N2525)*
4. Violation by an observer, electoral subject and mass media representatives of the requirements of subparagraph (a) (d) of paragraph 2 of the present article shall entail their responsibility in accordance with the rule established by electoral legislation. *(28.12.2009. N2525)*

Article 77.

Appeal Procedure and Timeframes

1. A violation of the electoral legislation may be appealed at a relevant election commission. Decision of an election commission my [sic] be appealed only at the higher election commission and only after that at the court, in accordance with the rules and timeframes determined by the present article, unless otherwise defined by the present law.
2. Decision of the Precinct Election Commission may be appealed by the commission within 2 calendar days at a relevant Election Commission usually examining the complaint within 1 calendar day. The decision of the District Election Commission may be appealed at District/City Court within 2 calendar day after this decision has been made. District/City Court adjudicates the lodged complaint within

2 calendar days. The decision of the District/City Court may be appealed at the Court of Appeal within 2 calendar days since the decision has been made. The Court of Appeal makes decision within 2 calendar days after its submission. The decision of the Court of Appeal is final and may not be appealed *(28.12.2009. N2525).*

3. By virtue of appealing of a decision of the Precinct Elections Commission, in case of appealing of a decision of the District Election Commission at the CEC, application/complaint remains unconsidered *(28.12.2009. N2525).*
4. The commission may appeal against the decision of the District Election Commission at CEC, within 2 calendar day after it has been made. The CEC shall consider the complaint within 1 calendar day. After the decision of the CEC has been made, it may be appealed at Tbilisi City Court within 2 calendar days. Tbilisi City Court shall consider the complaint within 2 calendar days. The decision of the Tbilisi City Court may be appealed at the Court of Appeal within 2 calendar days after it is made. After submission of the complaint, the Court of Appeal shall make decision within 2 calendar days. The decision of the Court of Appeal is final and may not be appealed *(28.12.2009.N2525).*
5. The decision of the CEC may be appealed at the Tbilisi City Court within 2 calendar days after the decision has been made. The court considers a complaint within 2 calendar days. Tbilisi City Court's decision, which shall be made within 2 calendar days after the complaint is filed, may be appealed at the Appellate Court within 2 calendar days. Appellate court's decision is final and may not be appealed *(28.12.2009 N2525);*
6. In case of submission of application/complaint to the court, the court is obliged first, to inform District/Central Election Commission about acceptance of the application/complaint and secondly, it has to give notice to the Commission regarding the decision made. The decision of the District/City Court should be dispatched to the parties involved before 12:00 of the next day.
7. During the court hearing if the involved party is absent, the court makes a decision by investigating the materials included in the case, and according to the provisions of articles 4, 17, 19 of the Administrative Procedural Code of Georgia.

8. Application/claim/complaint is considered to be submitted to the Election Commission or to the Court after it has been registered in the relevant Election Commission or at the pertinent Court.
9. Filing application/claim/complaint to the Election Commission or to the Court does not cease the operation of the appealed decision.
10. It is prohibited to prolong the timeframes of appeal and adjudication of the complaint, if the Law does not consider other than the determined time period.
11. Application/claim/complaint on election disputes envisaged by the article 771, submitted to the election commission or to the court by the persons that are not determined by the same article, shall remain unconsidered.
12. Timeframes and rules for appealing of a decision of the election commission and of a violation of the electoral law, also timeframe regulating consideration and decision making process of application/complaint and at the end the persons entitled to bring an action are determined by the Georgian legislation, unless otherwise provided for in the present law. *(21.03.08.N6013)*
13. During the elections held under the competence of the High Election Commission of autonomous republic, if violations regarding electoral law occur, terms and timeframes of an appeal of those violations may be addressed by the procedures established in the legislation of an autonomous republic *(15.07.2008 N 231).*
14. Since the announcement of the election day till its expiry, submission of an application/complaint shall be possible from 10.00 till 20.00 of a calendar day *(28.12.2009. N2525).*

Kosovo

Law on General Elections (No. 03-L073) (2008) (as amended)

Article 56.

Rights and Duties of Observers

56.1 An observer has the right to:

a) observe without hindrance the preparation and conduct of

elections, including post-election day meetings, hearings and activities related to the elections, complaints and appeals over election results, and determination of the winning candidates;

b) submit written comments to election commissions and polling station committees;

c) observe the packaging, transfer, delivery, handling, counting, safekeeping, and destruction of ballots;

d) obtain copies of decisions, protocols, tabulations, minutes, and other electoral documents during the entirety of the election processes, including processes before and after election day.

56.2 During the electoral process, including the voter registration process, an accredited observer may submit a complaint of any violation of applicable Rules, Administrative Directions, Electoral Rules, or Administrative Procedure to the CEC in accordance with its procedures.

56.3 An observer has the duty to:

a) respect the requirements of this law and the rules of the CEC;

b) to wear the observer's identity badge where it can be easily seen when the observer is engaged in observation activities;

c) refrain from wearing distinctive signs that serve as means of propaganda or that might influence the voters' will or identify them with a particular political entity or a candidate; and

d) refrain from violating the right of the voter to a secret ballot and from hampering the process of voting and the administration of the election.

56.4 An accredited observer organization may send one observer to CEC and MEC meetings.

Nigeria

Electoral Act 2010

Article 75.

Certificate of Return

(1) A sealed Certificate of Return at an election in a prescribed form shall be issued within 7 days to every candidate who has won an election under this Act:

Provided that where the Court of Appeal or the Supreme Court

being the final Appellate Court in any election petition as the case may be nullifies the Certificate of Return of any candidate, the Commission shall within 48 hours after the receipt of the order of such Court issue the successful candidate with a valid Certificate of Return.

(2) Where the Commission refuses and, or neglects to issue a certificate of return, a certified true copy of the Order of a Court of Competent Jurisdiction shall, ipso facto, be sufficient for the purpose of swearing- in a candidate declared as the winner by that Court.

Article 133.

Proceedings to Question an Election

(1) No election and return at an election under this Bill shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Bill referred to as an "election petition") presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Bill, and in which the person elected or returned is joined as a party.

(2) In this part "tribunal or court" means—

(a) in the case of Presidential or Governorship election, the court of Appeal; and

(b) in the case of any other elections under this Bill, the election tribunal established under the Constitution or by this Bill.

(3) The election tribunals shall—

(a) be constituted not later than 14 days before the election; and

(b) when constituted, open their registries for business 7 days before the election.

Article 134.

Time for Presenting Election Petition

(1) An election petition shall be filed within 21 days after the date of the declaration of results of the elections;

(2) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition;

(3) An appeal from a decision of an election tribunal or court shall be heard and disposed of within 90 days from the date of the delivery of judgment of the tribunal;

(4) The court in all appeals from election tribunals may adopt the practice of first giving its decision and reserving the reasons thereto for the decision to a later date;

Article 142.

Accelerated Hearing of Election Petitions
Without prejudice to the provisions of section 294 subsection (1) of the Constitution of the Federal Republic of Nigeria an election petition and an appeal arising therefrom under this Act shall be given accelerated hearing and shall have precedence over all other cases or matters before the Tribunal or Court.

Thailand

Organic Act on the Election of Members of the House of Representatives and the Installation of Senators (2008)

§ 57.

No State official shall, by exercising the function unlawfully, commit any act to be favorable or unfavorable to a candidate or a political party.

The unlawful exercise of function under paragraph one shall not include the performance of duty in an ordinary course of position of such State official or the advice or the assistance in an election of a candidate or a political party which is not relevant to the performance of duties, regardless of whether such act may be favorable or unfavorable to any candidate or political party.

In the case where there appears convincing evidence of any violation of the provisions of paragraph one, the Election Commission shall, if being of the opinion that any act may be favorable or unfavorable to any candidate or political party, have the power to order such State official to cease or suspend the act thereof. For this purpose, the Election Commission shall notify the superior or the supervisor of such official to order that such official shall vacate the office temporarily or shall attach to any Ministry, Sub-Ministry, Department, Changwat central office or Amphoe office inside or outside the constituency or to prohibit such person to enter into any constituency.

§ 103.

Prior to the announcement of the result of election, if the Election Commission considers that, after an investigation and inquiry, there is evidence that any candidate acted in violation of this Organic Act, a Regulation or a Notification of the Election Commission, or the circumstances suggest that any candidate caused another person to commit such act, supported or connived at such act of another person, or knew of and did not abate such act, and if the Election Commission considers that such act is likely to cause the election to be dishonest and unfair, the Election Commission shall order the derogation of the rights of candidacy for every candidate who committed such an act for a period of one year effective as from the date of the Election Commission order.

If there appears convincing evidence that a leader or a member of the Executive Committee of political party connive at or neglect or has known of but does not abate or rectify, for the purpose of an honest and fair election, the act under paragraph one, the political party shall be deemed as committing an act to obtain powers to rule the country by means not in accordance with the modus operandi as provided in the Constitution. In such case, the Election Commission shall, under the Organic Act on Political Parties, file a motion with the Constitutional Court in order to dissolve the political party. In the case where the Constitutional Court orders the dissolution of the political party, the Constitution Court shall derogate the rights of candidacy of its leader and members of the Executive Committee of such political party for a period of five years effective as from the date of the order of dissolution.

In the case where it appears to the Election Commission that there is a violation under paragraph one, regardless of the act being committed by any person, if the Election Commission considers that a candidate or political party benefited from such act, the Election Commission shall have the power to order the candidate or political party to abate or proceed in any manner in order to remedy such dishonesty and unfairness within the prescribed time limit. In the case where the candidate or the political party, without reasonable grounds, fails to proceed in accordance with the order of the Election Commission, it shall be presumed that the candidate was a supporter of such act or the political party connived at such act, save the case where the candidate or the political party proves that he, she or it did not connive at such act.

The resolution of the Election Commission to derogate the right of candidacy under this Section shall be in accordance with the Organic Act on the Election Commission.

When there is an order to derogate the right of candidacy for any candidate or the Constitutional Court orders the derogation of the right of candidacy for any leader or member of the Executive Committee of political party, the institution of criminal proceedings against such candidate, leader or member of the Executive Committee of political party shall also be considered. In such case, it shall be deemed that the Election Commission is the injured person under the Criminal Procedure Code.

In the case where an order to derogate the right of candidacy under this Section is made after the election day but before the day of the announcement of the result of election and the candidate whose right of candidacy is derogated is a candidate on a constituency basis who received the a sufficient number of votes to be elected in such constituency, the Election Commission shall order a new election in order that such constituency is endowed with the required number of elected candidates.

§ 107.

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 or to abstain from voting for any candidate or political party or prepared money or properties for such conduct, the Election Commission shall have the power to provisionally seize and attach the money or properties of such person until the court issues an order.

The Election Commission shall file a motion with the Changwat Court or the Civil Court in whose jurisdiction the seizure or attachment took place within three days as from the date of seizure or attachment under paragraph one. When the Court receives the motion, it shall conduct an ex parte investigation to be completed within five days as from the date on which the motion was received. If the Court considers it likely that the relevant money or properties in the motion was or will be unlawfully used for an election, the court shall order the seizure or attachment of money or properties until the announcement of the result of the election.

Ukraine

Law of Ukraine on Elections of People's Deputies of Ukraine (2007)

Article 59.

Monetary Deposit

1. The monetary deposit shall constitute two thousand minimum salaries and shall be paid by the party (bloc) in cash-free form to a special account of the Central Election Commission.
2. If the Central Election Commission adopts a decision to refuse the registration of all candidates for deputy, the paid monetary deposit shall be transferred to the account of the party (bloc) within a five-day term after the respective decision was passed.
3. When a decision about the registration of all candidates for deputy, included in the electoral list of a party (bloc) in accordance with paragraph four of Article 62 and paragraph ten of Article 63 of this Law, is cancelled, the monetary deposit shall be transferred to the State Budget of Ukraine within five days after passing the respective decision.
4. The monetary deposit shall be returned to parties (blocs), who took part in the distribution of deputy mandates.
5. The monetary deposit, paid by a party (bloc that did not take part in distribution of deputy mandate, shall be transferred to the State Budget of Ukraine within an eight-day term after official announcement of results of the elections.

Article 60.

Declaration of Property and Income of a Candidate for Deputy

1. The declaration of property and income of a candidate for deputy for the year preceding the year of the beginning of the election process shall be completed by him personally.
2. The Ministry of Finance of Ukraine shall approve the format of the declaration of property and income of a candidate for deputy no later than one hundred and thirty days prior to election day.
3. The Central Election Commission may address the State Tax Admin-

istration and commission it to verify the information indicated in the declaration of property and income of a candidate for a deputy.

4. Errors and inaccuracies revealed in the declaration of property and income are subject to corrections and shall not constitute a reason for a refusal to register a candidate for deputy.

Article 61.

Procedure for Registration of Candidates for Deputy

1. Candidates for deputy included in an electoral list of a party (bloc) shall be registered by the Central Election Commission on condition of the submission of the documents envisaged by Article 58 of this Law.
2. The submission of the documents for registration of candidates for deputy to the Central Election Commission shall end no later than eighty-five days prior to election day.
3. A person included in the electoral list of candidates for deputy by a party (bloc), who by the day a party (bloc) submits a statement about the registration of candidates for deputy fails to submit a statement giving consent to run as candidate for deputy from this party (bloc), shall be considered excluded from the electoral list of the party (bloc) from the day the party (bloc) submits the statement according to sub-paragraph 1 of paragraph one of Article 58 of this Law. A statement from such person, giving his/her consent to run, submitted after the party (bloc) has submitted the said statement about the registration of candidates for the deputy, shall not be accepted.
4. A person included in the electoral list of a party (bloc) shall have the right to revoke his/her statement of consent to run as candidate for deputy until the day of registration. From the moment when the Central Election Commission receives a statement to revoke consent to run as candidate for deputy, such person shall be considered excluded from the electoral list of the party (bloc). The Central Election Commission shall inform the party (bloc) in writing about the receipt of such statement no later than on the day following the receipt of the statement. A repeated statement of consent of a person to run as candidate for deputy from a party (bloc) shall not be accepted.

5. A person included in several electoral lists of parties (blocs) according to his/her written statements of consents to run as candidate for deputy on behalf of these parties, shall be excluded from all electoral lists in which he/she was included by the decision of the Central Election Commission.
6. In case of conduct of regular elections of people's deputies the Central Electoral Commission shall, no later than on the seventh day after the receipt of a statement and the necessary documents attached to it about the registration of candidates for deputy, pass a decision to register the candidate for deputy or to refuse registration. (Paragraph six of Article 61 with amendments made in accordance with Law No 1114-V on 01.06.2007)
7. The list and the order of candidates for deputy on the electoral list determined by a party (bloc) may not be changed after their registration by the Central Election Commission, except for the exclusion of certain candidates from an electoral list in cases envisaged by this Law.
8. If candidates for deputies are registered, the representative of the party (bloc) in the Central Election Commission shall be given the certificates of candidates for deputy in the form established by the Central Election Commission, together with a copy of the decision to register the candidate within three days after the respective decision was passed. The electoral list of candidates for deputy of a party (bloc) together with the decision on registration shall be published in the newspapers *Holos Ukrayiny* and *Uriadovyy Kuryer* within the same term.
9. If the Central Election Commission reveals signs of violation of paragraph one of Article 37 of the Constitution of Ukraine in the documents, submitted by a party (bloc), it is obliged to address the Ministry of Justice of Ukraine regarding a submission from it to the Supreme Court of Ukraine about the prohibition of the activities of the respective party. The consideration of the issue of registration of candidates for deputies from this party (bloc) shall be postponed until a respective decision of court takes legal effect.

Zambia

Electoral Act (2006)

§ 102.

Trial of Election Petitions

(1) An election petition shall be tried and determined by the High Court in open court, within one hundred and eighty days of the presentation of the election petition as provided under section ninety-seven:

Provided that where an election petition is not tried and determined within the period specified in this subsection due to a failure by the petitioner to actively prosecute the petition, the High Court shall dismiss the petition for want of prosecution.

(2) The High Court may adjourn the trial of an election petition from time to time and from place to place.

(3) Subject to the provisions of this Act, the High Court may in respect of the trial of an election petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

(4) On the trial of an election petition, a verbatim record of all evidence given orally in the trial shall be taken and transcripts of the record shall, at the conclusion of the proceedings, be delivered to the Commission by the Registrar.

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