

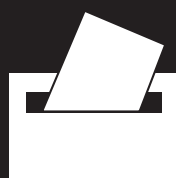


Prioritizing Justice

Electoral Justice in Conflict-Affected Countries
and Countries in Political Transition

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

The objectives of the Institute are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy.

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The Institute's work is organized at global, regional and country level, focusing on the citizen as the driver of change. International IDEA produces comparative knowledge in its key areas of expertise: electoral processes, constitution building, political participation and representation, and democracy and development, as well as on democracy as it relates to gender, diversity, and conflict and security.

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- More inclusive participation and accountable representation
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International IDEA resources on electoral processes

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Key recommendations

1. Prioritize the establishment of an electoral justice system before initial elections are held

Although there are other important steps that must also be taken to administer initial elections after a period of conflict or non-democratic rule, the development of a set of laws and institutions that ensure electoral justice is essential. An electoral justice system will decrease the risk of an initial election failing due to repression, electoral crimes or misconduct, or other irregularities, which in turn could result in a setback for democratic development or a return to conflict or non-democratic rule.

2. Develop a clear, comprehensive legal framework establishing electoral justice that meets international standards

The framework should promote electoral justice by ensuring that all stakeholders understand the full extent of their rights and the consequences of failing to conduct themselves in accordance with the law. Lawmakers should ensure that laws are drafted in a manner that involves the participation of a wide range of electoral stakeholders in order to promote their legitimacy.

3. Determine whether current institutions are compatible with an emerging electoral justice system, or whether new institutions must be established

Every conflict-affected or transitional context is different. Determining which institutions have maintained legitimacy with stakeholders and may be able to serve as a component of (or support to) an electoral justice system is an important early step in the planning stage. This determination will also inform decisions on whether to create and support new ad hoc or permanent electoral justice institutions.

4. Ensure the independence, inclusivity, professionalism, and impartiality of electoral justice institutions

Developing legal frameworks and institutions that meet these goals, and recruiting personnel to ensure electoral justice in accordance with these goals, will build public and other stakeholder confidence and will help ensure that institutions operate in accordance with international electoral standards.

5. Develop laws and procedures that mitigate the risk of electoral injustice occurring

Lawmakers and regulators should take steps to minimize the possibility of electoral injustice occurring by, for example, implementing procedures that make election-day misconduct more difficult to commit. Depending on political and historical context, lawmakers should opt for establishing an electoral system that minimizes the likelihood of electoral disputes.

6. Promote efficiency and effectiveness

Institutions must operate efficiently and effectively to safeguard electoral justice. Legal frameworks governing an electoral justice system should ensure that decisions and other actions are fully and uniformly enforced. Decision makers may wish to look to examples from other countries and other justice systems for information on maximizing efficiency in case screening, processing and tracking.

7. Continuously assess the need for proactive legal reform and changes to the electoral justice system overall

A transition period may include many phases. Political, economic, demographic, or other changes within the country, as well as changes in electoral laws and procedures, may require a reassessment of which institutions are necessary or best suited to address new risks of electoral injustice.

8. Promote transparency and accountability

To promote stakeholder trust, and to eliminate claims of bias or favouritism, institutions should ensure that their proceedings, decisions and other actions are accessible. This is particularly true of electoral management bodies, which should make certain that all regulations, decisions, actions, and other activities are publicly available and that detailed election results are publicized in a timely manner. In addition to transparency, judicial review of an electoral justice legal framework and a publicly accessible disciplinary process for electoral justice institution officials help ensure that an electoral justice system is accountable to the law and the people it serves.

9. Promote electoral justice education and public involvement in the electoral justice process

Particularly in a conflict-affected or transitional environment, the public and other stakeholders may require information not only about the mechanics of filing electoral claims or complaints but on their right to do so and why exercising this right is important. Effective civic and voter education will encourage individuals to actively identify and report instances of electoral injustice, and will promote electoral justice system legitimacy.

Executive summary

Elections require an intense investment of human, logistical and organizational resources. This is particularly true in conflict-affected countries and countries transitioning to democracy, where the fundamental institutions responsible for administering elections may have been destroyed (or may never have existed in the first place). While it is natural for aspiring democracies to focus on electoral operations related to election day, building a sustainable electoral democracy involves much broader efforts.

This Policy Paper addresses one such element: it asserts that creating an electoral justice system (EJS) is an essential priority in the beginning of a country's democracy-building process. Without an electoral justice system in place, repressive laws—or unaddressed electoral crime, violations or irregularities—may result in a failed election or an election that lacks credibility with key stakeholders. This in turn may lead to a step backwards on the path to democracy and in some instances a return to conflict or non-democratic rule.

Electoral justice concerns more than the resolution of electoral disputes related to election day, although that is an important component. It also involves the means and mechanisms for (a) ensuring that each action, procedure and decision related to the electoral process; and (b) for protecting or restoring the enjoyment of electoral rights are in line with the law. There are a variety of institutions that typically comprise the components of an electoral justice system. They may be investigative bodies, first-instance decision-making entities such as courts or tribunals, higher courts or other entities that consider appeals from lower court decisions, or other institutions that help electoral disputants reach a resolution. Particularly in a transitional context, non-state actors may at times assume important roles in support of an EJS.

For conflict-affected countries and countries in political transition, developing an appropriate electoral legal framework during the pre-electoral stage is an important early step. Laws at all levels should comply with international standards, which all countries transitioning to democracy should adopt—or reaffirm—as national obligations. It is critical that the legal framework is clear, comprehensive, and designed to be enforced equally on all. To the extent possible, lawmakers should try to ensure that a complete electoral legal framework, including a framework governing the role of electoral justice institutions, is in place at a sufficiently early point before election day so that all stakeholders have an opportunity to familiarize themselves with it. The process of developing a legal framework should include the opportunity for input from all key stakeholders to promote public and other stakeholder confidence in the law.

Establishing or identifying which institutions will implement electoral justice is also an important consideration. After a period of violent conflict or lengthy non-democratic governance, it is important to identify institutions (state and non-state) and individuals that have retained popular and stakeholder trust and legitimacy, and to consider including them within a new EJS, even as a short-term measure. Where no viable institutions exist, decision-makers should work inclusively to establish new institutions, which may be designed to be ad hoc or permanent. With either approach, international actors may play a constructive role through financial support and technical assistance, and in unusual circumstances, by playing a direct role in resolving electoral disputes.

To gain stakeholder confidence, electoral justice institutions should be (and be perceived as) independent, impartial, professional and inclusive. Independence should include both protections for individual officials from retaliation and institutional independence from interference by other branches of government. Impartiality may not always be attainable in a politically polarized setting, so institutions may opt instead for politically ‘balanced’ judicial panels or boards. Professionalism is a key, and often underrated, characteristic of an effective electoral justice institution. An electoral justice institution will lose credibility if its staff are discourteous and its operations are disorganized. Ensuring the inclusion of women and minority groups is particularly important because it helps ensure that the views of traditionally under-represented groups are considered, which in turn promotes institutional legitimacy with these groups. Inclusivity also encompasses the accessibility of electoral justice institutions to all persons, regardless of gender, native language, disability, or other statuses that in some instances may make these institutions difficult or impossible to access.

Decision-makers should focus on reducing the likelihood of electoral injustice occurring, particularly during the electoral stage of the electoral cycle. This can be accomplished by establishing and enforcing electoral laws and procedures designed to minimize the opportunity for crime, other misconduct, or irregularities. Decision-makers should also continuously re-evaluate all aspects of an EJS to ensure its maximum efficiency and effectiveness. As a country develops and consolidates democracy and its democratic institutions, it may be necessary to reconsider and perhaps modify the roles, responsibilities, and jurisdictions of electoral justice institutions to maximize their ability to address new risks of electoral injustice as they emerge.

Finally, it is essential that electoral justice institutions work to gain and maintain public and other key stakeholder confidence in order to develop the legitimacy necessary to operate effectively in a democratic society. Trust can be strengthened through the implementation of measures to promote institutional transparency and accountability. Both civic and voter education on the role of the EJS are essential to building trust. An electorate educated on both how an EJS functions and its importance as the guarantor of electoral justice will become a more active participant in asserting fundamental rights and identifying and reporting incidents of election-related misconduct.

1. Introduction

Free and fair elections are a requirement for democratic governance.¹ After a period of violent conflict, or after years of non-democratic rule, however, developing the laws and institutions necessary to conduct elections can be an enormous challenge, requiring the investment of significant human, logistical, and financial resources. Countries emerging from conflict or transitioning to democracy tend to devote most of their attention and energy on electoral operations related to polling day, including voter registration, the candidate application process, recruitment of electoral officials and other personnel, and the printing and shipping of ballots. Establishing an electoral justice system (EJS) may seem like a secondary concern or even an afterthought.

An effective EJS, however, is an essential part of a free and fair electoral process. Without an adequate system in place, elections may be plagued disputes and irregularities that in turn may threaten the legitimacy of election results (Mozaffar and Schedler 2002: 10–11). Elections without sufficient electoral justice safeguards in place are more likely to fail or to be perceived as non-credible by stakeholders, which may increase the risk of electoral violence (Global Commission on Elections, Democracy, and Security 2012: 25) or even trigger revolt or revolutionary action (Kuntz and Thompson 2009: 258), causing a setback on the path toward democratic development.

Electoral Justice: The International IDEA Handbook (2010) discusses electoral justice in all contexts. The Handbook includes an in-depth discussion of the importance of electoral justice during all stages of the electoral process.² This Policy Paper focuses on applying these ideas to conflict-affected countries or countries in political transition. It asserts that an effective EJS is an essential component of a sound electoral process, and that it should be a focus from the beginning for such countries. The paper is designed to benefit many different types of audience, particularly officials and other stakeholders who seek to ensure electoral justice in their countries, and those who are dedicated to strengthening electoral justice in countries emerging from violence or non-democratic rule.

The paper discusses unique challenges related to developing an electoral justice system in a transitional context. It emphasizes the importance of the development of a sound legal framework ensuring electoral justice. It focuses on electoral justice institutions, and how they might be identified, developed, and strengthened depending on the transitional context. The paper then turns to additional practices that leaders may wish to adopt as part of a strategy for developing an effective, efficient EJS and minimizing the risk of electoral injustice occurring in the first place. Finally, the paper will examine the importance of developing and maintaining public confidence in an EJS, and will discuss ways to promote public and other key stakeholder confidence. The paper makes practical recommendations regarding building or strengthening an EJS. Examples from different countries will illustrate cases where an effective EJS strengthened—or where a lack thereof may have damaged—free and fair electoral processes.

¹ ‘Free and fair’ refers to all of the qualities that are typically associated with truly democratic elections, including openness, legitimacy, viability, credibility, inclusivity, and genuineness.

² See, in particular, the discussion of electoral justice as a key consideration during all stages of the electoral cycle (International IDEA 2010: 18–20).

2. Defining terms

What is electoral justice?

Electoral justice encompasses all aspects of the electoral process. This includes the quality of electoral, civil and other political rights integral to the electoral process; the resolution of disputes related to elections; the identification and punishment of electoral-related wrongdoing; the identification and correction of irregularities related to the electoral process; and, in all possible cases, the provision of remedies to restore the integrity of the electoral process. It involves the means and mechanisms for ensuring that each action, procedure, and decision related to the electoral process is in line with the law. In addition, it involves the means and actions for protecting or restoring the enjoyment of electoral rights, and giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive an adjudication (International IDEA 2010: 1).

Electoral justice is not limited to well-known forms of electoral fraud such as ballot box stuffing—it also protects rights necessary for a robust democratic process. For example, as stated in the Accra Guiding Principles, electoral justice encompasses ‘the right to vote, stand for election, the equal rights of men and women, freedom of association and affiliation, the right to security of the person, and the right to take part in the conduct of public affairs’ as well as ‘the civil rights connected to these rights such as freedom of speech, freedom of association, the right of peaceful assembly, right to information, right to petition for redress’ (Integrity Action 2011: 3).³

Electoral justice also requires adherence to the rule of law. This includes guarantees of the right to an effective remedy, due process of law, judicial independence, state institution accountability, and other fundamental rights related to the provision of justice. Electoral justice is a fundamental element of democracy:

Electoral justice demands that core democratic values and principles be recognized and implemented in every corner of the world. It permits new ideas to infuse the process of civil government over the course of time and through succeeding electoral cycles. It provides means for the just, peaceful and acceptable deployment of wealth and resources in society. It encourages resolution of disputes through the sharpening of debates and the reaching of a broadly acceptable accommodation of important differences and of conflicting claims in society. It is a precondition to the establishment of an acceptable polity, deserving of membership of, and the respect of, the international community. (Integrity Action 2011: 3)

Electoral justice is not static—it is a positive, dynamic objective that requires constant reassessment. Because societies in transition are often changing rapidly (politically, socially, and demographically), electoral justice will also often be a shifting objective.

³ The Accra Guiding Principles consist of the following values: integrity, participation, lawfulness (rule of law), impartiality and fairness, professionalism, independence, transparency, timeliness, non-violence (freedom from threats and violence), regularity and acceptance (Integrity Action 2011).

Defining conflict-affected countries and countries in political transition

This paper uses the term ‘conflict-affected’ to refer to countries that have emerged from a significantly violent era and that have stated the goal of establishing (or re-establishing) democratic governance. A conflict-affected country may not be completely free of all violence or security threats. It should, however, have sufficient security and stability to hold elections in all (or a major portion) of its territory.⁴ In this paper, a ‘country in political transition’ is one that has expressed the intention, and has taken concrete steps, to convert from any form of non-democratic governance to democracy, regardless of whether there has been recent violent conflict.

A country that is transitioning *from* non-democratic rule may not necessarily be transitioning *to* full democracy, at least not right away. Some countries may be in what analysts have called a ‘grey’ zone between democratic consolidation and autocracy (Carothers 2002: 9–10; Norris 2014: 3, 148). When assessing the viability of an EJS, any limitations on the potential for genuine democratic practices and governance must be identified and acknowledged. These limitations might include political domination by one party or faction, the political exclusion of significant parties or factions, restrictive power-sharing arrangements, or undue military influence in governing. Although some of these circumstances may be tolerable as part of an intermediate step towards democracy, they make the establishment of the legal framework and level playing field necessary for a fully effective electoral justice system highly unlikely.

Success in establishing a new electoral justice system will also depend on other factors. For example, there must be sufficient order and stability for elections to be possible (Diamond 2006: 96). The existence of adequate economic resources to conduct elections is another important factor, which may require the financial support of international actors and donors at least in the short-term. Another determinant is whether there is a consensus among key stakeholders to effect a democratic transition (UNDP 2004: 31–32). In many cases, help from international actors in addressing these issues will be critical.

Electoral justice systems and their components

Establishing an electoral justice system (EJS) is necessary to attain the goal of electoral justice. An EJS includes the full set of means or mechanisms available to ensure and verify that electoral actions, procedures, and decisions comply with the legal framework, and to protect or restore the enjoyment of electoral rights. Further, an EJS is ‘a key instrument of the rule of law and the ultimate guarantee of compliance with

⁴ This paper uses the term ‘conflict-affected’ rather than the narrower term ‘post-conflict’. As International IDEA’s ‘Policy on Mainstreaming Conflict Sensitivity’ (2016) notes, ‘the post-conflict stage is usually reached when the number of (battle-related) deaths is reduced to below 25 per year and maintained for a period between 1 and 5 years. This usually, though not necessarily, happens after a ceasefire agreement, a peace agreement, or victory of one side. 25 battle-related deaths is, however, an arbitrary benchmark, as is the period of time that peace needs to be maintained. Conflict can be maintained—arguably at a lower level of activity—after a peace/ceasefire agreement, or after one side wins the war. The latter cases are more properly described as conflict-affected states.’

the democratic principle of holding free, fair, and genuine elections’ (International IDEA 2010: 9).

There is no ‘model’ EJS: a system that suits one country might not fit another (International IDEA 2010: 6). Furthermore, as conditions change, any successful EJS must be flexible enough to address new potential violations and may need to reform itself to adapt to new challenges, which is often the case in countries attempting to establish the laws and institutions necessary for democratic governance. For example, changes in the number of internally displaced persons or refugees may require new approaches to ensure these citizens’ right to vote. Establishing political parties in countries without experience in democratic governance may require the implementation of particularly stringent laws and regulations to prevent campaign violations and even interparty violence. Changes in electoral technology, such as the use of electronic voting, or the implementation of new methods of voting (e.g. absentee voting, early voting, or voting by post) will require new measures to prevent fraud or irregularities.

An EJS is composed of institutions governed by law. The laws at issue may be constitutional in nature, statutory or regulatory provisions, and may also include binding codes of conduct, judicial decisions with legal force, and other instruments depending on the country’s legal system. International obligations pertaining to electoral and related rights, standards that a country has adopted and that carry the force of law, are also key aspects of a comprehensive electoral justice legal framework. The term ‘institutions’, as used in this paper (see Box 2.1), includes formal entities such as electoral management bodies (EMBs) and courts as well as less formal mechanisms for the resolution of electoral disputes, such as alternative dispute-resolution mechanisms.⁵

Different institutions usually have responsibility for addressing and resolving distinct types of electoral violations or disputes. An EMB, for example, may have the mandate to correct certain electoral operational irregularities. EMB decisions, in turn, may be appealable to a court or tribunal. Either a regular court or special electoral court may hear cases related to electoral criminal offences in the first instance. Other institutions and laws may address matters involving fundamental electoral, civil and other political rights, voter registration challenges, campaign finance violations, political party practices, and electoral boundary delimitation disputes, among other matters.

Not all electoral justice institutions are primary or ‘first-instance’ decision makers. Law enforcement agencies (including prosecutors or police) may investigate electoral violations and present findings to another entity for its consideration. One or more levels of higher courts—including constitutional courts, higher-level electoral courts,

⁵ International IDEA (2010) adopted the terms ‘electoral dispute-resolution mechanism’ (EDRM) and ‘electoral dispute-resolution body’ (EDRB) to describe components of an electoral justice system. An EDRM is defined as ‘all of the means in place for ensuring that electoral processes are not marred by irregularities, and for defending electoral rights. Among the mechanisms, a distinction should be made between: (a) those that provide a formal remedy or are corrective in nature; (b) those that are punitive in nature; and (c) alternative electoral dispute resolution mechanisms’ (200). An EDRB is defined as ‘the body entrusted with defending electoral rights and resolving electoral disputes. These may be entrusted to administrative bodies, judicial bodies, legislative bodies, international bodies or, exceptionally, as a provincial or transitional arrangement, to ad hoc bodies’ (199). To minimize the number of acronyms used, this Policy Paper refers to EDRBs as ‘electoral justice institutions’.

Box 2.1. Examples of electoral justice institutions

- electoral management bodies (EMBs)
- ordinary courts
- administrative courts
- special or electoral courts, and appellate courts
- constitutional or other high courts or councils
- electoral complaint boards or commissions (either as part of an EMB or independent)
- departments or divisions within government ministries
- specialized agencies (regulating, for example, political parties or campaign finance)
- legislatures or other elected bodies
- law enforcement agencies (police, prosecutors)
- sub-national governmental bodies
- international institutions or organizations
- alternative dispute resolution actors or mechanisms
- political parties
- other non-state actors such as civil society organizations

or elected bodies—may consider appeals on electoral matters. Local or sub-national institutions, such as city or provincial election commissions and local tribunals, may play a role in ensuring electoral justice. Countries may employ alternative dispute-resolution (ADR) mechanisms as a complement to more formal dispute resolution institutions, or to address matters that a formal EJS is not yet equipped to handle (Kovick, Young and Tohbi 2011: 229–57; International IDEA 2010: 183). Civil society organizations, including political parties, may play a role in setting electoral rules, resolving disputes, and in the case of parties, policing themselves.

Especially in fragile countries with a high risk of returning to violence, regional or international institutions and actors may play a primary role in supporting electoral justice—often in the form of financial support and electoral technical assistance. Regional and international courts may rule on matters related to rights connected to the electoral process. In certain unusual circumstances, international organizations may play a direct role in handling and resolving electoral disputes.⁶

⁶ See e.g. the role performed by international actors in adjudicating complaints in Afghanistan in 2004–10.

3. Developing the laws for a sound electoral justice system

Protecting civil and political rights

A legal framework cannot serve the goals of electoral justice if important civil and political freedoms related to the electoral process are not protected. Through international conventions and regional treaties and agreements countries around the world have agreed upon and defined certain universal standards that all countries should assume as obligations if they are to be considered genuine democracies. The subject of electoral justice is addressed in many of these international and regional conventions and treaties:

Electoral justice not only resolves electoral disputes; it also protects citizens' political and electoral rights as defined in UN treaties and a number of regional electoral instruments. Thus, electoral justice protects fundamental obligations such as the Right and Opportunity to Vote and to be Elected, Equality Between Men and Women, Freedom of Association, the Right to Security of the Person and the Right and Opportunity to Participate in Public Affairs—and touches on Freedom of Opinion and Expression, Freedom of Assembly, Transparency and the Right to information, Right to a Fair and Public Hearing, and the Right to an Effective Remedy. (International IDEA 2014: 260)

To help build trust with all electoral stakeholders, including opposition factions or groups within the country, governments in political transition should be encouraged to assume (or reassert their adherence to) all international and regional obligations related to the democratic process and the rule of law.⁷

A challenge for any institution called upon to implement rights, however, is ensuring that restrictions on rights are not overbroad or implemented in a manner that eviscerates the right itself. Some rights restrictions under law, such as narrowly-tailored hate speech prohibitions, regulation of campaign rallies and assemblies strictly to ensure traffic flow and public safety, and bans against political associations that advocate violence, may be consistent with the language and spirit of international obligations. The temptation for lawmakers in countries in political transition, and indeed for lawmakers in all countries, to impose excessive restrictions on key rights such as that of speech, the media, assembly and association may be great, however, since doing so allows them to maintain the fiction that the underlying fundamental right remains protected in law.

For example, in enacting Hungary's Fundamental Law in 2011, drafters included provisions guaranteeing the freedom of speech, but added in a later clause that 'freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community'.⁸ Critics have expressed concern that this restriction on freedom of speech, besides being vaguely worded, appears to go well beyond any recognized definition of unacceptable hate speech and

⁷ The Carter Center's Electoral Obligations and Standards database enables users to search for electoral obligations and standards by country, authoring body, document or topic: <<https://eos.cartercenter.org/>>.

⁸ The full text of Hungary's 2011 Fundamental Law is available on the website of the Constituent Project: <https://www.constituteproject.org/constitution/Hungary_2013?lang=en>.

could be used to stifle public dissent (European Commission for Democracy through Law 2013: 13–14). Similarly, Uganda’s crackdown on free assembly by opposition political stakeholders prior to its elections in 2016, authorized in part by that country’s 2013 Public Order Management Act, seemingly contradicts Uganda’s 1995 Constitution, which establishes ‘freedom to assemble and to demonstrate together with others peacefully and unarmed’ (article 29(1)(d); Human Rights Watch 2015), as well as article 21 of the International Covenant on Civil and Political Rights, to which Uganda acceded in 1995. The country’s law in this case renders hollow the constitutionally-stated right.

Electoral justice requires more than the protection of rights; it must also enable all individuals to have an equal opportunity to enjoy their rights. As a start, this requires the protection and enforcement of internationally-recognized civil rights such as freedom from discrimination on the basis of gender or minority status. Lawmakers—and electoral justice institutions with the authority to interpret legislation—give meaning to these rights by ensuring that electoral laws are enforced in a manner that guarantees that previously excluded groups will have a meaningful opportunity to participate in the electoral process. In the case of law-making, implementing measures that establish parliamentary quotas based on gender, or that guarantee the involvement of minority groups in parliamentary operations, may address persistent patterns of inequality and political exclusion. Some countries have taken additional legal measures to encourage meaningful political participation for women. In Costa Rica, for example, both the high constitutional court and the Supreme Electoral Tribunal have rendered decisions ensuring not only that quota requirements are met, but also that women are placed in ‘electable’ positions on candidate lists and enjoy fair representation as members of key parliamentary committees (Facio, Jiménez Sandova, and Morgan 2005: 109–11). These decisions relied in part on international conventions such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and regional conventions.

As another example, Mexico’s Electoral Tribunal of the Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federación, TEPJF) ruled in 2011 that political parties putting forward a candidate must ensure that a substitute for that candidate is of the same gender. In the 2009 elections there were several cases of women candidates winning seats, resigning their seats soon thereafter, and being replaced by a man as a designated substitute. In ruling that candidates and their substitutes must be of the same gender, the TEPJF relied on international conventions that Mexico has ratified, such as CEDAW and the American Convention on Human Rights, and in doing so cited Mexico’s own Constitution, which requires that international obligations should be interpreted in a manner that provides the broadest protections possible (Guevara Castro 2015: 191).

Ensuring that international electoral obligations are observed can be particularly challenging because the violator of international obligations is often the state itself, and/or powerful stakeholders connected to the state. They may feel threatened by the free exercise of rights, and attempt to repress or hamper efforts to protect or restore rights. The willingness of electoral justice institutions to stand up to attempts

to abridge rights, and whether powerful stakeholders choose to respect and honour their decisions, are particularly crucial factors when determining whether free and fair elections are possible after conflict or non-democratic rule. Electoral justice system designers should, therefore, carefully analyze the potential for significant resistance to or rejection of key initiatives before attempting them. This analysis also may require balancing the risk of an increase in conflict in the short-term with the important long-term goal of establishing an electoral justice system that is seen as legitimate and credible by all.

Implementing the rule of law

The ‘rule of law’ has many definitions, but a key characteristic contained within many of these definitions is predictability (Kleinfeld Belton 2005: 12–14). Those governed by law must have a clear understanding of the limits of acceptable election-related conduct and a predictable sense of the consequences that may arise for failing to meet standards of conduct determined in law. For this reason, it is important that legal drafters use legal terminology and develop legal texts that are clear. Unclear legal provisions, or those featuring key terms that are undefined, lead to inconsistency in enforcement and make it impossible for those who wish to adhere to the law to know when they have violated it. Drafters of laws and regulations may wish to consider the definition of key terms as part of the introductory section of any legal or regulatory provision.

Gaps in the legal framework, including areas in which laws do not address a certain electoral right or procedure, may also lead to inconsistencies in enforcement that affect the fairness of the electoral process. In some instances, the establishment of an unclear, incomplete electoral legal framework may be evidence of electoral manipulation by authorities who seek to gain an advantage from a legal framework’s complexity or vagueness (Birch 2011: 74–85). Citing the example of Nicaragua, Birch notes that ‘gaps’ and ‘imprecisions’ in Nicaragua’s electoral legal framework during the 2000s resulted in electoral officials having a greater degree of administrative discretion in performing their duties. Given the politicization of Nicaragua’s electoral process during this era, the likelihood of discretionary actions being politically-motivated increased (Birch 2011: 82–83).

Selectively enforced or unenforced electoral legal provisions also create the risk of state persecution and unequal treatment of certain groups. For example, in Egypt, where voting is compulsory, a longstanding legal provision calling for a fine on those who fail to vote without a proper excuse has not traditionally been enforced (International IDEA 2016). In a recent election, however, officials publicly raised the possibility of enforcing the fine, which in 2014 could be as large as approximately USD 70, reportedly to boost low turnout (Poushter 2014). Although officials ultimately did not follow through on these threats, they had a disproportionately intimidating impact on poorer Egyptians, who may originally have chosen not to vote. In short, an electoral legal framework is most likely to be effective and embraced by diverse stakeholders in society when it is clearly written with well-defined terms.

To prevent confusion and the opportunity for manipulation, the legal framework should be comprehensive, contemplating all phases of the electoral process and electoral operations. It should not include provisions that are only selectively enforced (or selectively threatened to be enforced), particularly if doing so harms or disadvantages opposition stakeholders or certain groups in society. In a conflict-affected or transitional context, legal drafters and electoral justice institution officials in particular have to take special care to ensure that the legal framework approaches these standards, so that flaws in the framework cannot be used by powerful interests to punish opposition stakeholders or otherwise manipulate the electoral process.⁹

Establishing electoral legal stability

To the extent possible, national decision-makers in conflict-affected countries or countries in political transition should ensure that key elements of the electoral legal frameworks are established well in advance of planned elections. According to the Venice Commission's Code of Good Practice in Electoral Matters, the fundamental elements of electoral law—particularly the choice of electoral system, membership of electoral commissions and the drawing of constituency boundaries—‘should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law’ (European Commission for Democracy Through Law 2002). There are important reasons for this, such as ensuring that all political stakeholders, including the public and EJS officials, have an opportunity to familiarize themselves with the electoral system and electoral administration, and because late or last-minute amendments to electoral laws can often (fairly or not) be interpreted as an attempt by the state to manipulate electoral outcomes.

Promoting the legitimacy of the legal framework

To help guarantee legitimacy, law-making following a long period of violence or non-democratic governance should be a collaborative, transparent, and inclusive process—especially, as is often the case, if an unelected body and/or international actors have responsibility for drafting and implementing the first laws during the political transition. A consensual, transparent process involving all key factions or other stakeholders in society will promote general acceptance of new laws and will lessen the likelihood of litigation, protests, or violent conflict initiated by factions that claim that their voices went unheard.

Deciding how to draft and implement certain laws may require negotiation with, and the support of, traditional centres of legitimacy in society (OECD 2010: 37). Religious leaders, ethnic leaders or other non-state actors often play key roles working with interim

⁹ It is worth noting that no country in the world has an electoral legal framework that meets all of these ideal standards. In consolidated democracies, the meaning of legal terminology is debated frequently and the law is often amended, if at all, only after electoral problems emerge that no one in a position of authority contemplated. The series of events and court cases that culminated in the 2000 US Supreme Court case *Bush v. Gore* following the contested presidential election in the state of Florida is a case in point.

legislators. For example, following a truce and peace agreement in 2001, Bougainville (an autonomous region of Papua New Guinea) enshrined the role of traditional actors such as the clan structure and traditional chiefs in its 2004 constitution. Its hybrid post-conflict legal framework helped ensure a relatively stable and peaceful environment for elections in 2005 and 2010 (USAID 2013: 16–17; OECD 2010: 42; International Election Observer Team 2005; Pacific Islands Forum Secretariat 2010).

Particularly when there is a high likelihood of election-related violence, the best approach to achieving legitimacy in transitional law making might not involve formal legislation at all, but lie in developing pre-electoral agreements between key electoral participants. This includes codes of conduct agreed to by participants as a requirement for entry into the electoral process, as has been the case in India and South Africa. A party that agrees to rules of conduct cannot easily claim later that it did not understand or accede to the terms of the agreement.

Key stakeholders may also enter directly into ad hoc agreements explicitly setting electoral conduct standards and goals. An example of that took place in 2015 with the negotiation of the Abuja Accord among presidential candidates in Nigeria. The Accord was the result of a mediation effort conducted by Nigeria's National Peace Committee and supported by former UN Secretary-General Kofi Annan. In the Accord, the candidates made several promises, including a pledge to base their campaigns on issues as opposed to on ethnicity or religion, a promise not to make incendiary comments or other statements that might provoke violence during the presidential campaign, and a commitment to follow the law (UNDP Nigeria 2015a). The two leading candidates reiterated the Accord in March shortly before election day, pledging in part to 'respect the outcome of free, fair and credible elections' (UNDP Nigeria 2015b). Although electoral violence remains a concern in Nigeria, and it is impossible to know the precise impact of the Accord in lessening electoral violence in 2015, the incumbent president, Goodluck Jonathan, conceded defeat and prepared to transfer power to his opponent, Muhammadu Buhari, without attempting to challenge or resist it.

The legitimacy of interim electoral and other laws may also be strengthened by the use of direct, popular methods of ratification such as referenda, although this too depends in part on the context and degree of collaboration in which the laws were drafted and promulgated in the first place. Ultimately, a duly elected legislature should have the opportunity to review, amend, or substitute new laws that should (hopefully) enjoy even greater legitimacy.

4. Establishing institutions to ensure electoral justice

Creating, identifying and strengthening electoral justice institutions

One of the most challenging aspects of transitioning to democratic governance is establishing the necessary institutions to conduct free and fair elections. This is also true in the case of electoral justice institutions. Judicial, electoral administrative, legal, and legislative institutions, if they ever existed in the first place, may have been destroyed after years of conflict or non-democratic rule. Institutions that have endured may be tainted with the perception that they collaborated with a non-democratic regime or warring faction (International IDEA 2012: 9).

In many cases, it may be necessary to establish new electoral justice institutions. These institutions may be temporary at first, such as ad hoc electoral complaint commissions. Short-term, new institutions provide certain advantages. They may be less likely than longstanding institutions to be stigmatized by association with previous unpopular regimes. They may also provide a vehicle for international actors and funders to play a role in assisting in establishing electoral justice, without the risk of this involvement becoming long-term. A primary concern, however, regarding the establishment of ad hoc institutions is that they may inhibit the development of permanent, sustainable institutions. In the case of significant international involvement, there is also the risk that ad hoc institutions may be seen as non-credible and infringing upon national sovereignty, or the possibility that national electoral institutions will lack the resources and capacity to take over costly electoral functions once international aid and other support has ended (Ottaway and Chung 1999: 99–100).

Developing new, permanent and sustainable institutions to take on electoral justice responsibilities into the future often also entails broad international involvement, depending on the electoral technical assistance needs and the resource needs of the country at issue. The advantage of taking this approach is that the successful establishment of new, permanent electoral justice institutions would ideally promote long-term electoral stability without need for extended international involvement. Depending on the transitional context, however, these new institutions may lack the experience, strength, or legitimacy to assert their authority in matters related to electoral justice in the long-term and, as with international support of ad hoc institutions, also run the risk of failing once international support is minimized or ended altogether.

Public and other key stakeholder perceptions of new electoral justice institutions are therefore very important. Key political stakeholders must view them as professional, independent, and untainted by past affiliations with repressive regimes or warring factions. Even then, larger factors—such as a renewal of conflict, increased political polarization, or an economic crisis—may threaten their sustainability. Guatemala's EMB represents an interesting example. The Supreme Electoral Tribunal (TSE) was established in 1983 following a long period of violence and political turmoil. Consisting of five magistrate judges with five in reserve elected by a two-thirds majority of Congress, the non-partisan tribunal was perceived into the 2000s to be one of the country's more trustworthy and prestigious state institutions (IFES and UNDP

2005: 122). The TSE has faced criticism about its impartiality and effectiveness in recent years due to the perception that it had become politicized (EU 2007: 17–18; NDI 2016), although it appeared to successfully administer elections in 2015 (OAS 2016). International organizations have called for the implementation of a series of proposed legislative reforms that are intended to strengthen the integrity and authority of the TSE in future electoral cycles. (NDI 2016). It remains to be seen whether these reforms, if implemented, will enhance the TSE’s sustainability and legitimacy with the Guatemalan electorate.

Whether they are new or already existing, it is important for electoral justice institutions in conflict-affected or transitional contexts to identify individuals or other institutions in society that could play a supporting role in helping to resolve electoral disputes while more permanent institutions and practices are being strengthened. Depending on where institutional capacity lies and, most importantly, where popular trust is greatest, courts, provisional legislative bodies, government ministries, or an existing ‘committee of notables’ connected with the process of ending violent conflict or non-democratic rule, for example, may need to take on a larger short-term role in helping to support new or existing formal electoral justice institutions, which may not have the legitimacy and capacity on their own to protect electoral integrity. Alternative dispute resolution (ADR) mechanisms may also be employed where more formal legal or judicial mechanisms are unavailable or ineffective, particularly in countries that have experience with ADR (Kovick, Young and Tohbi 2011: 234). A willingness of electoral justice institutions to recognize their limitations, adapt, and work flexibly in alliance with other institutions and centres of legitimacy in society to resolve disputes in a fair manner contributes to the longer term stability and sustainability of these institutions.

An example that encapsulates this approach took place in South Africa in the late 1990s. South Africa’s Independent Electoral Commission met with CSOs including the Electoral Institute for Sustainable Democracy in Africa (EISA) to discuss solutions to the intense politically motivated violence taking place in 1998–99. These meetings generated the innovative concept of establishing conflict-management mediation panels in each of South Africa’s provinces. These panels of respected local citizens were designed to work with political parties in their respective provinces to resolve disputes that otherwise might turn violent. Notably, although these semi-official panels did not have the authority to impose judgements, they could refer unresolved disputes to South Africa’s formal electoral court, which could then enforce decisions against political parties based on their violations of South Africa’s binding Electoral Code of Conduct (Jackson 2013: 4–5).

The knowledge of CSOs and the prestige of the members of local panels augmented the effectiveness of South Africa’s more formal electoral justice institutions. Moreover, disputes before these mediation panels fell sharply during subsequent elections in 2000 and 2004. Coupled with the establishment of party liaison committees, respected committees consisting of representatives of political parties that employed a consensual approach to resolving disputes among or between parties, many disputes that may have clogged or possibly overwhelmed South Africa’s EJS were effectively resolved before the involvement of the formal EJS became necessary (International IDEA 2010: 184–85,

189). Arguably the flexibility exhibited by the EJS in these crucial years following the apartheid era enhanced its sustainability and legitimacy among key political stakeholders.

Guaranteeing impartiality

An EJS, and all who serve within it, should be scrupulously impartial and free from conflicts of interest (or the appearance thereof) with political stakeholders. Impartial individuals, however, may be difficult to identify, particularly following years of conflict or fiercely divisive political discourse.¹⁰ An intermediate course is to ensure that all significant forces in the country play a meaningful role in establishing the system or mechanism in question, and that there is fair representation of all within electoral justice institutions such as EMB boards and judicial panels (International IDEA 2010: 94–97).

For example, in 2006, Bosnia and Herzegovina administered its first elections without international oversight. Its seven-member Central Election Commission—comprised of two Bosniacs, two Serbs, two Croats, and a seventh member designated to represent other minorities in the country (International IDEA 2010: 97)—has generally received international praise for its fair administration of elections since 2006 despite the ongoing tensions among these groups in society (OSCE-ODIHR 2015: 7).

Establishing inclusivity

A new EJS must also be inclusive. For example, gender must be taken into account when forming electoral justice institutions (DPKO and DFS/DPA 2007: 37). In accordance with international norms, women should be represented in significant numbers and in significant leadership roles in all areas of the development and administration of an EJS. Where electoral justice officials such as judges and EMB board members are chosen from the leadership of male-dominated institutions such as national judiciaries and civil services, as is the case in some countries, special provisions should be made to ensure gender balance.

The same should also be true of vulnerable populations, including racial, religious, ethnic, linguistic, and other minorities. As with women, these groups should play a proportional but meaningful role in establishing institutions, drafting relevant laws, and administering these systems. A failure to ensure the fair participation of all groups not only denies democratic rights to large portions of the electorate, it may provoke a return to non-democratic governance or even violence if certain groups or factions feel that the system does not speak for (or to) them. One approach to ensuring inclusivity can be found in Bolivia, where the Supreme Electoral Tribunal is required by law to

¹⁰ The word ‘impartial’ in this context means not only that an individual is able to act or decide on matters without bias, prejudice or favouritism, but that she or he is also perceived to be impartial by others. This second part of the test may (unfairly) be hard to fulfil following a bitter civil war or violent factionalism, regardless of the personal qualities of the individual.

comprise ‘seven members, of whom at least two shall be of indigenous origin. From the total number of members of the Supreme Electoral Tribunal, at least three will be women’ (UN Women and UNDP 2015: 30). The Electoral Commission of Nepal (ECN) is one of several EMBs around the world that have taken additional steps to ensure balanced gender equality and social inclusion of minorities in electoral processes and administration. These steps included a gender-mapping exercise in 2010, the development of a Gender and Inclusion Policy in 2013, and steps to promote and measure efforts to mainstream gender equality and social inclusion as part of the ECN’s 2015–19 Strategic Plan (UN Women and UNDP 2015: 17, 25–26).¹¹

Inclusivity also pertains to the accessibility of electoral justice institutions for all people. Initiating a complaint or other action with an EMB or in a courthouse or other legal institution can be daunting, particularly if you are a member of a group in society that has been underserved in the past by such institutions. Leaders and other stakeholders should take steps to ensure that women can obtain equal access to electoral justice institutions and receive equal treatment within the system. The same should also be true for other groups that may face unique challenges, such as persons with disabilities and persons whose first language is other than the dominant language of the country or region.

Affirming real independence

In order to perform the politically sensitive functions of ensuring electoral justice, it is essential that institutions maintain functional independence from other sectors of government and other political stakeholders (International IDEA 2010: 89–109).¹² Legal provisions guaranteeing autonomy should be established and followed to safeguard the credibility of these institutions. This includes tenure protection for officials with exceptions for serious misconduct allegations that have been proven in a proceeding that accords with standards of due process. Officials should enjoy protections against arbitrary demotions, transfers, secondments, and salary or benefit cuts due to interference by other parts of the government (International IDEA 2010: 106–09). Electoral justice institutions in general should also enjoy broad financial independence: legal provisions should prohibit other state actors from penalizing electoral justice institutions through the allocation of budgetary resources.

The independence of the judiciary is a primary feature of the rule of law (Judicial Group on Strengthening Judicial Integrity 2002: Preamble). Judicial independence is particularly important for ensuring electoral justice, since courts are usually the institutions of last instance in considering electoral-related cases. Establishing judicial independence in countries that have been subject to authoritarian or other non-democratic rule can be difficult. As with other aspects of establishing transitional electoral justice, judicial independence requires more than constitutional and legal safeguards. Judges

¹¹ The Electoral Commission of Nepal’s 2010 gender-mapping exercise investigated ‘the legal and institutional framework, looking at challenges to women’s participation in the electoral process and their employment status with the ECN’ (UN Women and UNDP 2015: 17).

¹² On the importance of EMBs’ independence in transitional contexts see International IDEA (2012: 8–9).

must demonstrate the will to be independent, and other stakeholders—including the government and powerful non-state interests—must choose to abide by judicial decisions peacefully.

Independence is also a matter of perception. Stakeholders must perceive the judiciary as independent for its decisions to be trusted. This might be difficult or impossible to achieve if judges are associated with previous repressive or violent regimes. Even if these challenges are met, judiciaries (and indeed all electoral justice institutions) must also guard against operating with impunity, outside international legal, constitutional, and domestic legal constraints. A failure to do so may open institutions to charges that they are politicized and partial towards certain stakeholders. For example, although international observers declared the 2013 election in the Maldives to be free and fair, the UN High Commissioner for Human Rights criticized the Supreme Court for ‘interfering excessively’ and ‘subverting the democratic process and violating the right of Maldivians to freely elect their representatives’ (OHCHR 2013). The Supreme Court nullified the first round of the presidential election on the basis of irregularities and imposed what the UN High Commissioner for Human Rights described as ‘an onerous set of guidelines’ on the Elections Commission (OHCHR 2013).

Creating a culture of professionalism

An effective EJS must rely on professionals to investigate and adjudicate electoral disputes. Untrained, unprepared, discourteous or disrespectful officials create a disincentive for individuals to report electoral violations or seek redress of grievances, and may add to perceptions that the overall EJS is not impartial or credible. The hiring and training of all such personnel should emphasize the laws regarding corruption and conflicts of interest. Election officials may wish to implement a mandatory code of conduct for any person serving in an electoral justice institution. The code should ideally include an obligation to treat all groups and individuals with respect and courtesy. Liberia’s Code of Conduct for Personnel of the National Elections Commission, for instance, provides a helpful example of standards for the professional treatment of others and ethical conduct in administering the electoral process (see Box 4.1).

Determining the most appropriate type of electoral justice institution

Although learning from the experience of other countries is valuable in determining what types of institutions may most effectively comprise an EJS in a conflict-affected country or a country in political transition, ultimately each country must determine for itself the types of institution that are appropriate for it. This determination will depend on many factors, including the country’s political and electoral context, its legal and governmental culture and traditions, and the proposed frequency of elections.

An issue that frequently arises for countries attempting to establish a new EJS is whether to employ temporary or permanent institutions. Some electoral justice institutions that

Box 4.1. Extract from Liberia's Code of Conduct for Personnel of the National Elections Commission

3.4. The Commission shall conduct elections in accordance with the United Nations and other internationally acceptable standards. Thus, when conducting these elections, personnel of the Commission shall not in any form or manner be corrupted, unduly influenced, bribed, or controlled by any outside authority.

3.5. The Commission recognizes its pledge to deliver free, fair, and transparent elections and enlists the support of all stakeholders in Liberia as well as members of the International Community to assist in the achievement of its goal. In furtherance of this mandate, employees of the Commission:

- a) Shall be committed at all times to act within his/her authority to condemn and prevent any violence, coercion, and intimidation related to elections;
- b) Shall not be biased and shall not do anything by way of action, attitude or speech which indicates a bias or preference for any political party, candidate or political party representative in the implementation of his/her duties;
- c) Shall, at all times, embrace a culture of fairness, neutrality, independence and non-partisanship in its dealings with any registered political party or candidate, and consequently, will not act in a way that demonstrates partisan support for a candidate, political party, political actor or political tendency;
- d) Shall create a friendly environment for representatives and agents of registered political parties and candidates through the facilitation of ready access to the offices and relevant documents of the Commission;
- e) Shall conduct itself at all times in an appropriate manner, exercise sound judgment, observe the highest levels of personal discretion, and ensure that all the employees of the Commission apply standards of professionalism and integrity in their work.

Source: National Elections Commission of Liberia (NEC), 'Code of Conduct for NEC Personnel', [n.d.], <http://necliberia.org/admin/pg_img/Code%20of%20Conduct%20for%20NEC%20personnel.pdf>, accessed 26 July 2016.

also perform year-round, non-electoral functions will usually be permanent institutions (such as ordinary first-instance courts, appellate courts, and legislatures), while others, such as ad hoc complaint commissions, are meant to be temporary. Whether other institutions such as an EMB or an electoral court should be permanent depends on a series of factors, including the expected frequency of elections, the expense of maintaining permanent institutions, and the value of developing professional expertise and institutional memory. Employing temporary institutions might save money in the short term, but might also incur greater longer-term costs if they are disbanded and re-formed frequently, with the need to train new personnel each time and with the costs associated from lacking institutional memory.¹³

During each post-electoral phase, it may be useful to reconsider which institutions are the optimal entities in the EJS to handle various types of electoral misconduct.

¹³ For a comparative analysis of the strengths and weaknesses of permanent and temporary EMBs see the website of the Administration and Cost of Elections (ACE) Electoral Knowledge Network, <<https://aceproject.org/ace-en/topics/em/ema/ema06>>.

For example, campaign finance violations may be best investigated and adjudicated by an EMB, by an independent agency dedicated solely to that purpose, or by an audit committee or other government department that focuses on corruption and finance, depending on the national electoral context. Each approach may offer advantages and disadvantages. Citing the above example, an EMB may have the expertise to police campaign finance, but may lack the human and financial resources to do so effectively. An independent, specialized agency may have the skill and resources, but may be costly to establish and maintain. An entity connected to a government ministry may have the skill and resources, but may be insufficiently independent of government influence, or perceived to be that way.

Judiciaries in many countries may be the ideal institutions to render difficult or significant electoral justice-related decisions (International IDEA 2010: 86–88). However, not all judiciaries are independent, particularly in many transitional contexts. Judiciaries in many countries operate slowly and have large backlogs of cases. Furthermore, decision-making on what are often very sensitive political questions can exert grave pressure on the independence of the judiciary (Hirschl 2013: 270–71). It might therefore be worthwhile to explore whether EMBs, specially-formed electoral courts or tribunals, or other institutions are better equipped than ordinary courts to render final decisions on sensitive electoral justice matters.

5. Additional practices that promote electoral justice

Viable institutions governed by clear and fair laws are components of a successful EJS. There are, however, practices of well-functioning EJSs that conflict-affected countries and countries in political transition may wish to consider to strengthen further electoral justice-related laws and institutions.

Preventive measures

Many incidents of electoral misconduct occur because lax or inadequate laws or procedures facilitate its commission (Birch 2011: 75). A key objective of any electoral justice legal framework is therefore to establish practices and procedures that minimize the likelihood of electoral disputes arising in the first place.¹⁴ Lawmakers and electoral officials may take a wide range of approaches to ensure that violations of electoral laws and procedures do not take place during the electoral phase of the cycle. Possible measures include:

- the dissemination of a voter registry that is comprehensive, accessible, accurate, and verifiable by the public;
- promoting accessibility to the electoral process itself, including the fair regulation of candidate and party agents, domestic and international observers, and the media, allowing these actors unfettered access to all phases of the electoral process, including electoral complaint or case adjudication proceedings;
- the use of anti-fraud and other security measures, such as tamper-proof bags and ballot boxes for holding or transporting ballots;
- enforced election day polling procedures, including voter identification requirements (see Box 5.1) and ballot secrecy requirements;
- the production of a paper record or other verification measures for electronic voting in case of fraud or irregularity claims;
- the assurance of accessibility of polling sites and the voting process for persons with disabilities; and
- post-election-day legal provisions to verify the integrity of results, such as random audits of ballot boxes and results forms or targeted, transparent audits based on perceived anomalies in voting patterns or credible complaints.

The choice of electoral system, the system under which votes are translated into seats won by parties or candidates, can also greatly influence the level of tension and mistrust among electoral stakeholders in a society, which in turn could threaten post-conflict peace and a transition to democracy (International IDEA 2005: 5–6) and provoke a greater number of allegations of electoral misconduct. Although the establishment of

¹⁴ All of the positive qualities of electoral justice laws and institutions described in this paper contribute in different ways to the prevention of electoral disputes, by increasing the likelihood of public and other political stakeholder confidence in electoral and EJS legitimacy. For a fuller discussion of this issue see International IDEA (2010: 23–34).

Box 5.1. Photo identification in Northern Ireland

Prior to 2002, one of Northern Ireland's largest nationalist parties, the Social Democratic and Labour Party (SDLP), accused its chief nationalist rivals, Sinn Féin, of committing impersonation fraud in certain electoral precincts. Following the enactment of the Electoral Fraud (Northern Ireland) Act of 2002, which requires (freely provided) photographic identification for in-person voting (Electoral Commission of the United Kingdom 2003: 26–27), allegations of impersonation fraud dropped greatly (Scharff 2010: 4). The SDLP felt sufficiently comfortable with the new identification requirement that it no longer called for a police presence at suspect polling sites (Scharff 2010: 4).

an optimal electoral system in any particularly country is dependent on many factors, a system where voters perceive the system to be fair, where the government once elected can efficiently legislate and govern, and whether the system avoids discriminating against parties or factions, will minimize the likelihood of stakeholder dissatisfaction and claims of electoral injustice (International IDEA 2005: 11). Broadly speaking, electoral systems that, for example, result in an all-or-nothing contest between two powerful factions for executive authority or that are likely to allocate parliamentary seats disproportionately to one group or faction at the expense of others should be avoided.¹⁵

Ensuring effectiveness and efficiency

An EJS has to be effective and efficient in order to preserve the possibility of a free and fair election. Electoral justice institutions will face enormous pressures at certain points in the electoral process, particularly on or after election day. The failure to develop an administrative plan to adjudicate electoral complaints fairly and in a timely manner may create uncertainty about the electoral results, which in turn could derail the entire electoral process and lead to instability and violence in conflict-affected countries and countries in political transition. Furthermore, it is not unusual for losing electoral stakeholders and others to file a significant number of grievances with relevant electoral justice institutions, justifiably or in an attempt to manipulate electoral outcomes. These complaints must be handled with sensitivity and transparency, but also expeditiously and—particularly given the resource constraints in many countries—efficiently.

Case management

The efficient internal management and administration of any electoral justice institution is therefore essential. Elections are high-pressure events in the best of circumstances, and a sudden crush of complaints can disable an office if it does not have a well-developed system for processing and managing cases and case documentation. Newly established institutions may wish to consider seeking international technical assistance on the development of efficient computerized court and case tracking and

¹⁵ International IDEA's interactive online Best Electoral System Test (BEST) provides users with suggestions for the most appropriate electoral system for a particular country context based on a range of priorities: <<http://www.idea.int/esd/best-electoral-system-test.cfm>>.

management systems, as have been developed in court systems and administrative agencies with adjudicative functions in various countries in recent years. For example, Kenya has developed an effective system for tracking election-related petitions. Using International IDEA's Electoral Risk Management Tool, Kenya's Independent Electoral and Boundaries Commission (IEBC) was able to track petitions filed at different levels of the court system following the 2013 elections. Figure 5.1 displays an example of a product of that tracking.

Screening of complaints

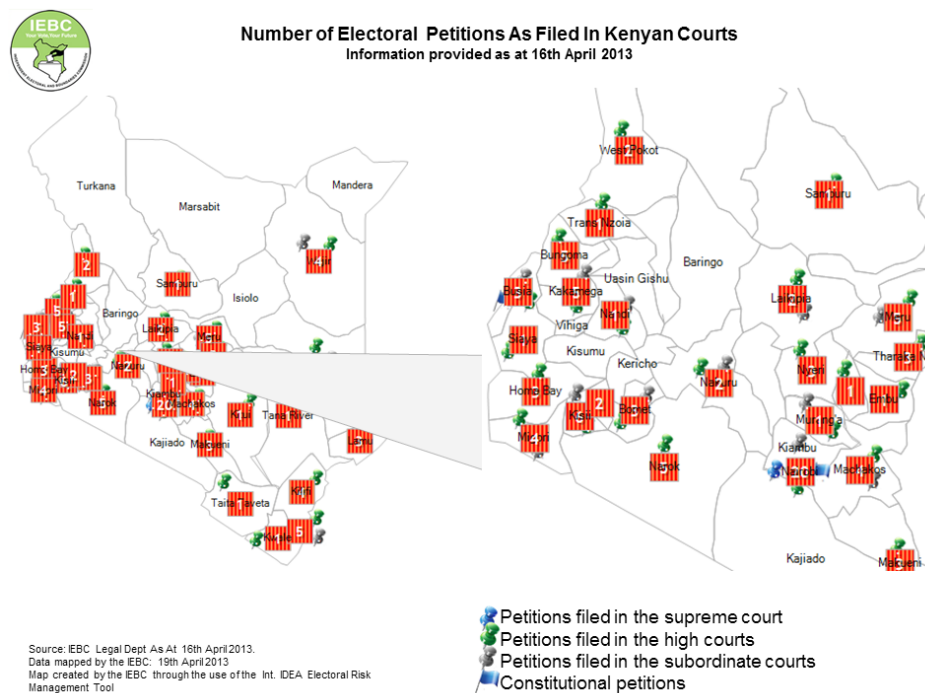
Institutions should consider developing fair, transparent procedures for screening and dismissing frivolous, incomplete, or unfounded complaints. All institutions should be mindful of attempts by political stakeholders to manipulate the electoral process by filing complaints in bad faith, or complaints based primarily on dissatisfaction with valid election results. A failure to develop an adequate screening system can hamper the effectiveness of an electoral justice institution. For example, legal experts from the International Foundation for Electoral Systems (IFES) who assessed the 2004 elections in the Philippines noted that, although there were 'substantial due process safeguards' in place, the adjudicative process was 'complex, extremely slow, and plagued by frivolous complaints' (Vickery 2011: 54). Their report noted that there was 'no mechanism to avoid frivolous claims or to prioritize the most important claims', which slowed down the overall process of resolving electoral complaints (Vickery 2011: 54).

Effectively addressing unfounded objections to the electoral process enhances EJS credibility and helps enable systems to address significant, valid complaints in a timely manner, which is particularly important when national stability may be at stake. Any screening process, however, should be transparent and include clear, written explanations of why an institution has decided to reject complaints without further review.

Enforceability of decisions

Institutions must also have the capacity to enforce their decisions in order to sustain public and stakeholder confidence in the EJS and the broader electoral process. In some respects, this is the ultimate test of whether a new EJS will be an effective guarantor of rights and procedures: if powerful political stakeholders peacefully accept decisions that are against their electoral interests, it sets a valuable precedent. Conversely, cases where stakeholders commit electoral crimes with impunity, receiving no meaningful sanction for their criminal acts, can become a source of public discontent and may destroy electoral legitimacy. This includes cases where electoral justice institutions attempt to have decisions enforced and are rebuffed, or cases where electoral justice institutions fail to consistently seek enforcement of decisions. EJS designers may wish to consider approaches that guarantee the automatic, or easily instituted, execution of election-related decisions and legal provisions penalizing stakeholders that have failed to comply with electoral justice decisions.

Figure 5.1. Use of the Electoral Risk Management Tool to track election-related petitions, 2013



Source: Independent Electoral and Boundaries Commission of Kenya

Adapting to change

Continuous re-evaluation of an EJS is important for maintaining its effectiveness. As is often the case in conflict-affected countries or countries in political transition, sudden demographic changes (e.g. an increase in the number of internally displaced persons or returning refugees) or changes in electoral processes and procedures (e.g. attempts to develop a new voter registry or voter identification process) may test the capacity of a new EJS. These and other changes may require new approaches to ensure electoral justice. All electoral justice legal frameworks should include a focus on proactive legal reform. In every country, it is often difficult to identify flaws in a legal framework until that framework has been tested. If available, independent judicial review of electoral laws consistent with international and constitutional norms may increase the legitimacy and credibility of a new EJS and the laws under which it operates.

International organizations have developed tools that may help conflict-affected countries and countries in political transition determine (a) how best to establish an EJS and (b) how leaders may choose to modify an EJS as new risks of electoral injustice emerge. International IDEA's Electoral Justice database provides a comprehensive source

of global comparative data on electoral dispute resolution mechanisms.¹⁶ International IDEA's Electoral Risk Management Tool anticipates a range of internal or external factors that may result in a failed election; provides the tools to enable electoral officials, CSOs and others to gather data on the magnitude of each risk; and assists planners in developing strategies to mitigate or eliminate these risks.¹⁷

Electoral justice institutions, like all public sector institutions, should also consider periodic surveys or other assessments of popular and key stakeholder satisfaction. Members of the public and other stakeholders should be able to provide input or comments on an institution's performance and make suggestions for possible improvements, either online, by post, or in person. An EJS that is more responsive to stakeholder input, and flexible enough to adapt based on input, is more likely to maintain credibility with the public and other stakeholders.

¹⁶ *Electoral Justice Regulations Around the World: Key findings from International IDEA's global research on electoral dispute resolution systems* (International IDEA 2016) provides a useful overview of the Electoral Justice Database and its contents. Additionally, International IDEA is developing an electoral justice 'toolkit' that will assist users wishing to assess the strengths and weaknesses of a country's EJS.

¹⁷ Darnolf (2011) also provides useful guidance to stakeholders in a new democracy, including EMBs and political parties, on how to assess the risk of fraud and develop a plan to control and mitigate it.

6. Maintaining public confidence in an electoral justice system

Establishing transparency

Transparency is a key aspect of any EJS that wishes to enjoy stakeholder and public trust. An EJS should welcome public scrutiny, as well as that of party and candidate agents or representatives, the media, and domestic and international observers. This is in part a reflection of the axiom that ‘justice must not only be done; it must be *seen* to be done’. Through openness, the public and other electoral stakeholders (aided by the media and knowledgeable observers) may see and understand that electoral justice is being done. Transparency helps refute claims that an EJS is operating for the benefit of only certain stakeholders, which is an important consideration when trying to support a peaceful, inclusive transition to democracy.

Reports by the media, observers, and others also create a historical record that benefits future electoral processes by pinpointing the strengths and weaknesses of the electoral justice institution(s) being examined. Observers and the media can aid an EJS by identifying areas in which rights may be abridged or violated, or electoral process violations are being committed. This especially includes trends in electoral misconduct or irregularities on election day (for example, improper inking of fingers, lack of ballot secrecy, or counting irregularities or inconsistencies).

Transparency can also be achieved through a number of important practices. For example, ensuring that there is accurate recordkeeping and adequate publicity of key information regarding all pending and resolved complaints, on-line and in print, promotes trust in the system and provides stakeholders with a better sense of what to expect as a complainant, respondent, or defendant before that institution.¹⁸ Publicizing decisions also helps electoral stakeholders in future electoral cycles understand the potential consequences of various types of misconduct.

Adjudicators should ensure that all decisions are issued in writing and include information on the nature of the allegations, evidence collected or other investigative steps taken, information on hearings held, the disposition of the complaint or grievance, and a rationale for the decision. A decision that is thoroughly explained and justified is one that is more likely to be accepted by the parties involved. Detailed decisions also serve as guides for other electoral justice institutions that may seek to use earlier decisions as precedent in rendering decisions in the future. This amount of detail is particularly important with decisions that affect electoral results. Electoral justice institutions should therefore make clear all details regarding decisions that result in the modification of preliminary vote totals. A best practice for any EMB is to ensure that official election results are published in print and online in an expeditious manner and that results are disaggregated to the polling station level with information indicating districts in which electoral justice decisions altered final vote totals.

In order to promote transparency, another useful institutional practice is for electoral justice institutions to issue reports periodically or following the completion of the

¹⁸ It should also be noted that some electoral justice systems do not disclose the identities of complainants in electoral justice matters, to protect the complainant from potential retaliation.

electoral process. Such reports typically also serve an educational function, and include the full text of key portions of the electoral legal framework, procedures for filing complaints and responses, and aggregated or general data on the number, types, and locations of complaints received and their dispositions. Ideally, these reports should be made available free of charge in public institutions and online.

Throughout the electoral process, electoral justice institutions benefit by focusing on the quality of their communications with the public and other stakeholders. In addition to working to develop publications, websites, and other items that are clear, understandable, and user friendly, institutions should consider designating spokespersons to be the sole officials charged with answering media inquiries, reporting publicly on significant matters pertaining to the institution, and responding to information about electoral justice being disseminated by others, particularly if it is false information. (This last point is particularly critical in the era of social media and fast-travelling misinformation.) One designated spokesperson would help improve the clarity of an institution's message to stakeholders and would minimize the risk of various officials issuing inconsistent or inaccurate statements.

Ensuring accountability

In a democracy, an EJS is ultimately accountable to the law and the people that it has been established to serve. It is essential, therefore, that lawmakers and other decision-makers provide the people and other democratic institutions of government the opportunity to hold electoral justice institutions and officials accountable when they violate the law or ethical rules. The appellate process can be a particularly important component of institutional accountability. In most cases—particularly where an EMB or another entity with a legal interest in an election has decision-making authority regarding electoral disputes—it is important that an independent court or other tribunal has the opportunity to consider and (if applicable) modify, reverse, or remand decisions based on clear legal standards. While in some EJSs certain first-instance decisions are not subject to appeal, leaders in conflict-affected countries or countries in transition to democracy may wish to ensure that all (or a significant number of) electoral decisions are subject to appeal, particularly if there are questions about the integrity or impartiality of other electoral bodies and if the appellate body enjoys a reputation for independence and integrity.¹⁹

An independent disciplinary process for EJS employees, including judges and high-ranking election officials, is an important source of professional and institutional accountability. Initiated by individuals or internally, misconduct complaints against EJS officials and their resolutions should be publicized in aggregate form (e.g. number of complaints filed, types of allegations, types of resolutions and so on). Significant punishments related to proven misconduct by EJS officials should also be publicized,

¹⁹ Once a legislative body is elected, legislative oversight is another important tool for ensuring that institutions are accountable to the people they serve. Within the bounds of institutional independence, parliamentary inquiry into institutional practices helps raise public awareness of these practices. Inquiries foster debate on the work of the EJS and its component institutions, what practices have been effective, and what can be improved.

to reinforce for all the accountability of the official and institution in question and to serve as a guide to others if similar misconduct takes place. EJS officials, like defendants in all other electoral justice matters, should enjoy a fair hearing and full due process rights throughout the disciplinary process.

Conducting civic and voter education

Especially for citizens who have lived under repressive regimes during violent conflict, it will be important to disseminate and promote the perhaps unfamiliar message that state institutions are not enemies or entities to be evaded, but guarantors of rights and proper electoral procedure that require engaged citizens to interact with and support them. Educational programmes should not only include operational details for voters such as how to file a claim or complaint (although that is important). They should also provide a clear description of the rights enjoyed by all voters, the due process rights that a complainant and the accused have within the EJS, the importance of electoral justice in a democratic system and the responsibility for all to report concerns to proper authorities. For example, Bhutan embarked on a unique voter education programme in 2008 in response to false rumours (see Box 6.1).

Although EMBs are ideally situated to provide voter education on electoral justice, the obligation to educate citizens on their civic rights and responsibilities lies with many public and private institutions, including schools, universities, and CSOs. It is vital that electoral officials and decision-makers embark upon a robust, multi-platform, multi-audience programme of civic education on the importance of electoral justice.

Promoting public access and involvement

An effective electoral justice system requires the robust participation of all. It is possible to imagine electoral laws, institutions, and practices that meet the electoral justice standards described above, but that are largely irrelevant because the population

Box 6.1. Bhutan's voter education programme

As polling day in 2008 approached, competition intensified and a number of baseless and damaging rumours—for example, that hidden cameras in voting booths would compromise the secrecy of the ballot—circulated in the small and close-knit society. In response, the electoral commission developed a brochure, written in simple and conversational local language, to address all such allegations and baseless rumours. The brochure also sought to reassure voters of their rights, including the right to a secret ballot, and the measures put in place to uphold these rights. The brochures were widely distributed to the Gup (local administrative leader) of all 205 counties, who were required to read them out at public gatherings. Schoolchildren were also encouraged to read the brochure to illiterate parents and family members.

By using a variety of techniques and including all stakeholders in the civic education process, the programme educated the population and dispelled rumours, and also served as an important step in the prevention of possible election-related violence or malpractice (International IDEA 2010: 26).

does not wish to engage in the democratic process. Removing barriers to access and facilitating involvement by the public and all other key stakeholders in all phases of the political and electoral process minimizes the likelihood of apathy, fear, or indifference weakening the robustness of an electoral process. As noted earlier, this is especially the case for groups that have been excluded or have faced barriers to access previously on the basis of gender or minority status.

Particularly in countries facing economic hardship or great economic inequality, ensuring low- or no-cost access to electoral justice institutions is an important measure of fairness and inclusivity. High costs or other barriers to access may result in electoral misconduct or other irregularities remaining unreported, and may result in an EJS that effectively serves only wealthier stakeholders. The development and dissemination of easy-to-use (and free) complaint forms would facilitate the process of filing complaints. In coordination with national bar associations or legal syndicates and CSOs, it is often beneficial for courts and other institutions to develop programmes that enable individuals to obtain legal advice or other support at low or no cost as they pursue claims of election-related violations. These programmes can be particularly beneficial for women and vulnerable groups who traditionally face added barriers in accessing the legal system (DPKO and DFS/DPA 2007: 37).

Voters can also be enlisted as partners in the effort to ensure electoral justice in order to enhance the popular legitimacy and efficiency of an EJS. One emerging tool for both preventing electoral misconduct and efficiently investigating allegations of electoral misconduct is the use of crowdsourcing to identify potential improper electoral activities or areas of concern, particularly during campaign periods and on election day. Mobile phone technology, the Internet and social media platforms have made the public a much more active partner with EJSs in several countries. Critics of using crowdsourcing data for this purpose note that public reports of misconduct may be inaccurate or even manipulated (Morozov 2011: 271). With these caveats in mind, and to the extent that a country's information technology infrastructure allows it, EJS leaders and other electoral stakeholders such as political parties and CSOs may wish to consider how best to employ modern communication methods to allow the public to assist in identifying and informing on potential misconduct trouble spots as they develop.

Crowdsourcing has already proven to be valuable in preventing post-election day confusion about election results. For example, the non-partisan Enough Is Enough Nigeria Coalition developed ReVoDa, a system that enables citizens to anonymously report incidences of electoral misconduct through a locally developed app on their mobile phone.²⁰ ReVoDa and other social media monitoring applications were used during Nigeria's 2015 presidential election (Edozien 2015) and played a key role in disseminating unofficial but accurate results from polling centres throughout the country shortly after the election (Agilonby 2015). Likewise, to prevent public confusion and misinformation, private Indonesian citizens analysed the election results from all 480,000 of the country's polling stations (which the Election Commission

²⁰ On ReVoDa visit the Enough Is Enough Nigeria Coalition website, <<http://eie.ng/revoda>>.

made publicly available on its website for the first time in 2014) after both presidential candidates claimed victory and several days before the Election Commission had completed its own tabulation of the final results (Bland 2014).

CSOs, through their capacities to mobilize large sectors of the population, can serve as important allies of an EJS in other ways. Through processes such as parallel vote tabulation (PVT), where one or more CSOs recruit a number of individuals to conduct an independent count of a representative sample of votes in polling sites around the country, CSOs can establish greater confidence in the accuracy of vote counts and help electoral justice institutions and officials flag instances where official counts diverge sharply, and suspiciously, from independent counts. PVT projects typically include a large number of participants and in recent years have taken advantage of social media and communication technology to ensure that accurate information regarding counts occurring throughout the country can be processed and publicized rapidly. In Ukraine, for example, the CSO OPORA performed PVTs during national elections in 2014 and local elections in 2015 (OPORA 2014, 2015). In the course of conducting PVT for the local election in 2015, OPORA was able to bring allegations that some ballot papers had been stolen at one polling station to the attention of local law enforcement authorities.

7. Conclusions

A compromised election may, in a worst case scenario, result in a lost opportunity to build democracy. After a damaging period of violent conflict or non-democratic rule, failed initial elections can delay a country's transition to democratic governance, and in some cases may lead to violence or a return to non-democratic rule. Countries facing these challenges should therefore prioritize and focus on developing an effective EJS at once, before holding initial elections. A functioning EJS will help prevent or reverse breaches of electoral integrity that might jeopardize the credibility and legitimacy of first elections.

This will not be an easy task, for several reasons. As this paper illustrates, an EJS is only as strong as its weakest aspect or component. Fair, clear laws; capable institutions; sound practices; and public trust and confidence are all essential features of an effective EJS.

Ensuring electoral justice also requires courage. In many cases EJS officials will be asked to challenge the electoral interests of powerful stakeholders, including ruling parties and candidates. In a conflict-affected country or country in political transition, where powerful interests may be more likely to use violence or repression to persecute critics, pursuing and enforcing electoral justice can be a particularly brave act.

Establishing an EJS in a transitional context can also be particularly difficult because of the nature of the democratic process itself. Ideally, elections pit parties or candidates against each other on a level playing field in the competitive pursuit of power. As has been seen from time to time in all democracies, the urge to cheat or gain an improper advantage over election rivals may at times be difficult to resist. For some stakeholders in a transitional context, the temptation may be great to 'tip the scales' by manipulating a flawed electoral justice legal framework or exploiting weak or compromised electoral justice institutions to gain an electoral advantage. If powerful stakeholders are sincere about wishing to establish democracy, and in some cases they may not be, they must also therefore support the creation of an EJS that treats them fairly but equally with others.

It is worth reiterating that there is no 'model' EJS for countries facing the challenge of emerging from conflict or facing a transition to democracy. Each country must therefore carefully and honestly assess the strengths and weaknesses of its own political and electoral environment before deciding on how best to develop the system necessary to protect free and fair elections. The approach to EJS establishment in each country will therefore be a unique one, addressing each country's special challenges and incorporating each country's unique characteristics. Beginning with initial elections, establishing an EJS that stakeholders understand, respect, and trust, will in turn ensure that the unique path to democracy of each conflict-affected country or country in political transition is steadier and more secure.

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When a country begins a political transition away from violent conflict or non-democratic rule, there are many difficult steps that it must take. Developing an electoral justice system, which includes the means and mechanisms to ensure that electoral integrity is maintained or restored when an electoral process is damaged by repression, misconduct, or irregularities, may appear to decision-makers to be a secondary concern or even an afterthought.

This Policy Paper argues for the establishment of an electoral justice system at the outset of a transition, and before initial elections are held. It explains why doing so, despite the challenges, is so important, and offers recommendations on how to develop such systems, in an environment where an adequate legal framework and strong electoral justice institutions may not yet exist.

