

# Designing and Implementing Alternative Dispute Resolution Mechanisms for Elections

## Applicable Standards

As well as resolving specific disputes, the broader goals of a dispute resolution mechanism are to deter electoral violations, prevent electoral conflicts from escalating into violence, strengthen compliance with the rule of law, improve electoral practice, and contribute to building trust in election results—or at least acceptance of the results. These goals apply to both formal and informal justice mechanisms.

In post-conflict countries, informal systems of dispute resolution may also be fundamental to restoring some degree of law and order; they may be all that is available for many years, as formal justice sectors take time to rebuild.<sup>20</sup> As a recent IFES analysis of democracy and governance assistance in post-conflict countries has identified, “in some post-conflict countries, the legal structure for protecting citizens’ rights might be weak, manipulated, lacking in enforcement mechanisms or nonexistent. The lack of established justice mechanisms, or [lack of] awareness of existing mechanisms to resolve grievances in peaceful ways, can also lead to violence.”<sup>21</sup> The report continues that “[e]stablishing sound procedures for handling and resolving electoral disputes through legally valid mechanisms is crucial to strengthen trust in electoral systems, especially in regard to perceptions of impartiality and fairness. This is particularly true in post-conflict environments and applies to both formal EDR mechanisms and alternative dispute resolution (ADR) mechanisms that might be put in place to resolve certain types of disputes in a more informal, consensus-driven way.”

International frameworks promote the rights and standards that apply to dispute resolution. The International Covenant for Civil and Political Rights (ICCPR) and regional human rights treaties and conventions do not explicitly refer to ADR. Article 14 of the ICCPR applies to “courts and tribunals.” Depending on the characteristics of the ADR body, the ADR process may fall “outside the ambit of the procedural requirements of the Covenant.”<sup>22</sup> These agreement-based mechanisms are incorporated within national legal frameworks, and there is a proliferation of their use in courts in civil, administrative or criminal law.<sup>23</sup> For example, the “European Union has adopted a series of resolutions on mediation.”<sup>24</sup> In September 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development, which includes Sustainable Development Goal No.16: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” The goal of ensuring access to justice for all includes both formal and informal justice

<sup>20</sup> Wojkowska, E. (2006). *Doing justice: How informal justice systems can contribute*. UNDP Oslo Governance Centre.

<https://www.un.org/ruleoflaw/files/UNDP%20DoingJusticeEwaWojkowska130307.pdf>

<sup>21</sup> Buriil, F., Dinman, B., & Vickery, C. (2022, January). *Increasing the success and sustainability of democracy and governance interventions in post-conflict countries*. IFES, p. 35 [https://www.ifes.org/sites/default/files/migrate/transitions\\_2\\_report\\_final.pdf](https://www.ifes.org/sites/default/files/migrate/transitions_2_report_final.pdf)

<sup>22</sup> Office of the High Commissioner for Human Rights. *Human rights and traditional systems in Africa*. United Nations. p. 50.

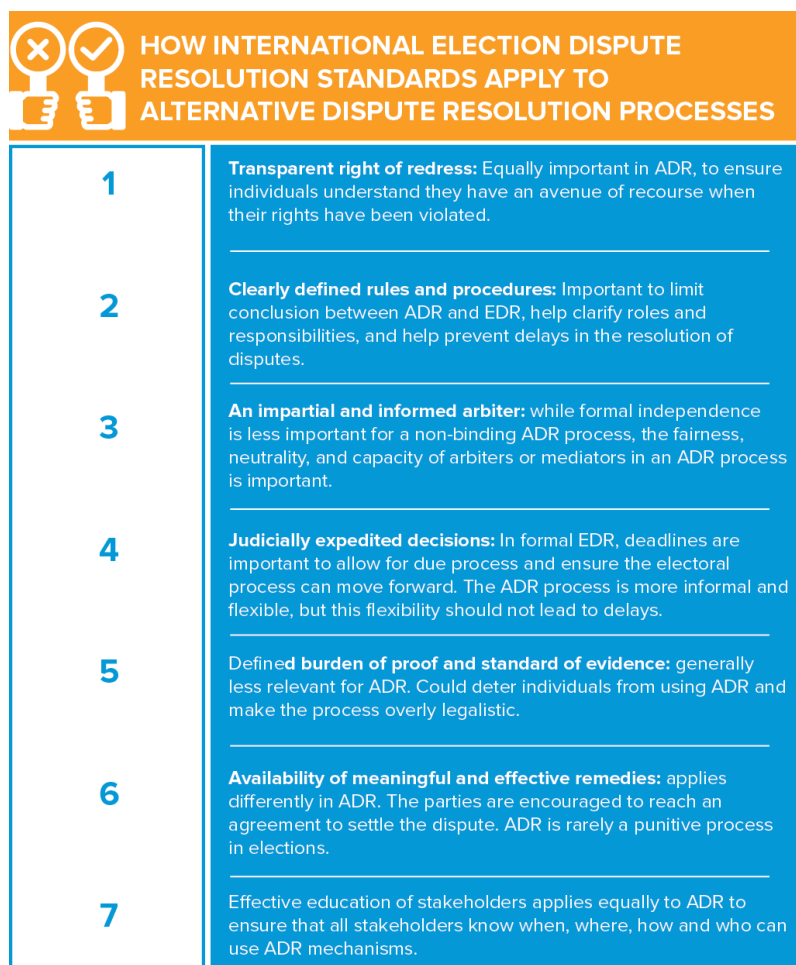
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<sup>23</sup> McGregor, L. (2015). Alternative dispute resolution and human rights: Developing a rights-based approach through the ECHR. *The European Journal of International Law*, 26(3), 607–634. <https://doi.org/10.1093/ejil/chv039>

<sup>24</sup> Ibid.

mechanisms.<sup>25</sup> However, the fundamental right to an effective remedy, as enshrined in international law, requires recourse to an independent and impartial tribunal, meaning that, where fundamental rights are concerned, there needs to be the right of appeal to a court or tribunal from these ADR mechanisms.<sup>26</sup> Because the right of redress applies to any violation of political rights, the administrative and judicial adjudication system—election tribunals, courts, EMBs—should remain the primary avenue for receiving and adjudicating election disputes. This means that ADR should play a complementary role to EDR mechanisms to enhance the legitimacy, inclusiveness, and efficiency of the electoral dispute resolution process. ADR should not replace the formal EDR process and further specifies that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing....”

IFES’ 2011 [Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections](#) (GUARDE) laid out seven international standards applicable to electoral complaints and appeals processes.<sup>27</sup> These legal standards stem from widely recognized fundamental rights, such as the right to participate in government, the right to a fair and public hearing, and the right to an effective remedy and access to justice.<sup>28</sup> Most of these standards are relevant to informal justice mechanisms, as outlined in the graphic below. In addition, anti-discrimination treaties require these rights to be accessible to all in practice. ADR can provide a more inclusive and accessible dispute resolution mechanism, helping traditionally disadvantaged individuals claim their political rights.



**HOW INTERNATIONAL ELECTION DISPUTE RESOLUTION STANDARDS APPLY TO ALTERNATIVE DISPUTE RESOLUTION PROCESSES**

- 1** **Transparent right of redress:** Equally important in ADR, to ensure individuals understand they have an avenue of recourse when their rights have been violated.
- 2** **Clearly defined rules and procedures:** Important to limit conclusion between ADR and EDR, help clarify roles and responsibilities, and help prevent delays in the resolution of disputes.
- 3** **An impartial and informed arbiter:** while formal independence is less important for a non-binding ADR process, the fairness, neutrality, and capacity of arbiters or mediators in an ADR process is important.
- 4** **Judicially expedited decisions:** In formal EDR, deadlines are important to allow for due process and ensure the electoral process can move forward. The ADR process is more informal and flexible, but this flexibility should not lead to delays.
- 5** **Defined burden of proof and standard of evidence:** generally less relevant for ADR. Could deter individuals from using ADR and make the process overly legalistic.
- 6** **Availability of meaningful and effective remedies:** applies differently in ADR. The parties are encouraged to reach an agreement to settle the dispute. ADR is rarely a punitive process in elections.
- 7** **Effective education of stakeholders** applies equally to ADR to ensure that all stakeholders know when, where, how and who can use ADR mechanisms.

<sup>25</sup> United Nations SDG Hub. (n.d.). *SDG 16 indicators*. <https://www.sdg16hub.org/landing-page/sdg-16-indicators>.

<sup>26</sup> See Vickery, 2011, p. 16 onwards and footnote 26 for a discussion of the right of redress and citation of international standards. The right of appeal to an independent court or tribunal is protected by ICCPR Art 2(3)(b) and Art 14(1), and similar provisions in other treaties. See also UN Human Rights Committee (HRC) CCPR General comment No. 13: Article 14 (Administration of justice), Equality before the courts and the right to a fair and public hearing by an independent court established by law (April 13, 1984); HRC CCPR General Comment No. 25: Article 25 (Participation in public affairs and the right to vote), The Right to participate in public affairs, voting rights and the right of equal access to public service; UN Doc. CCPR/C/21/Rev.1/Add.7, (July 12, 1996); HRC, General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant; UN Doc CCPR/C/21/Rev.1(HRC/Add.13 (May 26, 2004); HRC CCPR General comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32 (August 23, 2007).

<sup>27</sup> International standards. (2011). In C. Vickery (Ed.), *Guidelines for understanding, adjudicating, and resolving disputes in elections* (GUARDE) (pp. 9-96). IFES. <https://www.ifes.org/publications/guidelines-understanding-adjudicating-and-resolving-disputes-elections-guarde>

<sup>28</sup> Ibid.

This overview of the seven standards shows that ADR mechanisms used during an election process are not exempt from rule of law principles. It is also important to ensure that the mechanisms do not perpetuate discrimination based on ethnicity, gender, or other grounds. Indeed, research by practitioner organizations shows that discrimination or corruption in informal justice bodies can tarnish the resolution process and perpetuate human rights abuses.<sup>29</sup> It is crucial to maintain the avenue to the formal EDR process, which can act as a safeguard to fundamental justice principles.

## Types of ADR in Elections

ADR mechanisms in elections can engage a multitude of actors and tackle many diverse issues. The different methods of ADR include conciliation, mediation, arbitration, and negotiation, with varying degrees of formality. These terms have slightly different meanings in different countries according to the legal system and the language used, and they are sometime used interchangeably in the literature and in practice, and even in countries' laws.<sup>30</sup> Some legal frameworks are silent on these modes of ADR, despite institutions carrying out ADR in practice. Finally, some countries have set up hybrid systems involving consultation, awareness-raising, and problem-solving mechanisms, although their laws refer to "mediation."<sup>31</sup> The lack of clarity around the definitions has the potential to cause confusion. However, broadly speaking, ADR types can be classified as follows:

- **Conciliation and Mediation** are voluntary and informal processes in which the disputing parties select a neutral third party (one or more individuals) to assist them in reaching a mutually acceptable settlement. *Mediation* encourages a search for the solution by the parties involved in the dispute. *Conciliation* involves a more active role by the conciliator, including proposing a resolution. Parties are free to accept or reject the proposal of the conciliator.
- **Arbitration** is rare in the electoral context. It is similar to mediation and conciliation in that it is a voluntary process in which a neutral third party is involved in arbitrating the dispute. However, instead of guiding the conversation to help the parties come to a resolution, the arbitrator is presented with the evidence and then makes the final decision, which can be binding or non-binding in its outcome according to what the parties have agreed to in advance. When binding, it is often used by agreement in place of court proceedings, as it has similar characteristics to a judicial decision.<sup>32</sup>
- **Negotiation** is a relatively unstructured method of settling disputes in which a third party facilitates communication between parties to reach voluntary agreement on the issues in dispute, even where the issues do not raise an actionable legal claim.

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<sup>29</sup> See Wojkowska, 2006; Golub, 2014; International Development Law Organization, 2019.

<sup>30</sup> For example, the Kenyan Code of Conduct (Schedule II of the Electoral Act) refers to three modes of ADR— "conciliation, mediation or negotiation"—being available for peace committees to address breaches of the code of conduct.

<sup>31</sup> For example, El Salvador and Guatemala.

<sup>32</sup> This point is made in the definition of Arbitration in the International IDEA Electoral Justice Handbook, p. 187. Orozco-Henríquez, J. (2010). *Electoral justice: The International IDEA handbook*. International Institute for Democracy and Electoral Assistance.

<https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf>

For the purpose of preventing or resolving certain types of election disputes, EMBs appear to have focused on the use of conciliation<sup>33</sup> and mediation<sup>34</sup> rather than arbitration (although Namibia is a rare example of the latter).<sup>35</sup> Informal methods of resolution, including discussion and dialogue,<sup>36</sup> and referrals to non-formal authorities, such as respected members of the community, are also used to resolve electoral disputes in some countries.<sup>37</sup> It is important to distinguish these mechanisms from the complaints adjudication function of the EMB when it has a quasi-judicial role and has the mandate to make binding decisions as part of its mandate to ensure the integrity of elections. In such cases, these mechanisms will be referred to as formal or conventional EDR (or simply “EDR”), rather than ADR.

It is generally a feature of ADR mechanisms that the parties have voluntarily agreed to enter into the process, whereas EDR does not require any opt-in process or agreement of the parties. Our research and interviews with interlocutors found that mediation or conciliation in the electoral field are voluntary processes that the parties agree to participate in, although in other areas of law mediation can be mandated by a court. In general, it is rare for ADR processes to yield a binding outcome, although arbitration can do so, whereas mediation and conciliation tend to yield an agreed, consensual outcome. Regardless of the nature of the outcome, it is an important principle in the electoral context, given the fundamental rights at stake, that the right of redress to a court is maintained.



**“[Alternative Election Dispute Resolution] mechanisms may exist alongside formal EDR mechanisms or come into being on an ad hoc basis or during exceptional circumstances. They provide for one or more parties to a conflict to initiate a process to resolve it, unilaterally, bilaterally, or through a third party or agency. In the latter case, the equivalent judicial mechanisms are conciliation, mediation and arbitration.”**

*International IDEA, Electoral Justice Handbook*



In practice, case studies show that the lines between ADR and EDR can be blurred. For example, in adjudicating complaints about voter or candidate eligibility, some EMBs include in the decision-making body representatives from political parties or persons from the community. This can result in confusion over the final adjudication authority. These blurred mandates appear to be more and more common due to the expansion of ADR mechanisms by EMBs without adequate rules, guidance, or training for election officials, mediators, or conciliators. In some countries, the broad or undefined mandate of these EDR and ADR committees can raise concerns over the quality and fairness of the adjudication, as stressed in the examples from Tanzania, Myanmar, and Ethiopia discussed later in this paper. While the line between ADR and EDR may sometimes be blurred, the element of consent, the non-binding nature of

<sup>33</sup> For example, in Cambodia, which employs Conciliation Committees through the National Election Commission.

<sup>34</sup> For example, District Ethics Committees in Tanzania, Election Mediation Committees in Myanmar, indigenous traditional justice mechanisms in the state of Oaxaca in Mexico, the Complaints Center in Sri Lanka, Conflict Management Committees in Zambia.

<sup>35</sup> Electoral Institute for Sustainable Democracy in Africa. (2005). *EISA Election observer mission report Namibia – Presidential and national assembly elections 2004: EISA election observer mission report*, No. 18, pp. 17-18. <https://www.eisa.org/pdf/namomr04.pdf>

<sup>36</sup> For example, in El Salvador, the Attorney General's Office provides trained mediators to provide information and facilitate discussion.

<sup>37</sup> For example, committees of the wise in Niger, made up of traditional and religious leaders. See *Committees of the wise in Niger's general election (in French)*. (2020, December 6). Africa-Press. <https://www.africa-press.net/niger/homepage-french/elections-generales-au-niger-le-comite-des-sages-appelle-toutes-les-parties-a-oeuvrer-pour-des-elections-apaisees>

<sup>38</sup> Orozco-Henríquez, J. (2010). *Electoral justice: The International IDEA handbook*. International Institute for Democracy and Electoral Assistance. <https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf>

decisions, the degree of informality and the actors involved are key elements to distinguish ADR from EDR. The distinction between formal and informal mechanisms also needs to be interpreted based on each country's legally mandated EDR system.<sup>39</sup> Although there is no universal consensus on the definitions of each ADR mechanism, it is important to ensure in each country that terms are defined clearly and are well-understood by all stakeholders.

## Legal Basis for ADR In Elections

Several national constitutions studied for this research provide for or encourage the use of ADR mechanisms as a general principle rather than specific to election disputes.<sup>40</sup> More commonly, references to ADR mechanisms are found in electoral laws,<sup>41</sup> election bylaws, rules, or notifications.<sup>42</sup> But in most of the countries studied, IFES has noted that details are very limited in the legal framework or even in the rules, as will be described later in this paper. The legal provisions sometimes provide for the mode of ADR to be used (negotiation, conciliation, or mediation) but often remain vague on the composition of the ADR body, timing of appointment, number of members, respective roles, scope of issues that can be addressed, and procedures.

## Models of ADR Mechanisms Used in Elections

As outlined previously, this paper focuses primarily on ADR mechanisms initiated or led by EMBs. While such mechanisms often include a multitude of actors, party representatives, governmental officials, elders from the community, and civil society actors, we mostly included case studies of committees or panels set up by an EMB or by courts. However, there are alternative models to resolve election disputes initiated by civil society or political parties, as set out in the table below.

### ADR committees established and chaired by EMB

Such committees have been established in a number of countries. While they are chaired by EMB officials, these committees and panels include diverse actors as members (government officials, party representatives or lawyers, community members). The EMB can act as a mediator or arbiter or form part of a panel or committee that is mandated to perform that role.

- **Kenya:** The law provides for the establishment of Peace Committees at the constituency level led by a returning officer to conciliate, negotiate, and mediate disputes arising from breach of code of conduct.
- **South Africa:** The EMB established conflict management mediation panels to mediate local conflicts and allow for consultation and cooperation between the EMB and electoral stakeholders.

<sup>39</sup> See the chart at Kovick, D. & Young, J.H., 2011, p. 238.

<sup>40</sup> Constitutions that encourage the use of ADR include those of Kenya, Nepal, Malawi, Mexico, and Zambia, as set out in the case studies below.

<sup>41</sup> For example, in the South Africa Electoral Act and in the Kenya Electoral Act Schedule II on Code of Conduct or in Indonesia Election Law 2017.

<sup>42</sup> For example, in Myanmar and Sri Lanka.

- **Myanmar:** Election Mediation Committees established by the EMB mediate local disputes in elections.<sup>43</sup>
- **Zambia:** EMB-constituted Conflict Management Committees at the national and district levels mediate and resolve electoral disputes.<sup>44</sup>
- **Sri Lanka:** Complaints Centers established by the Election Commission mediate disputes and refer disputes to relevant adjudicating authorities.<sup>45</sup>
- **Botswana:** Dispute Resolution Committees established by the Code of Conduct serve as a preliminary step before a dispute moves to court.<sup>46</sup> Also uses a conciliation form of ADR.<sup>47</sup>
- **Tanzania:** The EMB sets up an Ethics Committee in each district and at the central level, composed of returning officers and election officials as well as party representatives and government officials.
- **Oaxaca, Mexico:** The EMB establishes local mediation committees to resolve disputes at local council elections governed by indigenous customs.
- **Malawi:** The EMB establishes the National Elections Consultative Forum and Multiparty Liaison Committees to mediate disputes over the electoral process.<sup>48</sup>
- **United States:** The [Federal Election Commission](#) offers mediation to the parties involved as a first step to the resolution of election disputes.<sup>49</sup>
- **Sierra Leone:** District Monitoring Committees, which operate under the Political Parties Registration Commission (PPRC), address political party disputes at the local level to defuse tensions before they came to formal complaints regarding campaign spending.<sup>50</sup>

### Political party liaison committee led by the EMB

This is a common model. These committees are established to increase communication between parties and EMBs. They are consultative so, while they can make recommendations and work to resolve problems, the final decision-making power rests with the EMB. While their exact form varies depending on the country, party liaison committees can utilize mediation and arbitration to resolve conflicts, or they may simply offer a forum for discussion. The wide variety of implementation models also affects the range of possible resolutions.

<sup>43</sup> The Carter Center. (2016). *Observing Myanmar's 2015 general elections final report*, p. 66.

[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/myanmar-2015-final.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/myanmar-2015-final.pdf).

<sup>44</sup> The Electoral Process Act No. 35 (2016) GOVERNMENT GAZETTE (SI) § 113 (Zam.); *European Union election observation mission final report: Republic of Zambia – General elections and referendum 2016*. (n.d.) European Union Database on Election Missions, pp.30–31. <https://ec.europa.eu/info/strategy/relations-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/missions/>

<sup>45</sup> Mohan, V. (2015). *Sri Lankan electoral commissioner Mahinda Deshapriya sets the bar high*. IFES. <https://www.ifes.org/news/sri-lankan-electoral-commissioner-mahinda-deshapriya-sets-bar-high>.

<sup>46</sup> Electoral Institute for Sustainable Democracy in Africa. (2010). *EISA technical assessment team report Botswana - Parliamentary and local government elections 2009: EISA election observer mission report, No. 35*, pp. 2–22. <http://aceproject.org/electoral-advice/dop/?keywords=&country=Botswana&organization=&year=&election=&mission=&report=>

<sup>47</sup> Ibid.

<sup>48</sup> See the Malawi case study in the annex.

<sup>49</sup> See the United States case study in the annex and Federal Election Commission Guidance on how to file a complaint at

<https://www.fec.gov/legal-resources/enforcement/complaints-process/how-to-file-complaint-with-fec/>

<sup>50</sup> "District level PPRCs operated in most of the districts (not the new ones). In some cases, they played an important role in mediating." *European Union election observation mission final report: Republic of Sierra Leone - Presidential, parliamentary and local council elections 2018*. (2018). Election Observation and Democracy Support. [https://www.eods.eu/library/eu\\_eom\\_sl\\_2018\\_final\\_report\\_4.pdf](https://www.eods.eu/library/eu_eom_sl_2018_final_report_4.pdf)



- **Ethiopia:** The Political Party Joint Forum was established and is coordinated by the EMB, with a mandate to resolve inter-party disputes by dialogue and consent.<sup>51</sup>
- **Democratic Republic of Congo:** Party liaison committees utilize mediation during elections.<sup>52</sup>

## Inter-party mechanism not led by the EMB

Various African nations have established inter-party committees or task forces that mediate conflicts among parties, and between parties and the EMB. In some cases, the EMB participates in these mechanisms, but it does not lead them. These mechanisms can be set up at the local level, regional level, and/or at the central level.

- **Nigeria:** The Inter-Party Advisory Council and National Peace Committee mediate conflicts between parties during elections.<sup>53</sup>
- **Somaliland:** The Election Task Force and an Eminent Group consisting of three former vice presidents mediate conflict between political parties.<sup>54</sup>
- **The Gambia:** The mandate of Inter-Party Committees and Inter-Party Advisory Committee covers the resolution of disputes between political parties and with the EMB.<sup>55</sup>
- **Ghana:** The Inter-Party Advisory Committee and National Peace Council can mediate pre-election disputes between political parties.<sup>56</sup>

## Other Dispute resolution or prevention efforts

In a few countries, other state bodies take on a role in preventing or resolving specific type of election disputes, which can be at the national or local level. In some countries, conflict management bodies are established to train community leaders in conflict management skills. EMBs coordinate with these panels to receive their feedback in identifying potential risks or conflict, which allows the EMBs to respond to them appropriately. Finally, some countries rely on their traditional legal systems.

<sup>51</sup> See the Ethiopia case study in the annex.

<sup>52</sup> Kovick, D. & Young, J.H. (2011) Alternative Dispute Resolution Mechanisms. In C. Vickery (Ed.), *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)* (pp. 227–258). IFES. <https://www.ifes.org/publications/guidelines-understanding-adjudicating-and-resolving-disputes-elections-guarde>

<sup>53</sup> International Republican Institute & National Democratic Institute. (2019). *IRI/NDI Nigeria International Election Observation Mission Final Report*, pp. 68–69. [https://www.iri.org/sites/default/files/2019-6-18\\_final\\_nigeria\\_eom\\_report.pdf](https://www.iri.org/sites/default/files/2019-6-18_final_nigeria_eom_report.pdf); see also *European Union election observation mission final report: Nigeria 2019 – General Elections*. (2019). [https://www.eods.eu/library/nigeria\\_2019\\_eu\\_eom\\_final\\_report-web.pdf](https://www.eods.eu/library/nigeria_2019_eu_eom_final_report-web.pdf)

<sup>54</sup> Walls, M., Heine, C., Klingel, A., Goggin, C., Farag, A., & Mwape, S. (2018). *The limits of consensus? Report on the Somaliland presidential election, 13th November 2017*. UCL Bartlett Development Planning Unit: London, UK. <https://discovery.ucl.ac.uk/id/eprint/10047014>

<sup>55</sup> *Report of the Commonwealth Expert Team: The Gambia Presidential Elections 24 November 2011*. (2011). The Commonwealth Secretariat. <https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/news-items/documents/TheGambiaPresidentialElection2011Final.pdf>; The European Union (EU) *Election Observation Mission (EOM) Final Report* on the 2017 National Assembly elections in The Gambia notes that the Inter-Party Committee was inactive (pp. 19 and 35). The *EU EOM Final Report* on the 2021 elections in The Gambia notes that the Inter-Party Committee has been more active and played a role in organizing the signing of the Code of Conduct for Political Parties and in mediating an inter-party dispute (p. 10).

<sup>56</sup> Nkansah, L. (2016). Electoral Justice Under Ghana's Fourth Republic. *SSRN Electronic Journal*. [https://www.researchgate.net/publication/318006586\\_Electoral\\_Justice\\_Under\\_Ghana%27s\\_Fourth\\_Republic](https://www.researchgate.net/publication/318006586_Electoral_Justice_Under_Ghana%27s_Fourth_Republic). See also European Union Election Observation Mission Final Report: Ghana 2020 – Presidential and Parliamentary Election. (n.d.) [https://www.eas.europa.eu/sites/default/files/eu\\_eom\\_ghana\\_2020\\_final\\_report.pdf](https://www.eas.europa.eu/sites/default/files/eu_eom_ghana_2020_final_report.pdf)

- **El Salvador:** The Attorney General's Office deploys trained mediators to guide voters on how to report potential violations and promote dialogue and peaceful resolution of problems on Election Day and during the count process.<sup>57</sup>
- **Kenya:** CSOs formed a broad-based network with the EMB and other state agencies for conflict prevention and resolution, known as the Uwiano Platform for Peace.<sup>58</sup>
- **Burundi:** A traditional system called Bashingantah or "Council of Wise Men" to resolve election disputes was reported in the 2010 elections.<sup>59</sup>
- **Niger:** Committees of the Wise, made up of traditional and religious leaders, worked on inter-party dialogue during the 2020 elections.<sup>60</sup>

## Judiciary or quasi-judicial models

The judiciary could also implement a mediation system for election disputes. This could allow for a formalized process that is faster and more approachable to members of the community. But our research has found only rare examples of successful use of ADR mandated by election judges in elections.

- **Senegal:** Selected judges from an ad hoc commission supervising the tabulation of results act as mediators when addressing polling and counting disputes prior to the announcement of preliminary election results.
- **Kenya:** The Political Parties Dispute Tribunal refers to mediation as the first step for resolving disputes on party nomination or inter and intra party disputes.
- **Indonesia:** Bawaslu, an election supervisory body with adjudication powers over administrative disputes and election offenses, introduces mediation as a first step upon receiving complaints for some pre-election disputes (nomination of candidate, party registration, and campaign disputes).

Our research identified only limited use of ADR in election processes in Central and Eastern Europe. One explanation may be that many of these countries have tight deadlines for administrative review or adjudication of election complaints before the EMB and before the courts.<sup>61</sup> ADR is often used to avoid lengthy judicial proceedings and to provide a quick remedy. It is not prevalent in Western Europe, either, which could be due to the generally lower degree of conflict around elections and stronger law enforcement. However, mediation and

<sup>57</sup> El Salvador Attorney General's Office, [Report on Election Day 2018](#). Also, see the case study in the annex.

<sup>58</sup> *Guide for Civil Society on Sustaining Peace through Elections*. (2019). European Commission Supporting Democracy Programme. [https://media4democracy.eu/wp-content/uploads/documents/Toolkit\\_EN/Guide-sustaining-peace.pdf](https://media4democracy.eu/wp-content/uploads/documents/Toolkit_EN/Guide-sustaining-peace.pdf); The IFES EVER and PAVE programs work on capacity-building and training local CSO partners in preventing electoral violence.; Uwiano Platform for Peace. (n.d.). <https://nscpeace.go.ke/108/about.php>

<sup>59</sup> Kovick, D. & Young, J.H. (2011) Alternative Dispute Resolution Mechanisms. In C. Vickery (Ed.), *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)* (pp. 227–258). IFES. <https://www.ifes.org/publications/guidelines-understanding-adjudicating-and-resolving-disputes-elections-guarde>; Union européenne Mission d'observation électorale rapport final: Burundi 2010 - Elections communales, présidentielle, législatives, sénatoriales et collinaires 2010. (n.d.). [https://www.eods.eu/library/FR%20BURUNDI%202010\\_fr.pdf](https://www.eods.eu/library/FR%20BURUNDI%202010_fr.pdf)

<sup>60</sup> *Committees of the wise in Niger's general election (in French)*. (2020, December 6). Africa-Press. <https://www.africa-press.net/niger/homepage-french/elections-generales-au-niger-le-comite-des-sages-appelle-toutes-les-parties-a-oeuvrer-pour-des-elections-apaisees>


<sup>61</sup> Kosovo, Serbia, Bulgaria, Romania, referred to in the European Commission for Democracy Through Law (Venice Commission) Report on Election Dispute Resolution, 2020, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)025-e)



conciliation in other areas of law is expanding in Europe and North America and could be considered for use in elections in the future.

## Types of Disputes

ADR can offer an efficient resolution to a variety of election disputes and serve as a complement to the judicial system if designed well. For example, in Myanmar in 2015 and 2020, voters, political parties or candidate reported violations to the Election Mediation Committees (EMCs) to resolve issues of hate speech, allegations of illegal campaign activities, intimidation of voters, and disturbances on Election Day. ADR can be used to address concerns about the secrecy of voting and to ensure compliance with electoral or non-electoral regulations, such as COVID-19 restrictions. In South Africa, mediation and conciliation are used for violations of the electoral code of conduct (e.g., mediation or conciliation can de-escalate threats, address instances of undue influence or abuse of state resources, tackle illegal campaign materials, and mitigate disinformation). Disputes may involve political parties, candidates, agents, election officials, or group of voters.



### TYPES OF DISPUTES

ADR can offer an efficient resolution to a variety of election disputes and serve as a complement to the judicial system

Examples of pre-election disputes that could be suitable for ADR, subject to the specific legal framework, context and determination of suitability as described below:

- Destroying, removing or defacing campaign materials of other parties;
- Using hate speech against a specific individual or group;
- Intimidation of candidates or voters by rival party supporters;
- Publishing false information about candidates or parties on social media;
- Misuse of a political party's symbols or names to mislead voters;
- Carrying arms or weapons at political meetings, marches or campaign rallies;
- Disrupting the campaign rallies of a party or candidate;
- Public officials working for a campaign during official working hours or using public premises or resources for campaign activities; or
- Intra-party disputes around candidacy.

## Determining Whether Disputes Are Suitable for ADR

Before designing an ADR mechanism for election disputes or accepting a specific dispute for mediation or conciliation, certain issues and the cultural and political context should be carefully considered. When facing the scenarios featured in the box below, the EMB, court, or tribunal should question whether ADR is appropriate.<sup>62</sup>

<sup>62</sup> EDR BRIDGE MODULE. ADR session.

Not all disputes are suitable for mediation or conciliation. In election cases, there are “interested parties” to a specific dispute, but the resolution of the dispute may also have broader implications for the public interest. During consultations with the Africa Electoral Jurisprudence Network on the use of ADR in elections, judges confirmed that, when the public is a party to the dispute (e.g., bribery of voters, intimidation, or election results), mediation may not be appropriate. In some cases where the dispute concerns fundamental rights, such as the right to be a candidate, or when serious acts of election violence or intimidation have been committed, it may be preferable to refer matters directly to a quasi-judicial body for resolution with the required due process rights. But it can be challenging for non-legally trained mediators to clearly assess the nature of the disputes submitted. The failure to distinguish cases that are not suitable for ADR can be particularly problematic. That is why it is crucial that the mediators, arbiters, or conciliators clearly inform disputants of the right to file their complaint with a formal EDR body if ADR fails.



### **FACTORS THAT MAY MEAN A DISPUTE IS NOT SUITABLE FOR ADR:**

- Where the dispute is of a recurring nature and/or severe or novel and there is a particular need for consistency among like disputes in other parts of the country.
- Where the dispute or its resolution will affect parties outside the process to a substantial degree (for example, affecting a particular group of voters).
- Where it is in the public interest for certain kinds of issues, such as major criminal offenses and legally prescribed qualifications to become a candidate, to be dealt with publicly through the formal process.
- Where there is ambiguity or a gap in the legal framework and judicial resolution of the dispute is needed to establish a precedent for future similar disputes and ensure consistency.
- Where there is a considerable gap in social status or education between the parties to the conflict, which could lead the less sophisticated party to be pressured into agreeing to an unfair resolution or agreement.

In some regions and states in Myanmar during the 2015 election campaign, the EMC facilitated the settlement of disputes concerning voter intimidation and violence between two major political parties. The group of voters who were the aggrieved parties to the dispute were not invited to attend the mediation meetings. Moreover, these violations were apparently occurring in multiple areas across the state and region, showing the widespread nature of the violation. Due the lack of representation of the victims and the severity of the violations, the EMCs should likely have considered these cases to be inappropriate for ADR.

The type of dispute may not be the only factor that determines whether ADR is advisable in elections. The local socio-political context and the efficacy of existing adjudication bodies will often play a key role in determining the electoral disputes to be handled by an ADR mechanism. In South Africa, concerns around increasing election violence led to the deployment of an ADR mechanism specifically focused on addressing violence. The success of ADR initiatives that are focused on a particular type of dispute could encourage an EMB to expand its scope in future elections. For example, in the 2020 elections in Myanmar, the EMCs’ mandate in 2015 was expanded to cover hate speech and disinformation. The status of the alleged respondent to a dispute—whether a senior official, a public servant, a party, or a voter involved in the dispute—may also be relevant to determining whether a dispute is suitable for ADR. If there

is an existing effective disciplinary mechanism to deal with abuse of state resources violations by a senior official, for example, ADR may not be appropriate. But if the dispute involves voters or party supporters from both sides of the political spectrum abusing financial resources or accessing public vehicles, it may be important to engage in dialogue during the pre-election phase and reach a settlement, rather than immediately engaging in disciplinary or legal proceedings.

## Advantages of Using ADR

IFES's GUARDE research identified the benefits of implementing ADR in election disputes. While not applicable to all conflicts, ADR can serve as an effective complement to EDR because it can efficiently provide tailored remedies to challenges that arise without being overly restricted by complicated procedures. This allows EMBs to tackle violations of the code of conduct or misunderstandings about election procedures—giving them an important tool to prevent and resolve conflict and a mitigation measure to address small irregularities in election processes before they become more pervasive. Because of these advantages, when ADR is applicable it can aid the EMB and the courts, as well as the participants. As noted by the chair of Nigeria's election commission: "It would be ultimately cheaper for everybody if we have a seamless process, and that process can be achieved not just by the legislation enabling us to conduct elections and legal processes but also the intervention of Institutes such as the Institute of Chartered Mediators and Conciliators."<sup>63</sup> With this in mind, ADR mechanisms can be designed to decrease conflict and improve legitimacy.

### AFRICA ELECTORAL JUSTICE NETWORK MEETING, JULY 19–20, 2022, CONSULTATIONS ON ADR:

**"A lot of issues can be effectively disposed of in pre-election phase through mediation." But also warned that "ADR may well be used for pre-elections if the process and mandate should be adequately explained to the voters to avoid misperception about the mandate of the ADR body."**

### Potential advantages:<sup>64</sup>

- ADR claims are efficient, have a lower cost, and provide timely and accessible resolution of disputes, crucial during an election period.
- ADR can help to remedy the general lack of enforcement of election rules and codes of conduct, therefore reducing impunity and increasing deterrence.
- The ADR objective of reaching a solution that meets the needs of both parties can be more suited to local cultural preferences, notably for traditionally excluded populations. For example, mediation can limit the pressure of finality and winner-takes-all attitudes for cultures that are wary of win/lose decisions.
- ADR provides an opportunity for dialogue between stakeholders, which increases the chances for reciprocal commitments, improving satisfaction with the process and outcomes. This constructive dialogue can lead to more lasting resolution to grievances within or underlying the electoral process.

<sup>63</sup> Independent National Electoral Commission. (n.d.). *INEC advocates the use of ADR to reduce cases of election litigation*. <https://inecnigeria.org/news-all/inec-advocates-the-use-of-adr-to-reduce-cases-of-election-litigation/>

<sup>64</sup> Kovick, D. & Young, J.H. (2011) Alternative Dispute Resolution Mechanisms. In C. Vickery (Ed.), *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)*. IFES. p. 233

- ADR increases local access to justice because it can complement or bypass court systems that may be slow, costly, or corrupt. It also decentralizes the process, allowing for resolution of disputes at the grassroots level, which strengthens local communities' democratic engagement.
- ADR can increase participation because it is a more approachable system for those who may be intimidated by the courts or law enforcement. This can increase access to justice for minorities and traditionally excluded populations, youth, women, or minorities.
- These advantages mean that ADR can improve confidence in the electoral system and help to prevent or resolve conflict and defuse political tension.

## Disadvantages or Risks of Using ADR

Our study also highlighted potential risks with setting up ADR mechanisms in elections and demonstrated the importance of conducting a feasibility study prior to establishing an ADR mechanism, as well as conducting thorough lessons learned exercises after each election cycle.

### Potential disadvantages and risks:

- ADR's accessibility and lack of procedural requirements can fail to filter out frivolous or spurious claims, which can waste resources.
- Decisions taken at the local level for nationwide problems can lead to inconsistency, which can undermine the legitimacy of the ADR mechanisms.
- ADR mechanisms lack the traditional power of courts to compel participation and may not have enforcement authority around decisions.
- Some ADR mechanisms, such as traditional justice systems, may not offer adequate guarantees to redress social power imbalance and may harm justice. For example, in tribal communities with existing ADR mechanisms, these bodies may be male-dominated and can reflect social norms that may enable discrimination against specific groups of vulnerable people.
- ADR can slow reform in the court system when programs siphon off resources to a process that cannot create systemic change because it operates on a case-by-case basis.
- The potential sluggishness and inefficiency of ADR mechanisms can raise due process concerns and, in the absence of clear deadlines can also delay election operations.
- ADR administrators may lack the training, impartiality, and professionalism required for courts or tribunals.

The increased use of ADR, coupled with insufficient training or predetermined rules, can lead to confusion of mandates with the conventional EDR bodies, therefore damaging understanding of the system and limiting the ability of stakeholders to seek a remedy or to trust in the institution. Moreover, the decision to establish an ADR mechanism should not lead to over-delegation of responsibility by the EMB to non-election officials, including civil society or traditional religious leaders who may not be bound by a commitment to neutrality and professionalism. The EMB should remain the body responsible for the conduct of the election process and, as part of its mandate, should address disputes and violations in the electoral process.

The lack of trust in an EMB may push it to design an inclusive ADR mechanism, but with that comes the risk of diluting its powers. IFES GUARDE stresses the importance of ADR as a complement to EDR, but not a replacement. Creating another forum will not solve existing defects in formal EDR processes.

Finally, another risk raised by judges when considering ADR as a first step to their adjudication of election disputes is their potential bias toward one of the parties. While they supported the introduction of ADR in pre-election disputes, they also noted that, if they are involved as mediators in a preliminary phase and if the mediation fails, it may be difficult for them to rule in an impartial manner on the case. To mitigate this risk, court needs to adopt strict rules on appointment of external mediators or conciliators or establish different panels of judges for the adjudication.