

## The Legal Framework: The Context for an Electoral Management Body (EMB)'S Role and Powers

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### ABSTRACT

*The extent to which electoral provisions are incorporated into the constitution is significantly affected by the level of public trust in the country's election administration. In many established democracies with a high level of public trust in lawmaking and public administration in general, and the organization of elections in particular, constitutions do not make provision for the design of the EMB. A more usual practice is for an EMB, particularly an independent EMB, to be empowered to make reviewable regulations by filling in the detail of concepts contained in the law, or filling existing gaps in the law. For governmental EMBs, this power may be held by the ministry within which the EMB is located. Such regulations in most countries are subject to review, generally by a court or constitutional court, to test whether they are within the powers of the EMB (or ministry) to make, and whether they are otherwise consistent with the law. Many EMBs have the power to formulate administrative policies and directions on operational issues such as their relationships with their own staff (on matters such as gender equality, affirmative action, performance management and staff development) and with external stakeholders. External stakeholders include government ministries, in particular finance ministries, the legislature, political parties, CSOs and the media.*

**KEYWORDS:** Legal Framework, Legal Instruments, Powers and Electoral Processes

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### Introduction

The structure, powers, functions and responsibilities of EMBs are defined in those parts of a country's legal framework that deal with electoral processes. (International Electoral Standards (2002) states that Especially in newer democracies, the current trend is to develop a comprehensive legal framework that guarantees the independence and integrity of the electoral process, promotes consistency and equality in electoral management, and supports full and informed participation in electoral events by political parties, civil society organizations (CSOs) and electors. The organization and administration of electoral processes is complex, and always involves a substantial mass of detail. It is therefore usually specified in written laws and regulations, rather than determined by unwritten tradition or administrative policymaking. Written laws and regulations provide the benefits of certainty, visibility and transparency; are easier to subject to judicial review; and are accessible to interested parties, including electors. In many countries, independent Electoral Management Bodies (EMB) have been championed as a key institutional reform measure to successfully strengthen election integrity, and as a result independent EMBs are now the most common institutional model for electoral management in

the world (Catt 2014). The legal certainty provided by a detailed exposition of electoral processes embedded in law, backed by constitutional authority, will tend to promote confidence in the consistency, fairness and even-handedness of electoral administration, and provide clear opportunities for legal redress. The level of detail specified at different levels of the legal framework will vary from country to country, depending on factors such as systems of law and the level of trust in EMBs' willingness and ability to make fair and consistent decisions and policies.

### **How Legal Instruments Define Electoral Processes**

According to (Van Ham and Lindberg 2015), electoral management boards (EMBs) are they key factor shaping the quality of elections. The full legal framework for elections can be based on a variety of sources, including the following:

1. International documents, for example article 25 of the International Covenant on Civil and Political Rights (ICCPR): 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a)To take part in the conduct of public affairs, directly or through freely chosen representatives; (b)To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c)To have access, on general terms of equality, to public service in his country'.
2. Regional documents, for example the African Charter on Democracy, Elections and Governance: 'State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa'.
3. The constitution
4. National laws, which may take the form of one comprehensive electoral code, as in Albania, Argentina, Armenia and the Philippines. Alternatively, there may be a set of laws covering different aspects of the electoral process. Indonesia, for example, has a Law on General Elections, a Law on Election Organisation, a Law on Presidential Elections, a Law on Political Parties, a Law Establishing the Constitutional Court (one of whose functions is the resolution of certain electoral disputes) and a Law on Local Governance, which includes provisions for elections for the heads of the regional executive branches of government. Some countries (e.g. Latvia, South Africa, Uzbekistan and Zambia) define the structure, composition and powers of their EMB in a separate law, as does Thailand, where this law has the higher status of an organic law. Other laws, such a voter registration law, ID law or a law on the organization of the national territory, can also be part of the legal framework (James, 2015).
5. Provincial or state laws, which in federal countries may govern the processes for provincial or state and local electoral events (as in Australia) or for national electoral events (as in the United States)
6. Ordinances and regulations made by national or lower-level authorities
7. Regulations, proclamations and directives issued by an EMB, if it has the power to do so
8. Customary laws and conventions that may be integrated into electoral law, or EMB regulations or policies dealing with issues such as separate voter registration and voting arrangements for women and men

9. Administrative policies made by an EMB or other bodies, and
10. Codes of conduct (voluntary or otherwise) that may have a direct or indirect impact on the electoral process, for example, for EMBs, election participants, observers and election reporting by the media.

## **International and Regional Treaties and Agreements**

Many UN member countries incorporate into their domestic law (using a variety of constitutional means) key UN decisions and treaties, such as the 1966 ICCPR and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women CEDAW (2017). In such cases, domestic electoral laws, and EMB policies and actions, need to consider the treaties' provisions as treaty obligations that their country has voluntarily adhered to, especially in relation to issues such as universal and non-discriminatory suffrage, secret and free voting, the rights of women to be elected and hold public office, and the rights of minority language groups. Bilateral agreements between countries and regional treaties on supranational bodies e.g. (European Union 2006) may also contain electoral requirements. While complementary laws are usually required to give effect to such treaties, EMB actions that contradict rights contained in ratified treaties may still be legally challengeable.

Member states of regional bodies, such as the OSCE, the Organization of American States (OAS) and the African Union (AU), are increasingly committing themselves through either legislative or executive ratification to implement treaties and decisions adopted by the regional bodies. In 1990, the OSCE adopted the Copenhagen Commitments, through which its participating states 'solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives'. According to James, (2014), the AU Charter on Democracy, Elections and Governance provides that 'State Parties shall:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.
3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior to, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels'.

The AU has backed up the charter in practice by establishing an electoral support unit within its secretariat. Similar frameworks have been developed by sub regional bodies, such as the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). One example of such a regional and enforceable treaty that affects the legal frameworks for EMBs is the (ECOWAS, 2001) Protocol on Democracy and Good Governance of 2001, under which member countries commit themselves to independent or impartial electoral administration and timely electoral dispute resolution.

In addition to ratified, binding treaties and decisions, there are non-binding decisions by international and regional bodies. In October 2005, the Global Declaration of Principles and Code of Conduct for International Electoral Observation were adopted by the United Nations and by a wide range of global and regional organizations; many more organizations have adopted it

subsequently. In the SADC region, the Electoral Institute of Southern Africa (EISA) and the Electoral Commissions' Forum of SADC countries (ECF) have jointly developed and adopted the Principles for Election Management, Monitoring and Observation (PEMMO), while the SADC Parliamentary Forum has established its own electoral norms and practices. These sets of principles and guidelines serve as benchmarks against which observer missions in the region assess whether an election is free, fair and credible (Reynolds, Reilly, & Ellis, 2005).

### **The Constitution**

According to Rosas (2010), a growing number of countries are incorporating fundamental electoral provisions in their constitutions, often including the type, composition and responsibilities of the EMB. Countries such as Bangladesh, Costa Rica, Ghana, India, Indonesia, South Africa and Uruguay have set up their respective EMBs as constitutional bodies, which makes it more difficult to alter their status and other constitutionally defined elements. Constitutional provisions are almost always more entrenched than mere laws; constitutional amendments require, for example, a qualified majority in the legislature or a referendum. The barrier that constitutional entrenchment presents to ruling parties that wish to change electoral provisions to their advantage gives opposition parties a sense of greater protection than they would have if those provisions were contained in government regulations or statute law, which can be altered by a majority in the legislature.

Some electoral provisions whose principles are often included in constitutions include: EMB independence; EMB composition and appointment system; EMB term of office; EMB powers and functions; suffrage rights or voter registration qualifications; political party rights; boundary delimitation authority or parameters; presidential election systems; national legislative election systems; the right or qualifications to stand for election; the intervals or maximum intervals at which elections must be held; and Mechanisms for settling electoral disputes.

Posited by Tokaji (2009), the range and nature of electoral provisions that are considered appropriate to be set out in a country's constitution vary widely according to local considerations:

- Austria's constitution defines EMB membership, franchise, the Constitutional Court's role in electoral disputes and the electoral system.
- The constitution of Bangladesh defines the powers, independence and functions of the EMB, the franchise, candidate qualifications, and the maximum period between elections.
- Cameroon's constitution specifies political party rights, candidate qualifications, and the intervals at which elections must be held, and the powers of the Supreme Court and Constitutional Council related to electoral disputes.
- In Costa Rica, the constitution establishes the independence, membership and functions of the EMB, and deals with the franchise, political party rights (including government funding), electoral systems and qualifications for candidacy.
- For elections in the Czech Republic, the constitution defines the franchise, the electoral system and the maximum period between elections.
- Ghana's constitution deals with the franchise, the establishment of the EMB, the right to form or join a political party, and the delimitation of electoral districts.

- In India, the constitution has provisions establishing an EMB and addresses the franchise and electoral register, barring court interference in electoral matters and reserving seats for legally defined ‘castes’ and ‘tribes’ in the House of the People.
- Madagascar’s constitution sets out candidacy rights, the electoral systems for the senate and presidency, and the Constitutional Court’s role in elections and election disputes.
- The Namibian constitution enunciates the qualifications and procedures for presidential elections.
- Peru’s constitution deals with the autonomy, membership and functions of the National Elections Tribunal, which supervises electoral processes and is responsible for party registration, announcement of results and electoral dispute resolution. The constitution also empowers the National Office for Electoral Processes to organize materials and logistics, funding and vote count information for all electoral events; sets out the qualifications for its chief executive; and empowers the National Registry of Identification and Civil Status to create the electoral register from its civil registry database.
- The constitution of Romania sets out the citizens’ right to elect and be elected, and requires an organic law to regulate the establishment and functioning of the Permanent Electoral Authority.

Similarly targeted electoral provisions in constitutions may also be drafted in very different ways. Consider the following two examples of constitutionally defined EMB ‘independence’:

‘Except as provided for in this Constitution or any other law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission shall not be subject to the direction or control of any authority or person’ (article 46 of the constitution of Ghana).

‘General elections shall be organized by a general election commission of a national, permanent, and independent character’ (article 22E (5) of the Indonesian constitution).

The extent to which electoral provisions are incorporated into the constitution is significantly affected by the level of public trust in the country’s election administration. In many established democracies with a high level of public trust in lawmaking and public administration in general, and the organization of elections in particular, constitutions do not make provision for the design of the EMB. Yet it is common—and not only among fledgling democracies—to have independent and robust EMBs that are supported by sophisticated and detailed legal frameworks that incorporate key electoral provisions in the constitution. The authority and clarity of the constitution foster stakeholder confidence in the electoral process.

### **Electoral Laws: Acts and Ordinances**

An EMB may be established by statute, through an act of the legislature. For example, Australia, Burkina Faso and Canada established their respective EMBs entirely by statute law. It is unusual for governmental EMBs to be defined specifically in law; tasks are more frequently allocated to government agencies in an electoral law. However, in the UK which has no written constitution, the Electoral Commission—the EMB for referendums—is defined in statute law.

It is generally good practice when drafting such electoral statutes (Tuccinardi, 2014):

- To transparently lay down the legislative framework for electoral processes and clearly allocate the responsibility for filling in the gaps and/or details through secondary legislation, regulations or EMB administrative procedures;
- To define the status of the national EMB(s) and any subsidiary EMBs, including their accountability, powers, responsibilities and functions; and
- For legislation to provide a clear and sufficiently detailed framework to ensure effectiveness and integrity in all matters relating to electoral administration, such as EMB member and staff appointments and tenure; operational management issues related to voter registration, political party and candidate registration, political campaigns, and voter education and information; EMB transparency; voting, vote counting and the announcement of results; financial and asset management issues; and electoral offences and resolving electoral disputes.

Other issues that may be covered in electoral legislation include boundary delimitation principles and processes, and codes of conduct for EMB members and staff, political parties, publicly-owned media and election observers.

Parts of the legal framework may also be enacted as secondary legislation, for example, by an EMB with the power to make regulations by some form of executive decree; by a state or provincial legislature in the form of secondary legislation in a federal country; or by municipal authorities in the form of ordinances (Spinelli, 2011).

Provisions for the conduct of provincial and local elections are often contained in separate legislation. In federal countries, national and provincial electoral legal frameworks may need to be separately defined, depending on the constitutional split of powers between the national and provincial levels. Inconsistencies or overlapping provisions between national and provincial electoral legislation, for example for voter registration or voting procedures, may confuse electors. Regular consultations between federal and provincial lawmakers and electoral administrators can help minimize confusion and duplication.

In addition, where elections to a supranational body are contemplated, national legislation is likely to be necessary to define the electoral management structure within the overall supranational agreement. Looking at the example of the European Parliament, the provisions contained in the European-level legal instruments are for the most part very general in nature, and the definition of the electoral management structure for European Parliament elections is left to each member state.

As with the balance between electoral provisions in the constitution and in legislation, the balance between electoral provisions in legislation and subsidiary regulations or procedures needs to be carefully judged. Electoral legislation needs to be detailed enough to ensure integrity and effectiveness, but not so detailed that legislative amendment would be required to permit EMBs to deal with minor changes in their operations. Too much detail in the legislation can result in, for example, an EMB being unable to change its staffing structure or the design of an administrative form, or to introduce office automation systems without a change to the law. Particularly in environments where election processes take place after legislatures' terms of

office have ended, electoral legislation needs to allow EMBs the flexibility to respond to changing electoral circumstances.

A modern electoral legislative scheme may entail one or several different laws. Traditional legal drafting for electoral legislation has often been precise, but in a structure and language that are not very accessible. The legislation may become particularly difficult to understand if it is subject to successive amendments over time, without a fully revised and consolidated law being produced (ECOWAS, 2001).

A single omnibus law covering all electoral activity can be cumbersome, but may facilitate reference and review. Separate laws on individual issues—as in Indonesia, for example, such as the EMB, political parties, electoral registers, elections to the legislature, presidential elections and local government elections—provide clear and easy reference to specific electoral activities, but it may be too time consuming or difficult to ensure that there are no conflicts of content between them. Another possible solution (as in Hungary) is that the substantive norms (such as suffrage rights, eligibility, number of election rounds and the electoral system) are embodied in separate laws (on elections to the legislature, local elections and referendums), while the electoral process is regulated in a common law that consists of a general part (binding on all types of elections) and special norms for each type of election.

### **EMB Rules, Regulations and Proclamations**

Noted by Struwig, Roberts, & Vivier, (2011), in some countries, an EMB has legal powers to regulate the electoral framework either by enacting new laws or by making rules and regulations that complement existing primary legislation. Such an arrangement is efficient and allows for the speedy amendment of the legal framework. For example, Uruguay's EMB can make decisions and dictate actions that cannot be reviewed by any other branch of government. Thus it has legislative powers (making laws that govern elections), judicial powers (reviewing and interpreting laws with binding effect) and implementation powers for the laws and norms it has enacted.

A more usual practice is for an EMB, particularly an independent EMB, to be empowered to make reviewable regulations by filling in the detail of concepts contained in the law, or filling existing gaps in the law. For governmental EMBs, this power may be held by the ministry within which the EMB is located. Such regulations in most countries are subject to review, generally by a court or constitutional court, to test whether they are within the powers of the EMB (or ministry) to make, and whether they are otherwise consistent with the law.

In countries such as the Gambia, Thailand and Yemen, the EMBs have the power to make regulations to facilitate their mandate, including the conduct of elections. In Namibia, the EMB has the power to issue proclamations that by law must be gazette, and that cover issues such as political parties' code of conduct, some procedural issues on voter registration and parties' disclosure of foreign donations. The Indonesian EMB has specific regulatory powers in some critical areas, including voter registration, candidate registration, and the conduct of election campaigns and voting processes (Spinelli, 2011).

Many EMBs have the power to formulate administrative policies and directions on operational issues such as their relationships with their own staff (on matters such as gender equality,

affirmative action, performance management and staff development) and with external stakeholders. External stakeholders include government ministries, in particular finance ministries, the legislature, political parties, CSOs and the media.

Unlike regulations, which by law must be issued publicly, an EMB may have no legal obligation to publish its administrative directives and policies, although it is always good practice for it to do so. Where EMB policies have to be formally approved by the EMB, they can be made publicly available through the minutes of EMB meetings. It is important that an EMB consult its stakeholders when formulating new policies or reviewing old ones in order to foster stakeholder awareness and buy-in.

### **Conclusion**

Electoral processes are complex, standardized activities that require clear, simple and relatively comprehensive legal definition in order to promote consistency, equity and a common understanding of electoral frameworks by all electoral stakeholders. The electoral legal framework within which an EMB operates may be defined in many different types of instruments—including international and regional treaties, the constitution, national and sub national statute law, and EMB and other regulations. International and regional treaties and agreements provide a framework of norms against which a country's electoral legal arrangements can be defined and assessed. There is a trend toward defining key electoral issues in the constitution, as this may provide a workable means of protecting electoral norms from manipulation by the ruling party. Electoral arrangements may be further defined in statute law, secondary legislation and regulations. Electoral statute law may either be a single law or multiple laws that need to be kept in harmony. EMBs or the executive branch of government may be able to issue regulations to fill in gaps in the law; usually these would be subject to some form of judicial or other review. The amount of electoral detail in higher-level instruments—constitutions and statute laws—will often depend on the level of trust in political participants and the EMB's performance.

### **Recommendation**

1. Government should establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. EMBs should establish and strengthen national mechanisms that redress election-related disputes in a timely manner.
3. EMBs should ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior to, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels'.
4. A balance needs to be struck between providing for certainty and consistency in the legal framework, on the one hand, and allowing an EMB the flexibility to respond effectively to changing electoral circumstances on the other.

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