

Helpdesk Research Report

Electoral compliance units

Róisín Hinds

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Question

Identify and summarise literature on the international experience in establishing 'elections compliance units' to enable prosecution of electoral laws. Provide a summary which highlights pros, cons, risks and issues. Also consider the following questions: Are national level compliance units effective or are locally driven, bottom-up community led approaches to election compliance more effective? Are there any precursors or conditions that must be in place for electoral compliance units to be effective? Of the successful models, what types of structures work, such as number of team members, investigative and prosecuting capacity and partnership arrangements between the electoral body and the police?

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1. Overview

The term 'electoral compliance units' is not widely understood by electoral scholars or practitioners in the field of electoral assistance¹. In the absence of a more concrete definition, this report understands 'electoral compliance units' to mean agencies or mechanisms that investigate and prosecute election-related fraud and breaches of law. Experts indicate that, rather than through specific, separate bodies, electoral laws are largely monitored and enforced by: legal departments within Election Management Bodies (EMBs), Election Commissions (EC), or the executive branch; specialised courts such as Election Tribunals; or Parliamentary Hearings². One expert cautions that there is such a wide variation in the design of electoral systems across countries it is difficult to 'nail down' which units have a regulatory and

¹ Expert comments

² Expert comments

enforcement role³. A comprehensive guide to electoral justice produced by International IDEA classifies electoral dispute mechanisms as: Legislative bodies; Judicial bodies; EMBs with judicial powers; and Ad hoc bodies (often transitional measures until a permanent solution is found) (International IDEA 2010).

There is very little evaluative literature on mechanisms that could be classified under the 'election compliance unit' term. What is available tends to be descriptive in nature, with limited comment on effectiveness or on pros, cons, risks and issues. It was possible to identify five relevant case studies:

- **Electoral Complaints Commission (ECC), Afghanistan** – The now defunct ECC had responsibility for addressing electoral disputes, including rejecting fraudulent votes and banning candidates (Worden 2010, p. 13).
- **National General Election Supervisory Board (Bawsalu), Indonesia** – The Bawsalu is a permanent state institution to which alleged electoral violations are reported. Oral or written reports must be given to the body within three days of the alleged incident and the Bawsalu determines whether they should be passed on to the police (Mboe and Tjoetra 2012, p. 7).
- **Independent Electoral Commission Conflict Management Programme (IEC-CMP), South Africa** – The Conflict Management Programme utilises the expertise of professionals in conflict resolution, such as attorneys, teachers and religious leaders, to address electoral disputes (International IDEA 2010, p. 185). Experts are given training in election laws and help to resolve conflict at the community level (p. 185).
- **Electoral Institute for the Sustainability of Democracy in Africa (EISA) Conflict Management Panel** – EISA-Conflict Management Panel is a grassroots mechanism where community leaders are trained in electoral law and monitor and mediate electoral disputes (Vickery 2011, p. 253). Communications technologies such as mobile phones, SMS messaging, emails, and radio have helped mediators respond quickly to potential conflicts (p. 254).
- **Electoral and Related Offences Prosecution Unit (EROPU), Kenya** – The EROPU is a newly established unit (Feb 2013) which aims to provide 'rapid response' to electoral violations. A team of 30 prosecutors is available 24 hours a day to provide support to and guide police in dealing with electoral complaints.

Some of the important aspects to consider when engaging in electoral compliance-related interventions include:

- **Clear jurisdiction** – Electoral compliance units should have a clear jurisdiction with relevant legislation defining aspects such as the required burden of proof and the body's standing (Vickery 2011, p. 126)
- **Membership** – The membership of compliance or adjudication bodies should be carefully managed. Appointees should be non-partisan if possible and recommended by bodies such as courts, universities, and human rights organisations (Vickery 2011, p. 127)
- **Terms and planning** – Bodies should be given appropriate planning and approval periods, to allow for pre-election preparation (Vickery 2011, p. 127; Mboe and Tjoetra 2012, p. 7)
- **Communications and civic education** – Public confidence in the electoral system can be an important determinant for electoral success. Voter education programmes can help to give

³ Expert comments

legitimacy to an elected government, aid stabilisation, and make the public aware of complaints procedures (Vickery 2011, p. 127; Mboe and Tjoetra 2012, p. 7)

- **Coordination among experts** – Establish a coordination system at the expert level to encourage cooperation and sharing among experts (Carrio et al. 2011, p. 30).

2. Approaches to dispute resolution

International IDEA (2010) *Electoral Justice: The International IDEA Handbook*.

Stockholm: International IDEA

http://www.idea.int/publications/electoral_justice/

‘Electoral justice’ encompasses the means and mechanisms of ensuring that electoral processes are in line with the law and not marred by irregularities. In this comprehensive guide, International IDEA highlights and assesses procedures that are in place to prevent electoral disputes and conflicts, particularly Electoral Dispute Resolution (EDR) mechanisms. EDRs refer to institutional and technical-legal means and mechanisms for challenging or exercising oversight of electoral processes (p. 37). There is great variation in the composition and structure of EDRs around the world, reflecting individual countries’ historical, socio-political context, and legal traditions (p. 37). For the purposes of comparison, and to identify elements of good practice, International IDEA classifies EDRs by using the following criteria:

- **Legislative body** – The entrusting of EDR systems to a legislative body or another political assembly is the oldest type of electoral justice mechanism, however it has been largely abandoned due to the potential for political abuse (p. 65). In its place some states, such as the USA and Argentina, have opted for a combined legislative-judicial system where the judicial branch is responsible for hearing and adjudicating on electoral complaints, while the legislative organ is entrusted with the final ruling (p. 65).
- **Judicial body** – A judicial EDR system is perhaps the most widespread mechanism for electoral justice in democracies worldwide. This can be entrusted to a regular court as part of the judiciary, a constitutional court, an administrative court, or an electoral court. Judicial EDR systems are seen to avoid the difficulty that arises in legislative EDRs of members judging and certifying their own election (p. 68).
- **EMB with judicial powers** – Under this type of system, an independent EMB has judicial powers to resolve challenges and issue a final ruling, alongside its responsibility to organise and administer the electoral process (p. 75). Examples of this type of model include the Supreme Elections Tribunal of Costa Rica, the Electoral Court of Uruguay, and the Supreme Election Council of Turkey (p. 76). In contrast to the judicial model, EMBs with judicial powers are not in charge of resolving all challenges, but only those relating to the actions of a lower ranking body (p. 76). There are various factors which influence the credibility of EMBs, particularly the system for selecting and appointing commissioners (p. 78).
- **Ad hoc bodies** – Ad hoc EDR systems are transitional mechanisms for addressing electoral disputes that are put in place until a permanent mechanism is established (p. 78). Often these feature international involvement, including members who are appointed by international organisations (p. 78). Internal national ad hoc solutions can also be utilised. In this case, they are usually established by a body of national law or through a peace agreement (p. 79).

The Handbook also identifies some **Alternative Electoral Dispute Resolution (AEDR)** mechanisms which provide a supporting role to formal EDR systems, particularly in cases where the latter faces credibility, financial, or time constraints in the operation of its duties (p. 183). AEDR approaches can be useful for resolving complex problems at the community level or in post-conflict countries (p. 185). In newly democratised South Africa, for example, alternative dispute resolution was used in a number of areas including labour disputes, service delivery, and, importantly, the conduct of the first democratic elections (p. 184). AEDR mechanisms are by nature voluntary and disputants are free to use them at will (p. 186). In this case they are different from EDR mechanisms, which are mandatory and legally binding (p. 186).

Vickery, C. (ed.) (2011) Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE). Washington: IFES.

http://www.ifes.org/~media/Files/Publications/Books/2011/GUARDE_final_publication.pdf

Drawing from over 20 years' experience in international elections, the International Foundation for Electoral Systems (IFES) produced this comprehensive guide to election complaints adjudication in 2011. At the outset, IFES notes that there is a great variation in election complaints adjudication processes, and that a crucial starting point for any intervention is recognition of how a country's system is organised and an understanding of how this relates to the electoral process (Vickery et al. 2011, p. 3). The report recommends that an effective complaints and adjudication system should **flexible and fit the particular cultural, political and legal traditions of each country** (p. 126). Some of the identified key issues for practitioners to consider when developing mechanisms for complaints adjudication include:

- **Clear jurisdiction** – The legislation for establishing a complaints adjudication body should be clear and define aspects including the required burden of proof, the jurisdiction of bodies handling aspects of electoral processes, and the body's standing (p. 126).
- **Membership** – Members of adjudication bodies should be politically balanced or, where possible, non-partisan. Nominations by political parties are not recommended, rather appointees should come from courts, associations of universities, and human rights organisations (p. 127).
- **Terms of appointment** – The term of appointment should allow for preparation and training before the election (p. 127).
- **Funding** – Election complaints bodies should be funded by an annual budget from the legislature rather than the Ministry of Finance. This will prevent the governing party having an undue influence on committee finance (p. 127).
- **Continuity in non-election years** – Permanent members of staff of electoral bodies should use non-election years to review and improve procedures to deal with complaints; participate in public information on elections; and keep informed on changes in the electoral processes (p. 128).

The report also makes a number of recommendations for electoral adjudication interventions:

- **Training of EMBs** – Training can help prepare members of electoral management bodies to utilise and implement complaints adjudication processes. IFES notes that training activities should be competency based, use adult learning models, and use case studies to add value (p. 133).

- **Electoral officials, lawyers, and arbitrators** – Personnel who are engaged in electoral complaints and adjudication processes should be effectively trained in the electoral law and procedural rules (p. 84). In Timor-Leste in 2007, for example, IFES hired, paid and trained six Timorese lawyers to assess complaints and make recommendations to the electoral commission (p. 87).
- **Civic education** – Public confidence in the electoral system can be particularly important in a post-conflict/fragile context as it can give legitimacy to the elected government and aid stabilisation (p. 78). IFES recommends voter education programmes be ‘simple, straightforward, and manageable’ and pay particular attention to marginalised groups such as women and persons with disabilities (p. 79).

3. Case studies

Electoral Complaints Commission, Afghanistan

Authority over the conduct of elections in Afghanistan falls to the Independent Election Commission (IEC), whose seven member board is selected by the Afghan President (Worden 2010, p. 13). The 2005 Election Law also created a five member Electoral Complaints Commission (ECC) which was tasked with judging all electoral disputes, banning candidates when appropriate, rejecting fraudulent votes, and taking other lawful remedial measures (Worden 2010, p. 13). The panel’s membership was comprised of three United Nations appointees and one appointee selected each by the Afghanistan Independent Human Rights Commission (AIHRC) and the Supreme Court.

An analysis of the first year of ECC operations on behalf of IFES found its performance to be somewhat disappointing (Ennis 2006, p. 10). The commission’s lack of a field structure to meet with complaints, investigate issues, and follow up on decisions was highlighted as a particular concern (p. 10). Observer groups found the ECC to be ‘unresponsive’ and complained that decisions were often issued a long time after the initial complaint (p. 10). To mitigate such effects, Ennis suggested that the mandate of the ECC be redrawn to allow it focus on a set of core responsibilities, for example hearing appeals from decisions of the IEC and investigating allegations of serious electoral misconduct.

In December 2012, the Afghan Council of Ministers approved a new election law without an ECC. The powers that did belong to the commission were assigned to the Supreme Court, which became the only authority to investigate and follow up election issues. Opposition political parties and activists widely criticised this move, questioning whether the Supreme Court would be able to ensure transparency and credibility⁴.

A number of donors provided assistance to the ECC, including USAID and UNDP. USAID’s Support to the Elections Process (STEP) project aimed to provide Technical Assistance to improve the capacity of the Commission to manage and process electoral complaints (USAID 2011). Activities that USAID engaged in included:

- Providing technical assistance to the ECC to review, investigate and adjudicate approximately 3000 cases in the 2010 parliamentary elections

⁴ See: <http://www.tolonews.com/en/afghanistan/8601-council-of-ministers-removes-election-complaints-commission->

- Providing expert election administrative support on election management and reporting, electoral regulations, and media programmes
- Training ECC staff in the management and processing of electoral complaints
- Providing technical assistance on the development of electoral fraud mitigation, vote counting and electoral complaint procedures (USAID 2011).

UNDP's assistance project, 'Enhancing Legal and Electoral Capacity for Tomorrow' (ELECT) provided similar technical and operational assistance to the ECC (Carrio et al. 2011). Recommendations by an independent evaluation of ELECT included:

- Include a legal adviser as a key member of a long-term technical assistance team to advise on issues including the adjudication of disputes (p. 30)
- Provide timely training to relevant actors including ECC commissioners, for example via 15-20 minute video lessons for easy access (p. 30)
- Establish a coordination system at the expert level to encourage cooperation and sharing among experts within institutions (p. 30)
- Develop an initiative to gather, systematise and archive all related information on assistance to ECC to help foster best practice and coordination among international actors (p. 30).

National General Election Supervisory Board, Indonesia (Bawsalu/Bawas)

Indonesia's national elections are the biggest single-day elections in the world (AusAID 2012, p. 1). The central bodies that are responsible for the management of elections are the General Election Commission of Indonesia (KPU) and the Election Supervisory Board (Bawsalu or Bawas). Bawsalu is a permanent state institution that to which alleged violations should be reported (Carter Centre 2009, p. 3). Oral or written reports must be given to the body within three days of the alleged incident. The Bawsalu determines whether the complaint is criminal or administrative in nature and passes the case on to the police if appropriate (p. 3).

A number of donors have provided electoral support to the Indonesian state, including UNDP, AusAID and the Carter Centre. The **Multi-Donor Programme-Support to Indonesia's Democratic Elections (Elections-MDP)** is a technical assistance initiative that seeks to enhance the institutional capacities of the KPU and the Bawsalu. In the areas of electoral compliance, its role has involved the following (UNDP 2008, p. 19-24):

- Assisting the Bawsalu in reviewing and analysing legal instruments regulating the electoral system (p. 22)
- Facilitating the Bawsalu in the development of a mechanism to enable effective external relations with other institutions, such as the Police, courts and the KPU (p. 22)
- Providing technical assistance and staff training at national and local levels (p. 23)
- Assisting the Bawsalu in developing an external communications strategy (p. 23).

In 2012, Mboe and Tjoetra (2012) conducted an independent evaluation of a component of the Elections-MDP programme, the 'Project to Support Local Elections in Aceh' (PSLEA). The evaluation offers a number of recommendations for donors engaging in electoral compliance programmes (p.7):

- **Influencing regulatory bodies** – To increase the institutionalisation of programme outcomes, the evaluation recommends Elections-MDP should be more proactive in influencing the Bawaslu to adopt necessary policies and recommendations.
- **Regulatory framework** – Electoral compliance programmes should develop regulatory frameworks that will equip the government/recipient institute with a methodology for developing or replicating useful practices beyond the project's presence.
- **Longer planning, approval and preparation** – The project would have benefited from longer planning, approval and preparation periods to mitigate for unforeseen periods of delay.
- **Communications expertise** – Effective use of media can help to ensure that messages are conveyed in a clear and impactful way. To this end, media should be 'pre-tested' in different areas prior to mass production and distribution.

Independent Electoral Commission Conflict Management Programme, South Africa

The South African Independent Electoral Commission established a conflict management programme in 1999 to help mitigate electoral disputes. A few weeks before the election, experts in conflict management, such as attorneys, teachers and religious leaders, are hired by the programme and given training in electoral law. Experts use their mediation and conciliation skills to submit reports to the electoral management body and make interventions via telephone or public hearings (International IDEA 2010, p. 185). In the case of the latter, parties to a dispute are heard and experts can propose a resolution. The programme has proved effective at reducing the number of electoral disputes (p. 185). In the 1999 elections there were 1113 disputes (over issues such as access to votes, intimidation, and destruction of campaign publicity) but one year later this was reduced to 314 (p. 185).

Electoral and Related Offences Prosecution Unit (EROPU), Kenya

In February 2013, the Kenyan government established the Electoral and Related Offences Prosecution Unit (EROPU). EROPU is a 'rapid response' team that seeks to ensure all electoral violations are investigated and prosecuted expeditiously⁵. The unit will work alongside and guide police in their investigations, and will be comprised of 30 prosecutors who are available 24 hours immediately before, during, and after the Election Day. The unit will be managed at a county level (with Heads of county offices taking responsibility for electoral offences within their regions) and there will be an overseeing coordinating committee based in the capital city.

The Electoral Institute for the Sustainability of Democracy in Africa (EISA) Conflict Management Panel

The EISA Conflict Management Panel (CMP) is a grassroots mechanism in which community leaders, women, youth, and traditional authorities are trained in conflict management skills to mitigate and resolve disputes (Vickery 2011, p. 253). Membership of the panel is selected through a consultative

⁵ See: <http://elections.nation.co.ke/news/Unit-set-up-to-prosecute-poll-offences--/-/1631868/1707428/-/yqrl7t/-/index.html>

process with election stakeholders (p. 253) and, in some circumstances, political parties have a role in appointment or approval of appointments. The electoral management body coordinates with the CMP, functioning as a 'watch dog' of electoral processes and providing feedback on conflicts or potential conflicts to which the EMB can respond (p. 253). Mediators are deployed before, during, and after Election Day and move between polling stations and public spaces to intervene in potential conflicts. Technology, such as mobile phones, SMS messaging, emails and radio, enables mediators to respond to situations immediately, while conflict mapping can help to identify and monitor potential hotspots (p. 254).

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Additional GSDRC reports

The GSDRC has published two additional Helpdesk Research Reports on electoral assistance programmes that may be of interest:

- Haider, H. (2008) *Electoral Assistance Lessons*. Helpdesk Research Report. Birmingham, UK: GSDRC, University of Birmingham.
<http://www.gsdrc.org/docs/open/HD546.pdf>
- Mcloughlin, C. (2008) *Multi-donor Funding for Elections in Post-Conflict or Fragile States*. Helpdesk Research Report. Birmingham, UK: GSDRC, University of Birmingham.
<http://www.gsdrc.org/docs/open/HD538.pdf>

Key websites

- Ace – The Electoral Knowledge Network: <http://aceproject.org/>
- The International Foundation for Election Systems (IFES): <http://www.ifes.org/>
- International Institute for Democracy and Electoral Assistance (IDEA):
<http://www.idea.int/index.cfm>

Expert contributors

Dr. Staffan Darnolf, Senior Advisor, IFES

Chad Vickery, Director Europe and Asia, IFES

Stina Larsrud, Policy Specialist in Electoral Processes, International IDEA

Dr. Judith Kelley, Associate Professor, Duke Sanford School of Public Policy

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