

# Alternative Dispute Resolution in Practice— Lessons for Practitioners

This section examines ADR initiatives in various countries between the late 1990s and 2021, highlighting the specificities of the design and use of ADR in elections and including both successes and challenges. We focus on the lessons that have been learned as the use of ADR continues to expand and evolve. Further details about the countries that illustrate the lessons are provided in the case studies in Annex 1.

## Lesson 1: ADR structures should be clearly defined and transparent, and training should be provided for ADR practitioners

Experience has shown that successful ADR mechanisms have clearly defined structures that are representative of electoral stakeholders at the local level, thereby enjoying stakeholders' trust and building local ownership. It is also vital that all members of ADR bodies are well-trained, to avoid inconsistent practices and outcomes that can simply give rise to new grievances. Another success factor is for the ADR bodies to report publicly on their work, which enhances transparency and public trust.

As a pioneer of ADR in elections, the Independent Election Commission (IEC) in **South Africa** has used various ADR mechanisms over different election cycles that have evolved with the socio-political context. These consist of conflict management committees (CMCs) headed by provincial election officers and made up of political party liaison representatives, local NGOs, security forces, and members of mediation panels. The provincial panels are assisted in their work by community panelists at the local level, so they can deal with local conflicts at the source. Panelists are approved by the local party liaison committees and enjoy the respect and trust of political parties and the community, which is credited for their success in preventing violent conflicts. More recently, coordinators of Conflict Panels have been integrated into Joint Operation Centers (JOCs), enabling local risks of electoral conflict to be mapped and fed up the JOC chain to the provincial and national level. One weakness in the CMCs' work is that they are not required to collect data and report on their work, which would help to systematize their efforts across the country, improve effectiveness and increase transparency.<sup>65</sup>

In **Zambia**, similar successes and challenges are evident. The Electoral Commission of Zambia established an ADR mechanism (CMCs) at the national and district levels to resolve electoral disputes. The composition of the CMCs includes religious leaders, political party representatives, law enforcement and other government agencies, and civil society representatives, which has helped to create local ownership. The decentralized structure of the CMCs allows members with direct knowledge of the context and the actors involved to resolve disputes quickly through mediation and conciliation. Despite a positive start, the impact of the CMCs has been mixed. Although they have helped to reduce violence and defuse tensions, there has been a lack of consistent training at the district level, resulting in their performance and effectiveness varying widely. Another challenge is the lack of transparency, caused by CMCs' failure

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<sup>65</sup> Based on the interviews conducted, the IEC's dwindling budget is thought to be responsible for this weakness.

to follow recordkeeping requirements or to publish their decisions, linked to a lack of training and, ultimately, to a lack of funding.

The need to establish rules and provide mediation training for election officials as well as education for stakeholders is exemplified in **Myanmar's** experience in 2020 elections, which improved upon their first experience with election mediation committees (EMCs) in 2015. The lack of rules and training in 2015 left the door open for inconsistency across regions and states. In some instances of mediation, the major political parties reached a resolution to the detriment of independent candidates, by means of an unequal process in which the independent candidate was not part of the mediation. In other instances, the main political parties reached a resolution to the detriment of the voter who reported intimidation and vote buying. In 2020, the Union Election Commission (UEC) institutionalized EMCs for pre-election disputes, and the EMCs played a prominent role in resolving disputes in the pre-election period; this role was commended by observers. However, Myanmar's experience also shows the importance of an EMB communicating on the ADR process and the nature of the disputes it addresses during the election. The UEC made only limited communication efforts in 2015 and 2020, so the EMC mechanism did not succeed in building trust in the UEC or the election process.

In **Indonesia**, Bawaslu, a supervisory electoral body with adjudication powers over pre- and post-election disputes, successfully introduced mediation for certain types of pre-election disputes. Following the adoption of a legal provision on mediation in the 2017 election law, Bawaslu had a clear mandate and a two-day window to mediate disputes related to nomination, registration and campaign issues, and made significant investments in training its officials on the required skillset to become a mediator. A total of 2,300 Bawaslu officials were trained at the central, municipality and city levels as mediators. A former commissioner shared with IFES that 50.9 percent of the disputes filed with Bawaslu in the last election ended at the mediation stage.

In 2000, the Federal Election Commission (FEC) in the **United States** initiated a pilot program to promote compliance with campaign finance laws, which "sought to expedite resolution of some enforcement matters, reduce the cost of processing complaints, and enhance overall FEC enforcement."<sup>66</sup> More than two decades on, the FEC offers this option for specific cases, which are assigned to the ADR office by commissioners or referred by the office of the general counsel, the report analysis division or the audit office.<sup>67</sup> The FEC has developed a guide for complainants, which explains the objective and details of this ADR process to ensure all stakeholders understand where they can file a complaint and where they have the opportunity to attempt to mediate a dispute.<sup>68</sup>

In **Malawi**, operating as a complementary mechanism to the conventional EDR process, Multi-Party Liaison Committees (MPLCs) have helped improve the legitimacy of elections through community dialogue and consensus-building. The legal director of the Malawi Election Commission noted that "ADR promoted by the EMB remain the most effective way of dealing with pre-polling electoral disputes in the Malawi context." Yet the MPLCs face

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<sup>66</sup> Federal Election Commission. (2000, August 1). *FEC institutes pilot ADR program* [Press release]. Retrieved from <https://www.fec.gov/updates/fec-institutes-pilot-adr-program/>

<sup>67</sup> Federal Election Commission. (n.d.). *Alternative dispute resolution*. <https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution/>

<sup>68</sup> Federal Election Commission. (2012, May). *Guidebook for complainants and respondents on the FEC enforcement process*. [https://www.fec.gov/resources/cms-content/documents/respondent\\_guide.pdf](https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf)

challenges: Their operation is not consistent across the country, with some meeting regularly, others only when a complaint is presented, due to lack of funding. Another challenge is that the MPLCs do not have a legal basis; they are established as an administrative arrangement by the Malawi Election Commission (MEC). As such, they do not have clear jurisdiction and procedures but act only on referrals from the MEC. The mechanism could be strengthened by new regulations and by greater liaison with and support from the national level body, the National Elections Consultative Forum, chaired and organized by the MEC, which mirrors the composition of the MPLCs at the national level.

## Lesson 2: The ADR mandate of an institution, and procedures used for ADR, should be clear and set in advance of elections

The legal or regulatory framework for elections needs to set out clear rules, procedures, and defined mandates for any ADR mechanisms. Otherwise, there is a risk of inconsistency, overlapping jurisdiction, and confusion between ADR and EDR. It is also crucial that the laws and regulations provide for the right of appeal to a court or tribunal following the ADR resolution. An expert on ADR in Africa wrote, “[L]egislation will elevate the status of ADR before a sceptical disputant, will build public confidence, and will further increase ADR utilisation and promote ethical practice. Legislation will also provide a framework for reference, review, and reform, as well as institutionalizing much needed education and professional training.”<sup>69</sup> It is also important that rules are published early in the process, giving time for all stakeholders to familiarize themselves with the process, to train or educate their networks, and to enable the EMB to provide public education.

**Kenya** and **Sri Lanka** are good examples of the need to establish rules in advance for non-binding and decentralized ADR mechanisms. While Peace Committees are provided for in the Kenyan Electoral Law to deal with disputes over the Code of Conduct, to date these mechanisms have not been set up with a clear mandate or procedures and have remained largely inoperative. The Independent Electoral and Boundaries Commission (IEBC) established Peace Committees in each constituency for the 2013 elections, to be chaired by returning officers. However, no specific rules were issued by the IEBC to govern the role, responsibilities, and functioning of the committees. This gap was not remedied for the 2017 elections. There were reports from both the 2013 and 2017 elections that the committees were set up in inconsistent ways, sometimes led by the returning officers, but sometimes usurped by county officials. There were no records of cases handled or decisions made, although sanctions were sometimes imposed—which is not the role of mediation. Clear regulation is crucial to avoid inconsistent resolution of disputes and potential abuse of authority, which could increase political tensions ahead of elections. In 2022, the IEBC adopted rules of procedure for its Election Dispute Resolution committee but did not issue specific guidelines for the Peace Committees, which could serve as a first avenue for addressing disputes over alleged Code of Conduct infractions. The mechanisms did not prevent any appeal before a court or a quasi-judicial body if mediation or conciliation failed.

As in Kenya, the **Sri Lankan** Election Commission (EC) established Complaints Management Centers as a decentralized ADR mechanism to complement the formal judicial process. The Complaints Management Centers received disputes for the first time in the 2015 elections and have enjoyed some success as a quick and decentralized

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<sup>69</sup> Uwazie, E. (Ed.). (2014). *Alternative dispute resolution and peace-building in Africa*. Cambridge Scholars Publishing.

way to resolve disputes instead of filing before the courts. But the law was silent about these complaint centers (beyond the general EDR mandate of the EC), and they were established with no mandate to adjudicate complaints or impose sanctions or remedies. Instead, election officials engage in discussion and mediate disputes raised by voters or parties and, as needed, refer complaints to the police. To date, Complaints Management Centers lack unified rules and timelines for handling complaints. In 2019, the EC made progress with the adoption of rules and voter education materials on how to file complaints. However, in its report on the 2019 elections, the EU Election Observation Mission (EOM) noted a lack of follow-up information about the outcomes of complaints and recommended that the EC issue clear, codified procedures and coordinate recordkeeping by the various bodies involved.

A lack of clear rules, as well as vulnerabilities in the design and execution of EDR mechanisms, can lead to ad hoc and inconsistent dispute resolution in practice and blur the line between formal EDR and informal ADR. For the 2021 elections in **Ethiopia**, the National Election Board of Ethiopia (NEBE) was mandated to establish Grievance Hearing Committees (GHCs) at all levels, from local to national. However, the GHCs were not established in most constituencies or in polling stations during the 2021 elections, due partly to the difficulty of finding thousands of volunteers willing to serve on them in an unpaid capacity. Furthermore, the NEBE did not finalize and adopt procedures for its own handling of disputes, and Parliament did not approve the draft regulation for the courts' handling of electoral disputes. In the absence of a fully functioning EDR system, NEBE and political parties used a variety of ad hoc methods to resolve disputes. The disadvantages of informal or ad hoc dispute resolution are that it may provide inconsistent outcomes for different parties (leading to claims of bias) and can lack transparency—unless the EMB publishes information about decisions taken. In some cases, parties raised complaints directly with NEBE headquarters, which resolved complaints informally (for example, by extending deadlines for voter and candidate registration, or by clarifying guidelines). The Political Parties Joint Forum coordinated by the NEBE was also a useful space for dialogue and dispute resolution, but in other cases, parties took cases to court for formal resolution with varying degrees of success. The disadvantages of informal or ad hoc dispute resolution are that it may provide inconsistent outcomes for different parties (leading to claims of bias) and can lack transparency—unless the EMB publishes information about decisions taken. It may also be unclear to those parties whose complaints were dealt with informally that they have a right to appeal the resolution to court and that they need a written decision to appeal. Another potential disadvantage of an ad hoc approach is that some parties may not have had the knowledge or established relationships to raise disputes informally with NEBE headquarters, and, therefore, may have felt they had no option but to use the slower and more costly route of a court challenge. It is also important to be aware of the risk of forum-shopping if multiple routes of dispute resolution are available to a party.

Some ADR mechanisms, such as arbitration or mediation, can include a binding resolution, as in **Ethiopia**; however, the parties involved in the dispute should expressly agree to that, or it should be clear in the rules of the ADR body. While binding decisions can offer legal protections, a non-binding ADR resolution, if supported by political and social pressure, can be more effective than a binding decision that has a poor enforcement mechanism. It is important for the parties to the dispute to understand and consent to the use of ADR, knowing that it will issue a binding decision.

The introduction of ADR in **Tanzania** was welcomed by stakeholders when first established, in particular because of the limitations on bringing a challenge to court to address election disputes. The National Election Commission (NEC) established Ethics Committees in each district and at the national level, made up of NEC officials and political party and government representatives, to resolve complaints about violations of the code of conduct. In 2015, the EU EOM assessed that the NECs had some effectiveness in resolving minor disputes. Still, other disputes bypassed committees and were resolved through direct negotiation between interested parties. This experience was repeated in the 2020 elections; however, important shortcomings in the process were noted. The Electoral Code of Conduct did not provide sufficient guidance on the composition or procedures of the Ethics Committees, and there was no detailed process for hearings or a clear mandate for the Ethics Committees. While the Ethics Committees were intended to be limited to Code of Conduct issues, some were addressing issues related to candidate nomination. Furthermore, there was a lack of transparency and reporting, including on the composition of the committees and participation of opposition politicians. These issues could be mitigated by adopting clear guidelines, training, stakeholder outreach, and transparency in the number and nature of disputes addressed through ADR.

### Lesson 3: It is important to account for the country's legal tradition, as well as relevant cultural traditions and practical factors, when designing an ADR mechanism for elections

To provide an effective and meaningful remedy, the process of resolving disputes through an ADR mechanism should consider the legal tradition, customs, and history of a country. Some cultures have a longstanding tradition of resolving disputes by dialogue and discussion rather than adversarial court proceedings. The case studies highlight the need to customize and decentralize the ADR structures and processes depending on the country context. For example, in **Somaliland**, it is customary to resolve conflicts through dialogue. International observers reported that the Eminent Group comported well with this tradition, working as an ad hoc mediation committee to resolve conflicts between parties in the 2017 elections.<sup>70</sup> There is also strong practice of mediation at the community level in fields other than elections in **Nepal** and growing practice in judicial proceedings aside from elections—opening the door for new opportunities for ADR in elections.<sup>71</sup>

The goals of providing for the peaceful resolution of disputes and avoiding violence and tension among ethnic communities are entrenched in the origins of ADR in elections in **South Africa** and **Kenya**. These cultures provide fertile ground for using ADR to resolve electoral disputes. In **Kenya**, ADR is mentioned in the Constitution, as well as in the Electoral and Political Parties Act, and both the IEBC and the Political Parties Disputes Tribunal are empowered to introduce mediation or conciliation as part of their EDR proceeding. However, these mechanisms are underutilized due to a lack of information. This has also been the case in **El Salvador**, where voluntary, informal mediation helps to prevent conflicts by orienting voters and explaining election day procedures to them, promoting dialogue and peaceful resolution of problems between individuals, political parties, and polling station staff during the voting and

<sup>70</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>71</sup> The Asia Foundation has led successful mediation programs and trained mediators in several provinces, leading to resolving thousands of land or family disputes by local community mediators.

counting process. Although referred to as “mediation,” this initiative goes beyond what is usually understood by that term. It includes providing accurate on-the-spot information to all stakeholders about voting and counting procedures. This can be enough to clear up misunderstandings and resolve minor issues, thereby averting conflict and reducing the burden of complaints that the Supreme Electoral Tribunal (TSE) would otherwise need to deal with. This mechanism has also shown that the introduction of ADR can be initiated by other institutions (in this case the attorney general) and not necessarily the EMB.

In an early OSCE/ODIHR research paper on EDR, Denis Petit noted that “challenging an election, its conduct or its results, should...not be perceived as a reflection of weakness in the system, but as proof of the strength, vitality, and openness of the political system.”<sup>72</sup> An important cultural aspect to consider with respect to EDR is the fear of tarnishing the EMB’s reputation if too many complaints are filed. This perception led the EMB in **Myanmar** to establish informal ADR mechanisms to resolve disputes ahead of the formal adjudication process before the court. The impact of the establishment of Election Mediation Committees in Myanmar in the 2015 elections had a positive outcome on the resolution of disputes during the pre-election period.<sup>73</sup>

However, it should not be ignored that one of the practical objectives for an EMB introducing ADR in elections is also to reduce the number of disputes filed with the EMB or limit the backlog of cases presented before the courts. **Nigeria** has a long tradition of using ADR in other fields. Still, electoral stakeholders appeared reluctant to use ADR since



“Our traditional forms of dispute resolution are still with us. We have simply failed to use them.”

Nigeria Former Hon. Nat. Commissioner,  
Prof. Anthonia Okoosi-Simbine

the election commission (INEC) introduced it in 2008 to resolve electoral disputes. In 2011, the INEC established an AEDR Directorate composed of election officials. Despite continued efforts to promote the use of ADR to limit and triage the number of disputes, which overwhelmed the courts before and after the 2019 general elections, the ADR mechanism remains underutilized and under-funded. In parallel, some experts and academics are calling for reform to introduce ADR in the proceedings of the election court. IFES’s nationwide public opinion surveys indicated that 40 percent of respondents preferred the ability to engage in ADR over filing before the courts.<sup>74</sup> Based on the experience of previous elections, it is unlikely that Nigerian politicians will agree to voluntarily submit their disputes to a person or body outside the established judicial system and accept the resolution or settlement of their dispute as binding.<sup>75</sup> The case in Nigeria has highlighted the need to distinguish and adapt solutions for local versus federal issues, and the importance of funding for outreach about the use of ADR. The willingness to submit disputes to mediation or conciliation during an election may vary among states and may also vary depending on whether it is a federal or provincial election. Therefore, a failure of stakeholders to use ADR at the central level does not necessarily mean that stakeholders would not use it in a municipal race or a particular county or province.

<sup>72</sup> Petit, D. (2000). *Resolving election disputes in the OSCE area: Towards a standard election dispute monitoring system*. OSCE Office for Democratic Institutions and Human Rights. [https://eos.cartercenter.org/uploads/document\\_file/path/402/17567.pdf](https://eos.cartercenter.org/uploads/document_file/path/402/17567.pdf)

<sup>73</sup> EU EOM Myanmar general elections 2015 - Final report. (n.d.). [https://www.eods.eu/library/myanmar\\_final\\_report\\_en.pdf](https://www.eods.eu/library/myanmar_final_report_en.pdf)

<sup>74</sup> IFES Nigeria. (2021). *Sustaining Electoral Reforms in Nigeria (2021–2026): Programming Options Paper*.

<sup>75</sup> Bello, A.A. & Aminu, R. (2009). Situating alternative dispute resolution (ADR) in the political sphere: Thoughts on mechanisms for pre-election political dispute resolution in Nigeria. <https://dx.doi.org/10.2139/ssrn.1369702>

Decentralizing election dispute resolution to have more local ownership and oversight, by directly linking the community to the EMB's EDR process, could also further the practical objectives of ADR mechanisms in elections. During the 2017 elections, the Election Commission of **Nepal** (ECN) established ad hoc EDR committees charged with issuing recommendations on alleged violations of the code of conduct to the commission. In addition, the ECN established a local-level code of conduct and campaign finance monitoring committees for the election. Both ADR mechanisms lack guidelines, training, and a clear mandate, and there is inconsistent practice, thereby blurring distinctions between monitoring, settlement, and adjudication of violations. The ECN could consider clarifying the mandate and functions of the ad hoc EDR committees, the local election officials, and the monitoring committees—to merge their roles or establish mediation committees with a clear mandate.

## Lesson 4: Multi-stakeholder coordination, led by the EMB, can help prevent conflict and fight impunity

Effective coordination among different agencies or actors responsible for electoral dispute prevention and resolution can play a positive role in reducing conflict and violence, thereby supporting the credibility of the elections.

During several recent elections, the EMB (the TSE) in **Guatemala** has led an Inter-Institutional Technical Working Group on Election Security. The working group brings together various public bodies to monitor, map, prevent, and resolve electoral conflicts. TSE inspectors at the national, departmental, and municipal levels are trained and take on a coordination role in the working group, working with TSE structures at all levels, the police, prosecutors, security forces, and other government agencies. Together, they monitor and map the risks of electoral conflicts, using information from their on-the-ground presence, media monitoring, and tracking where violations of the electoral law are alleged to have taken place. Through their coordination, the inspectors ensure the appropriate bodies are tasked as necessary. They seek to resolve conflicts before they become formal complaints that go through the established EDR system handled by TSE, thus it reduces the burden on the TSE as disputes are resolved at the local level. The multi-agency coordination has also helped tackle impunity for electoral crimes by quickly passing relevant cases to specialist electoral prosecutors. **El Salvador** provides another example of cooperation between the EMB and the Attorney General's Office to address voting and counting disputes.

The composition of ADR mechanisms need not involve only state actors but can also involve representatives of political parties and civil society, as they may be selected as members of ADR mechanisms. Such diverse composition requires cooperation, in particular, to ensure timely appointment and training of members. As in several other African countries, **Malawi** has a culture of community-level ADR mechanisms rooted in its traditional institutions. This led to the formal requirement in the Malawi Constitution to adopt and implement mechanisms for settling disputes through negotiation, good offices, mediation, conciliation, and arbitration. The commitment to ADR is reflected in the election context in the role of MPLCs. The MPLCs, made up of local stakeholders, including political parties, local authorities, civil society, and traditional leaders, can resolve disputes early and effectively, and they have gained the trust of stakeholders. They have succeeded in reducing the burden of pre-election disputes, mainly inter-party conflicts, for both the MEC and the courts. But, to be efficient, they need to be operational quickly.

## Lesson 5: The use of ADR in elections can provide an opportunity to enhance the role of women, youth, and marginalized groups in electoral justice

Formal dispute resolution mechanisms—courts and other EDR bodies, including EMBs in their adjudication role—are often led by men. Traditional or customary ADR mechanisms are often dominated by elders and community or religious leaders, and therefore are also likely to be led by men. The same applies to mediation led by political party leaders. As such, these bodies are less likely to be gender-sensitive in their treatment of complainants and of the issues in dispute. Studies have shown that women tend to face greater barriers in their access to justice generally, due to their family and child care responsibilities, lesser economic resources making it harder for them to travel to major cities to access courts, lower levels of education, and social and language barriers.<sup>76</sup> Women who identify as part of other marginalized groups—women with disabilities; ethnic minority women; or women from the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) community—face even greater barriers in their access to justice due to compounding discrimination that results from these intersecting identities.<sup>77</sup>

International law supports the elimination of discrimination and the equal treatment of women in dispute resolution bodies through the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by all but a handful of countries. CEDAW goes further than the principle of non-discrimination, providing that states have a positive obligation to take all appropriate measures to eliminate discrimination, including the use of temporary special measures (TSMs).<sup>78</sup> The TSMs may include affirmative actions, such as numerical quotas, to encourage women’s participation in political and public life and achieve de facto equality. This could include targeted recruitment campaigns to encourage women to participate in ADR bodies and to join the judiciary and EMBs for conventional EDR.<sup>79</sup> Further support for increasing women’s participation in ADR and EDR mechanisms comes from Goal 5 of the United Nations Sustainable Development Goals: “Achieve gender equality and empower all women and girls.”<sup>80</sup>

ADR mechanisms can mitigate some of the challenges faced by women and other marginalized groups in accessing formal justice.<sup>81</sup> However, ADR also carries risks: Evidence from ADR bodies outside the electoral field shows that

<sup>76</sup> *Guaranteeing equal access of women to justice*. (n.d.). Council of Europe. Retrieved from <https://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice>; *Report of the online roundtable on “framework to measure access to justice including specific challenges facing women.”* (2021). Council of Europe. <https://rm.coe.int/report-of-the-online-roundtable-on-framework-to-measure-access-to-just/1680a33bc0>; Turquet, L. (2011). *Progress of the world’s women 2011-2012: In pursuit of justice*. UN Women. <https://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice>

<sup>77</sup> High-level Group on Justice for Women. (2020). *Justice for women: High-level Group report*. <https://www.unwomen.org/en/digital-library/publications/2020/03/justice-for-women-high-level-group-report>

<sup>78</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 1249 U.N.T.S. 13. (Multilateral). Art. 7: “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country ... in particular ... the right ... to hold public office and perform all public functions at all levels of government”. Article 4 provides for “temporary special measures aimed at accelerating de facto equality.” Article 15(2) provides that women shall be treated equally at all stages of courts and tribunals.

<sup>79</sup> Trends in women’s representation on EMBs have improved but are still below equity expectations. See *Electoral Processes - Implementing a framework on gender policies for electoral management bodies* in International IDEA, *2020 outcome report*. <https://www.idea.int/2020-annual-report/implementing-framework-gender-policies-electoral-management-bodies>

<sup>80</sup> As part of this, Target 5.5 is to “[e]nsure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.”

<sup>81</sup> *Issue brief: Navigating complex pathways to justice: women and customary and informal justice systems*. (2020). International Development Law Organization. <https://www.idlo.int/publications/issue-brief-women-and-customary-and-informal-justice-systems>



they can favor patriarchal values, and they have often prioritized the goal of achieving resolution of the conflict without necessarily taking account of specific women's issues—in particular, gender-based or sexual violence.<sup>82</sup> More research is needed on how well ADR in electoral disputes works for women and other marginalized groups, especially for dealing with cases of threats, abuse, harassment, and violence. Research on ADR outside the electoral context shows it can be helpful to women, provided that:

- Women are represented on the ADR body and can bring women's perspectives, voices, and experiences to their work and, by example, show that this is an inclusive process.
- The ADR mechanism is designed carefully to empower women and protect women's rights and agency.
- ADR is voluntary, not mandatory, and the use of ADR is no bar to pursuing formal justice, including the ability to appeal the decision of the ADR body.
- The ADR body is trained specifically to deal with such cases, including being aware of societal power imbalances, and of the risks to those with less power.
- ADR is not used for serious criminal offenses or to allow the perpetrators of such crimes against women to avoid real penalties.<sup>83</sup>

These lessons and conditions also apply to the rights of ethnic, religious, and linguistic minorities. The International Convention on the Elimination of All Forms of Racial Discrimination mandates that states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of rights including as the first one the right to equal treatment before the tribunals and all other organs administering justice.<sup>84</sup> In Indonesia, the Bawaslu (supervisory electoral body) conducts mediation at the local level, and mediators are usually from or close to the area of the pre-election dispute. The mediators are usually from the same ethnicity as the parties in dispute, which has helped in the positive resolution of these disputes according to former commissioners.<sup>85</sup>

In **Myanmar** in 2020, every EMC was required to include at least one woman. As a result, the representation of women increased significantly, with women making up 18 to 20 percent of EMC membership at different levels. This

<sup>82</sup> For example, the traditional community-based Gacaca courts used in Rwanda to try crimes committed during the genocide were ultimately used for crimes of sexual violence, despite expressly not being originally intended for that purpose, and researchers have found they were not sensitive to women's issues and not appropriate for sexual violence. See Costello, E.M. (2016). *Justice for whom? The gacaca courts and restorative justice for survivors of sexual violence in Rwanda* (Bachelor's Thesis, University of Michigan, Ann Arbor, USA). <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/120576/emcostel.pdf;jsessionid=435696821010EA52DF3A46A02BC191E9?sequence=1>; Amick, E. (2011). Trying international crimes on local laws: The adjudication of genocide sexual violence crimes in Rwanda's gacaca courts. *Columbia Journal of Gender & Law*, 20(2). <http://cjl.cdrs.columbia.edu/article/trying-international-crimes-on-local-laws-the-adjudication-of-genocide-sexual-violence-crimes-in-rwandas-gacaca-courts/>; Justice compromised: The legacy of Rwanda's community-based gacaca courts. (2011). Human Rights Watch. <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>

<sup>83</sup> Heilman, B., Paul-Gera, N., Musuya, T., & Siebert, S. (2016). *Whose justice, whose alternative? - Locating women's voice and agency in alternative dispute resolution responses to intimate partner violence*. Beyond Borders, Center for Domestic Violence Prevention, and International Center for Research on Women. <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-Mediation-Paper-FINAL.PDF>; *Injustice and impunity: Mediation of criminal offences of violence against women*. (2018). United Nations Assistance Mission in Afghanistan and the Office of the United Nations High Commissioner for Human Rights. [https://www.ohchr.org/sites/default/files/Documents/Countries/AF/UNAMA\\_OHCHR\\_EVAW\\_Report2018\\_InjusticeImpunity29May2018.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/AF/UNAMA_OHCHR_EVAW_Report2018_InjusticeImpunity29May2018.pdf); Committee on the Elimination of Discrimination Against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, at 45 (July 14, 2017).

<sup>84</sup> United Nations International Convention for Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 195 (Multilateral)

<sup>85</sup> Dr. R. D. Pettalolo, personal communication, August 10, 2022.

contrasted favorably with the complete absence of women as members of the UEC or the election tribunals. Further research is needed to determine the impact of women's membership of the EMCs, but one positive impact is that women's role in ADR bodies during elections can build women's skills at grassroots level and set a precedent for an increased role for women in mediating other types of disputes outside election periods.

The presence of women in ADR bodies during elections could also empower and motivate other women to seek justice as complainants, because they would see that this is a space where women's voices can be heard. It is important that all aspects of the electoral process are inclusive, as that gives more legitimacy to the process. Additionally, consulting local women's organizations on this issue and on the design of the ADR mechanisms is critical. While not directly dealing with election disputes, a UN report from 2018 on mediation in **Libya** flagged that "the absence of youth and women from mediation efforts raises questions about the legitimacy of the agreements reached."<sup>86</sup> This is a common challenge raised by several actors and reports on mediation efforts globally. More inclusive membership of ADR bodies is crucial but not sufficient: The full body needs gender equality training and voter awareness in order to operate in a gender-sensitive and inclusive way.

In **Indonesia**, the Bawaslu has conducted extensive training on mediation. There are gender-related trainings for mediators, but these trainings remain limited. So far only 17 percent of the Bawaslu members/mediators are women. The 30 percent quota has not been met to date. During an interview, former Bawaslu commissioner and IFES She Leads alumna Dr. Ratna Dewi Pettalolo noted that, in addition to capacity building, there is a need to invest on advocacy to encourage women to become members, and thus act as mediators. Election management or supervisory bodies should also conduct advocacy with the political parties to increase the nomination of women as candidate and the participation in the leadership of the party. Indeed, Dr. Dewi stressed that the responsibility cannot rest solely with the mediators to protect the rights of women; other stakeholders should have a role in ensuring access for women to the EDR and ADR processes by raising awareness.

In Oaxaca, **Mexico**, mediation has been introduced by the state electoral institute (IEEPCO) to support the use of traditional practices by indigenous communities in the election of their local authorities. The UN Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous communities to self-government according to their traditional customs. IEEPCO has developed detailed guidelines for the mediation of such disputes, which include guiding principles to respect the indigenous traditions provided they are compatible with international human rights, respect legal pluralism, and find an inclusive and consensual lasting resolution. IEEPCO plays a facilitator's role and leads mediation, together with representatives of the parties. In some cases, the whole community is represented and consulted throughout the mediation. The process must be translated into the relevant indigenous language, as needed.

In such contexts, it can be difficult to strike a balance between protecting indigenous culture and customs and protecting individual rights—in particular, women's rights. A recent case at Mexico's Upper Federal Electoral Tribunal concerning a dispute from an indigenous community in Oaxaca reiterated the importance of supporting indigenous

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<sup>86</sup> Vericat, J.S. & Hobrara, M. (2018). *From the ground up: UN support to local mediation in Libya*. International Peace Institute. <https://www.ipinst.org/2018/06/un-support-to-local-mediation-libya>

traditions and customs, and the IEEPCO-supported mediation, but at the same time ensuring that a gender perspective is incorporated into the process. The case demonstrates the importance in such contexts of training and sensitization on indigenous customs as well as gender issues for all involved in the mediation.

## Lesson 6: Court-ordered or judiciary-led ADR is an avenue worth exploring for pre-election disputes

Up to now, EMBs and other state actors, rather than the judiciary, have introduced ADR mechanisms into the resolution of election disputes. Outside the electoral field, the use of ADR by courts is growing worldwide in diverse fields including family, employment, consumer, and administrative law—and even criminal law. Mediation is a prerequisite to court proceedings in some countries and fields, and in others it is a voluntary option. The European Law Institute and the European Network of Councils for the Judiciary released a report on the relationship between courts and ADR. They formulated a set of best practices to consider when encouraging the use of ADR, including: “[t]o the extent permissible under the law of the Member State, Courts and Judges should seek to integrate ADR processes into the justice system, treating them as complementary systems ... Courts and Judges should inform parties and legal professionals about the availability and potential merits of available ADR processes and give them the opportunity to consider using such process before and during litigation.”<sup>87</sup> Nonetheless, judiciary-led ADR remains rare in the election field. During consultations on ADR led by IFES on the occasion of the Africa Electoral Justice Network meeting in July 2022, judges reached consensus that, while ADR use by the judiciary should be encouraged, it should be limited to pre-election disputes and also consider clear rules to define the scope of disputes and avoid issues related to bias or impartiality if judges are involved in the mediation and also at a later stage in the adjudication of the same dispute.

However, judicial views on the use of ADR in election disputes are changing, as stakeholders see its potential to address disputes quickly and thereby ease pressure on the courts. Experts and election practitioners in **Nigeria** have called for increasing use of ADR by the judiciary to resolve the delays and backlogs of the electoral courts. There were reportedly at least 644 pre-election challenges in the 2019 Nigerian general elections, mostly related to party primary elections. The courts often resolved these late due to overly long legal deadlines and the volume of cases. In many other fields of civil law, the Nigerian courts have incorporated ADR into their Rules of Court, which is carried out at court-annexed Mediation Centers. The chief registrar of the Court of Appeal highlighted the advantages of mediation: “that it saves time, cost and matters are resolved in a more friendly way.” He said that building on its success in other fields of the law, judges and other stakeholders could consider the introduction of mediation for pre-election disputes. A significant challenge for ADR in elections, however, is outreach to political parties and party lawyers, and he believes that the push for ADR in election disputes cannot come from the election commission, as they are a potential party to the disputes.<sup>88</sup>

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<sup>87</sup> *The relationship between formal and informal justice: the courts and informal dispute resolution: Report of the European Law Institute and of the European Network of Councils for the Judiciary.* (2018). European Law Institute. [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ADR\\_Statement.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf)

<sup>88</sup> H. Isah, personal communication, September 1, 2021.

The Political Parties Dispute Tribunal (PPDT) in **Kenya** is composed of judges responsible for adjudicating inter- and intra-party disputes related to party nomination. The PPDT revised its regulations in preparation for the 2022 elections and is now offering mediation to disputants on a consensual basis. If ADR fails, the PPDT will hold a hearing and decide the case. The goal of offering mediation is to limit lengthy court proceedings and encourage parties to settle their intra-party disputes rather than involving judges in internal party politics. It is an initiative that, if successful, could present an example of judge-led mediation in electoral matters and expand to other pre-election complaints filed before the judiciary, such as hate speech or campaign-related disputes. A novelty of the 2022 election is that the Parliament amended the Political Parties Act to provide that the complainant should first attempt to raise disputes with the internal dispute resolution party mechanism prior to filing a dispute with the PPDT.<sup>89</sup>

For post-election disputes, **Senegal** features the use of mediation techniques by election officials, candidates' representatives, and judges during the verification and tabulation of results. The consensus-building techniques used by judges in their supervision of the results process enhance acceptance of the results by all candidates. The former president of the Senegalese Appeal Court noted that the low level of petitions filed against the results with the Constitutional Court since the introduction of this procedure shows the success of the procedures. Aside from the Senegalese example, the use of mediation by judges at the time of tabulation of results remains rare. But the reduction in post-election disputes filed before the courts may encourage EMBs or courts to adopt similar mediation procedures before publishing the preliminary results.

In **Malawi**, the civil procedure rules provide for ADR. While they support EMB led ADR mechanisms, some legal election experts interviewed by IFES expressed some skepticism about how these rules could be adapted to pre-election disputes by the courts. Some judges and electoral experts expressed concerns about judicially led mediation because of the need for speedy adjudication and voters' difficulties in accessing the courts for mediation. The legal director of MEC stated, "A court-led ADR process could defeat the true nature and purpose of ADR in pre-polling matters, which call for promptness in bringing the parties in dispute together." Courts are already facing an important backlog, and therefore introducing ADR in the election courts would create an additional burden on the judiciary to manage these ADR proceedings and will likely not lead to timely mediation. While judges appeared mostly supportive of the introduction of ADR in their courts during the Africa Electoral Jurisprudence Network consultation, others raised concerns about the timeliness of the mediation process and its impact on the election process. This divergence of opinions shows the need for a clear timeline in the pre-election phase to determine disputes—whether through the formal or informal resolution mechanism.

The lack of a legal framework for ADR in elections may be another reason why so few judiciaries have introduced or piloted mediation in election disputes. While an EMB may be more used to flexibility and adaptability in its operations due to the broad nature of its mandate, it is more difficult for the judiciary to operate or pilot a mediation project without a clear legal framework. Discussing judicial mediation in **Ukraine**, a Council of Europe policy paper noted that some judges piloted mediation projects by drawing on the support of the presidents of their courts and general provisions allowing for settlement of a case, but emphasized that, "... many judges stated that they would feel more comfortable

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<sup>89</sup> The law used to state that the complainants were required to exhaust this internal remedy first. But in practice, they were either not aware of this requirement, or their application remained unanswered. This practice created a challenge for the PPDT when assessing the validity of the dispute.

if mediation were directly encouraged by the law.”<sup>90</sup> The introduction of mediation in the electoral law or the judiciary’s rules of procedure, as well as the support of the judicial leadership, could give the necessary encouragement to the judiciary to introduce mediation as a first step to resolving election disputes.

In other countries, courts may be reluctant to introduce ADR practices due to the fundamental rights at stake in an election—whether the right to vote and stand for election or freedoms of assembly, association, and expression—and may wish to retain full control of the election dispute process. This reluctance may be well-founded for post-election disputes and issues directly tied to fundamental rights—such as candidate nomination. Indeed, election results petitions require speedy adjudication, can affect the stability of a country, and can involve drastic remedies, such as annulling the results of an election. Some interviewees also mentioned the concern for tight deadlines, notably in Europe, where the law provides 48 to 72 hours for administrative court or court of appeals to resolve election results petitions, making it impossible to introduce ADR without violating the legal deadline.<sup>91</sup> However, these concerns can be addressed by ensuring that a disputant retains the right to bring his or her case to court after using an ADR process and constraining these processes to tight deadlines. But for matters where the validity of the election results is questioned, the court should retain exclusive powers to make that determination. Nonetheless, in some countries, extraordinary mediation efforts during the post-election period, including by international actors, have shown positive outcomes when a results conflict is polarizing the country and potentially leading to political violence and bloodshed.

Considering the challenges and risks presented in this section, the legislature, EMB, and judiciary should carefully establish criteria and safeguards for a court-led ADR process that ensures the right to due process is not undermined, nor trust lost in the impartial, fair, and just resolution of pre-election disputes. These concerns can be mitigated by ensuring that a disputant retains the right to bring his or her case to court after using an ADR process—as an appeal or first instance, and by clarifying the proof needed to show the attempt or conduct of ADR as a first stage of the process. If necessary, legal deadlines for bringing a case to court should be stayed while ADR is being pursued in good faith, or strict deadlines should be set, as in **Indonesia**, where Bawaslu has a two-day period to mediate. The ADR process should also be designed to ensure a fair process and just outcome so that the judiciary can feel confident in it as a suitable complementary mechanism. Inter-institutional cooperation with the EMB to better understand existing mechanisms using mediation or conciliation of disputes in the pre-election period is also important. The Council of Europe has set out a Statement of European Best Practice related to courts’ interaction with ADR processes, which provides detailed guidance on the issues.<sup>92</sup>

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<sup>90</sup> Kyselova, T. (2017). Integration of mediation into Ukrainian court system: Policy paper. *Council of Europe*. <http://dx.doi.org/10.2139/ssrn.3054519>

<sup>91</sup> Romania, Bosnia and Herzegovina, North Macedonia, Albania.

<sup>92</sup> The relationship between formal and informal justice: the courts and informal dispute resolution: Report of the European Law Institute and of the European Network of Councils for the Judiciary. (2018). European Law Institute. [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ADR\\_Statement.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf)