



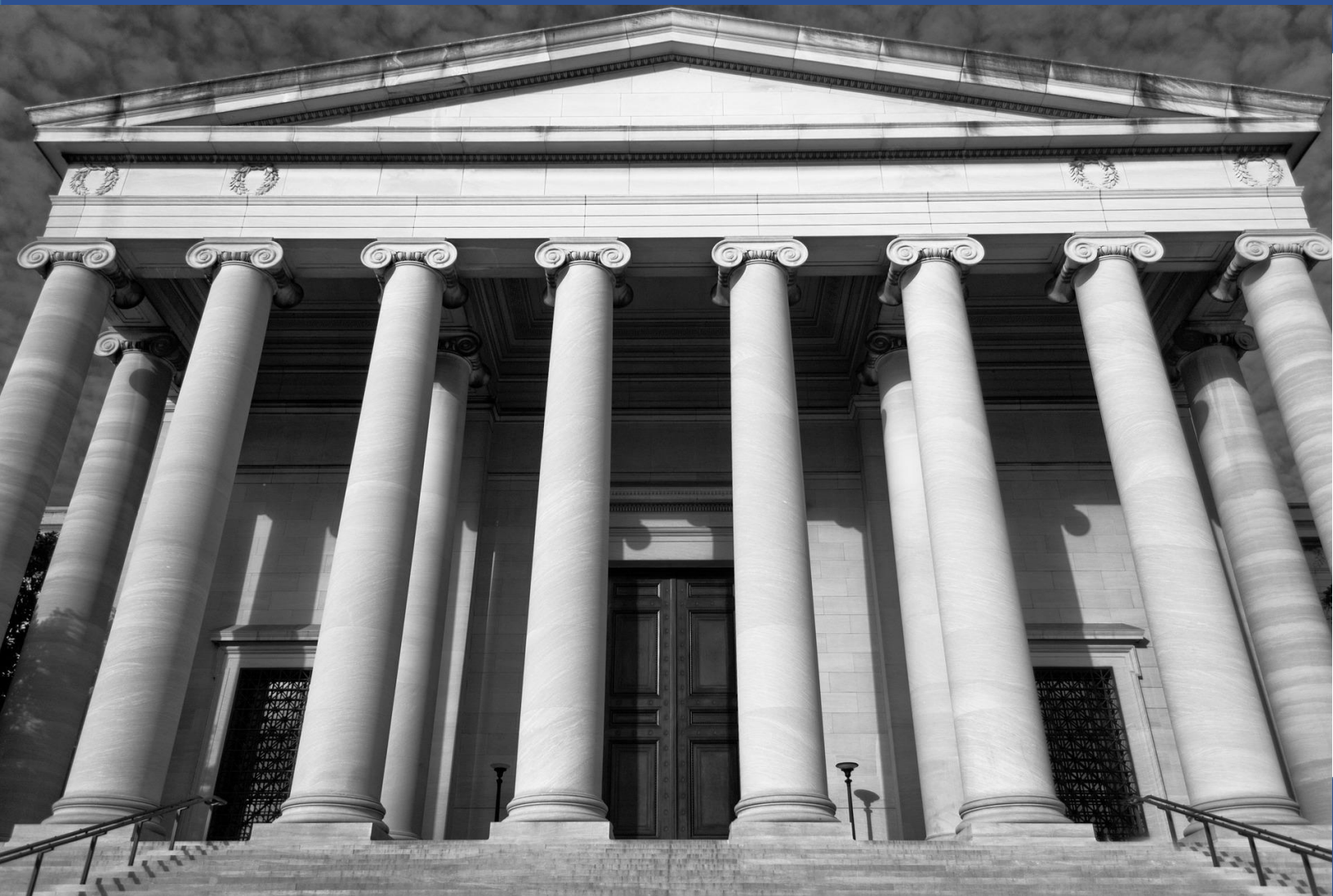
**USAID**  
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International Foundation  
for Electoral Systems

# ELECTIONS ON TRIAL

The Effective Management of Election Disputes and Violations



May 2018

# **Elections on Trial: The Effective Management of Election Disputes and Violations**

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International Foundation for Electoral Systems

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## Acronyms

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CAMS	Case and Appeals Management System (Kosovo)
CEC	Central Election Commission (Kosovo)
CMIS	Case Management and Information System (The Philippines)
COMELEC	Commission on Elections (The Philippines)
ECAD	Election Complaints and Adjudication Department (The Philippines)
ECAP	Electoral Complaints and Appeals Panel (Kosovo)
ECC	Electoral Complaints Commission (Afghanistan)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDR	Election Dispute Resolution
EIA	Electoral Integrity Assessment
EMB	Election Management Body
FEPADE	Specialized Prosecutor's Office on Electoral Crimes (Mexico)
GUARDE	Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections
HRET	House of Representatives Electoral Tribunal (The Philippines)
ICCPR	Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission (Kenya)
IFES	International Foundation for Electoral Systems
IMC	Independent Media Commission (Kosovo)
INE	National Electoral Institute (Mexico)
ISIE	Independent High Authority for Elections (Tunisia)
ODIHR	OSCE Office for Democratic Institutions and Human Rights
ODPP	Office of the Director of Public Prosecutions (Kenya)
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PET	Presidential Election Tribunal (The Philippines)
PPDT	Political Parties Disputes Tribunal (Kenya)
SBE	Supreme Board of Elections (Turkey)
SEC	State Election Commission (Macedonia)
SET	Senate Electoral Tribunal (The Philippines)
SISGA	Mexican Case Management Software
TEPJF	Electoral Tribunal of the Federal Judicial Branch (Mexico)
UDHR	Universal Declaration of Human Rights
UEC	Union Election Commission (Myanmar)
UNHRC	United Nations Human Rights Council
UNODC	United Nations Office on Drugs and Crime

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## I. Executive Summary

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The credibility of elections, acceptance of election results, and stability of the election environment increasingly hinge on the effective resolution of disputes and violations throughout the electoral cycle. Mechanisms for election dispute resolution (EDR) must withstand new forms of sophisticated political and electoral manipulation, most recently illustrated by the Cambridge Analytica whistleblower claims, but previously highlighted by the International Foundation for Electoral Systems (IFES) as a growing concern around the globe.<sup>2</sup>

Electoral democracies are also facing attempts by political actors to use the courts to legitimize staying in power,<sup>3</sup> and must address rising impunity for violence, intimidation and harassment in election campaigns. Election contests can devolve into battles or negotiations for political power, with the assumption or inevitability that winners will not be held accountable for their actions after the election is over.<sup>4</sup> A refusal by opposition parties or losing candidates to accept electoral outcomes can undermine the authority of the government, weaken trust in democracy and democratic institutions, and in extreme cases trigger violence.<sup>5</sup>

Because of these challenges, the strength of the EDR process – that is, the rules, institutions, arbiters and processes put in place by a country to resolve electoral disputes and violations – can have a profound impact on whether results are accepted. Further, public perceptions around elections have become the new battleground for actors seeking to undermine the electoral process, and these perceptions can have tremendous implications for the peaceful transfer of power and the viability of governing institutions, particularly in fragile and transitional contexts.

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<sup>2</sup> William Sweeney, Chad Vickery and Katherine Ellena, “Yes, The Presidential Election Could be Manipulated,” The Washington Post, 2 September 2016, [https://www.washingtonpost.com/opinions/global-opinions/yes-the-us-presidential-election-could-be-manipulated/2016/09/02/b125885e-6afe-11e6-ba32-5a4bf5aad4fa\\_story.html?utm\\_term=.ac59b6a27b80](https://www.washingtonpost.com/opinions/global-opinions/yes-the-us-presidential-election-could-be-manipulated/2016/09/02/b125885e-6afe-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.ac59b6a27b80). See also BBC News, “Cambridge Analytica Files Spell Out Election Tactics”, 29 March 2018, <http://www.bbc.com/news/technology-43581892>

<sup>3</sup> Financial Times, “Africa Third Terms: Who Stays, Who Goes”, <https://www.ft.com/content/f3c03602-771e-11e5-933d-efcdc3c11c89>

<sup>4</sup> Tim Craig, *Ghani named winner of Afghan election, will share power with rival in new government*, The Washington Post (Sep. 21, 2014), [https://www.washingtonpost.com/world/ghani-abdullah-agree-to-share-power-in-afghanistan-as-election-stalemate-ends/2014/09/21/df58749a-416e-11e4-9a15-137aa0153527\\_story.html?utm\\_term=.0fac3de76240](https://www.washingtonpost.com/world/ghani-abdullah-agree-to-share-power-in-afghanistan-as-election-stalemate-ends/2014/09/21/df58749a-416e-11e4-9a15-137aa0153527_story.html?utm_term=.0fac3de76240)

<sup>5</sup> Prominent researchers note: “electoral losers play a crucial role in the functioning and development of democratic political institutions and that their perceptions of the system’s legitimacy has potentially critical effects on that system’s proper functioning and maintenance.” See Anderson and Mendes; Llewellyn, Morgan H., Thad E. Hall and R. Michael Alvarez, *Electoral Context and Voter Confidence: How The Context of an Election Shapes Voter Confidence in the Process*, (Caltech/MIT Voting Technology ed., Project Working Paper No. 79, 2009).

Hence, the right to receive an effective remedy in the elections context, through the efficient and transparent administration of justice, has become even more fundamental.<sup>6</sup> This involves both the protection of procedural justice (for individuals involved in an election dispute or accused of a violation) and the advancement of open justice (for the public at large, which has a stake in the legitimacy of the election process and outcome). In the unique context of elections, where power, governance, and stability may be at stake, the quality of justice matters both privately and publicly. The interests of communities and states are impacted, not only the interests of individuals.

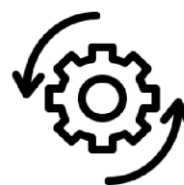
For example, an individual accused of vote-buying has an interest in receiving a fair hearing, while the wider public has an interest in the effective prosecution of legitimate violations to avoid a culture of impunity (or conversely, the dismissal of illegitimate accusations to avoid politically-motivated prosecutions). As another example, an individual has an interest in having clear procedures and reasonable deadlines to file a complaint about a candidate nomination application that was rejected, while the wider public has an interest in the candidate nomination process being conducted in such a way as to protect the fundamental right to stand for election.

In IFES' global experience, procedural justice and open justice are often taken for granted in more established democracies, but are frequently missing in countries with less developed electoral and judicial institutions – particularly with respect to the rules and processes followed by quasi-judicial institutions. IFES has also found that significant attention is often paid to the independence and impartiality of judges or arbiters making decisions on

*Components of procedural justice and open justice:*



*Fairness: the right to receive reasonable notice of a claim, reasonable opportunity to prepare a defense, and the right to a fair and impartial fact-finding process, hearing, and decision.*



*Efficiency: the requirement for an expeditious process, with reasonable deadlines for filing and disposition of different types of electoral disputes and complaints.*



*Effectiveness: the right to a written, reasoned decision that is not capricious, unreasonable or arbitrary, the right to appeal/judicial review, and the right to an effective remedy.*



*Transparency: access to case information (ideally in real time as an electoral dispute is being investigated and adjudicated), open hearings, and decisions that are publicly available (subject to limited restrictions).*

<sup>6</sup> Icelandic Human Rights Centre, *The Right to Due Process*, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> (last visited Aug. 28, 2017). In addition, one of the core standards identified in 1990 by the U.S. Commission on Trial Court Performance Standards is the requirement for expeditious, fair, and reliable court functions, so that “the public has trust and confidence that basic trial court functions are conducted expeditiously and fairly, and that court decisions have integrity.” See David Steelman, *CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM*, xvi (NCSC, 3 ed. 2004).

election cases, while the mechanisms through which these cases are managed and publicized are often overlooked (and hence are examined in this paper).

In addition, IFES analysis of common challenges to EDR globally has revealed a need to better understand how specific case management practices can ensure the uniform provision of justice in the resolution of different types of electoral disputes. Case management encompasses the tools and techniques through which a dispute or violation is processed and tracked, with the aim of facilitating the supervision, administration and disposition of the case.

To address this knowledge gap, IFES conducted preliminary comparative desk research on the case management of election dispute resolution in six countries: Mexico, Tunisia, Kenya, Macedonia, Kosovo, and the Philippines. The aim of these comparative country studies was to better understand how case management processes and platforms can help translate established procedure into actual practice, and ultimately how these elements – procedure, process and platform – can protect the right to procedural justice and realize the principle of open justice.

Analysis of the component parts of procedural justice and open justice demonstrates a variety of strengths and opportunities for EDR institutions in the six countries examined. For example, in the Philippines, detailed decisions on cases are developed by the Election Commission based on the facts and the law, but these decisions are currently not made public as a matter of course. In Kenya, there are established rules for service and response to complaints, but the complaints process for pre-election disputes is highly centralized in Nairobi, impacting access to justice for those complainants and respondents at the county level. In Kosovo, a dedicated case management system was developed in 2015 that provides public access to reports about complaints, but deadlines for filing and resolving complaints are extremely short, resulting in challenges with proving a complaint and receiving a fair hearing. Ultimately, the comparative country examples illustrate that case management practices and platforms can help strike a balance between the different and interlinked elements of procedural justice and open justice, and should be encouraged and adopted by institutions responsible for resolving electoral disputes.

Institutions dealing with election disputes and violations face enormous challenges as election litigation increases, and as political actors find new ways to undermine the process or to simply ignore laws and rules in place. In an intensely political environment, and within the pressured and time-critical context of elections, EDR can often be seen as a last priority, particularly for election management bodies (EMBs) who are also shouldering significant election administration responsibilities. It can also be an extremely difficult task to balance all the different components of procedural justice and open justice in a way that ultimately ensures a just and transparent process for all litigants. However, in spite all of this, elections are about fundamental rights, and these rights must be protected by a complaint adjudication process that is fair, efficient, effective and transparent. This will, in turn, help protect the actual and perceived legitimacy of the electoral process.



## Key Conclusions

For the management of election disputes and violations to be effective, two fundamental components must be realized in practice:

1. *Procedural justice or “due process” must be protected to ensure the individuals involved in an election dispute are treated fairly*
2. *Open justice should be advanced to the greatest extent possible for the benefit of the public at large, which has a stake in the legitimacy of the election process and outcome*

Taken together, the various elements of procedural justice and open justice require that courts and tribunals put in place rules of procedure and complaints management practices that strike a balance between the fair, efficient, effective, and transparent administration of justice.

Case management encompasses the tools and techniques through which a dispute or violation is processed and tracked, with the aim of facilitating the supervision, administration and disposition of the case. The adoption of an election case management system can streamline the implementation of rules of procedure, ensuring these rules are effective in practice and not just in law.

## II. Introduction

Existing research into the acceptance of election results suggests that both the rules that are in place to govern an electoral process,<sup>7</sup> and the public’s experience with the institutions and individuals administering those rules,<sup>8</sup> are important to overall perceptions of an electoral process and outcome. Hence, the way electoral disputes are handled can be as important as the final outcome of these disputes.<sup>9</sup> Because election litigation considers fundamental rights, and is adjudicated in compressed timeframes under intense political pressure and scrutiny, the requirement for public confidence in the administration of justice is particularly acute.

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<sup>7</sup> This idea of “organized uncertainty” appears in Adam Przeworski’s, *DEMOCRACY AND THE MARKET* (Uni of Chicago ed., 1991). Przeworski contends that democracy is a system of ruled “organized uncertainty” whereby electoral outcomes must be uncertain to ensure participation in competition, but the system or process for political competition must be governed by rules.

<sup>8</sup> Lonna Rae Atkeson, Kyle L. Saunders, “The Effect of Election Administration on Voter Confidence: A Local Matter?”

*Political Science & Politics*, October 2003, 657-658.

<sup>9</sup> In recent years, randomized control trials have been used to test the link between procedural justice, public perceptions, and public behavior. In summarizing the results of these trials, academic Kristina Murphy observed: “researchers have typically found that members of the public who have interactions with procedurally just authorities...are significantly more likely to evaluate those authorities positively and are more willing to display cooperative and compliant behaviours. See: Kristina Murphy, “Procedural Justice and its Role in Promoting Voluntary Compliance” in Peter Drahoš (Ed.) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 43

In “Why People Obey the Law,” psychologist Tom Tyler has examined the linkage between the perceived legitimacy of institutions and systems and the procedural justice protections provided by those institutions, and his findings “consistently suggest that the legitimacy of authorities and institutions is linked to the fairness of the procedures by which they exercise their authority.”<sup>10</sup> Tyler noted that beyond winning a case, people care about the procedures by which a decision is made (“procedural justice”).<sup>11</sup> As such, the fairness of the EDR process influences both the perceived legitimacy of the institution providing the remedy to an electoral dispute, and the remedy itself.<sup>12</sup> To this end, strengthening EDR procedures and processes in ways that are visible to the public prior to an election can be essential to public confidence.

As prior IFES research suggests,<sup>13</sup> public confidence in the EDR process is two-fold: it requires trust in the independence and impartiality of arbiters who are deciding cases, as well as trust in the process through which decisions are made.<sup>14</sup> On the latter element, this in turn requires trust in the fairness, efficiency and effectiveness of the process (procedural justice protections) and high levels of transparency (open justice) so that all stakeholders have access to the process and, ultimately, can understand the legal reasoning that lead to the decisions that are made. This paper considers this second element: how election disputes – both administrative and criminal – are managed, from filing to disposition. This focus is not intended to diminish the importance of judicial independence and impartiality, which IFES has written on previously,<sup>15</sup> but to examine in more detail how the effective management of disputes and violations can strengthen the quality and transparency of justice.

IFES has found in our work internationally that EMBs dealing with electoral disputes are often unprepared to apply the legal standards necessary to protect procedural justice and unwilling to be effectually transparent in the pressured election environment. Although these EMBs are acting in a quasi-judicial capacity, they may not have the infrastructure in place to implement procedure in a

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<sup>10</sup> Tom. R. Tyler, *Why People Obey the Law*, (Princeton University Press ed., 2006).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> The public’s perception of an institution’s legitimacy prior to a contentious electoral ruling can be pivotal to the acceptance of that institution’s judgements. Studies of the 2000 U.S. Supreme Court decision in *Bush v. Gore* suggest that in gaining acceptance of a controversial decision, the Court benefitted from the widespread view of the Court as a legitimate institution. See: James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, at 354 (2003). In contrast, Carter Center observers of the 2011 presidential elections in the Democratic Republic of the Congo (DRC) suggested that citizens’ belief in the inadequacy of the DRC’s dispute resolution mechanism may have contributed to widespread protest and violence during the electoral cycle as citizens resorted to protest, frustrated that there were no other avenues to express their grievances. See: Carter Center, *Final Report: Presidential and Legislative Elections in the Democratic Republic of the Congo* (2011). Ultimately, observers concluded that the underdeveloped system did not sufficiently protect citizens’ fundamental right to adjudicative remedy for alleged violations of their rights

<sup>13</sup> Chad Vickery (Ed.), *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections (GUARDE)*, 2001, Chapter 1.

<sup>14</sup> Trust in the fact that decisions will be respected and enforced is also important, but usually involves other institutions – including law enforcement – and as such is outside the scope of this paper.

<sup>15</sup> Chad Vickery (Ed.), *GUIDELINES FOR UNDERSTANDING, ADJUDICATING AND RESOLVING DISPUTES IN ELECTIONS (GUARDE)*, 2001, CHAPTER 1.

manner that protects procedural justice rights. Conversely, while tribunals or courts dealing with election disputes may have the requisite judicial knowledge and infrastructure, specific understanding of the challenges unique to election cases may be lacking, and courts may be constrained by unrealistic deadlines or procedures that impact the effective management and resolution of election cases.

Drawing on comparative examples across six countries (Mexico, Tunisia, Kenya, Macedonia, Kosovo and the Philippines), this paper examines the various elements of procedural justice and open justice, and how case management mechanisms – and the rules of procedure underpinning these mechanisms – can assist EMBs, tribunals and courts to deliver just and transparent processes and outcomes. This examination is broken down into two areas of analysis: the rules of procedure in place to govern the resolution of disputes, and the way these rules are applied in practice.

### III. Procedural Justice and Open Justice in Electoral Disputes

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International principles protect the right to be treated fairly, and to receive an effective remedy, through the efficient and transparent administration of justice.<sup>16</sup> This involves both the protection of procedural justice or due process (for the individuals involved in an election dispute) and the advancement of open justice (for the public at large who have a stake in the legitimacy of the election process and outcome). Taken together, the various elements of procedural justice and open justice require that courts and tribunals put in place rules of procedure and complaints management practices that strike a balance between the fair, efficient, effective, and transparent administration of justice. In IFES' experience internationally, procedural justice and open justice is often taken for granted in more established democracies but is frequently missing in countries with less developed electoral and judicial institutions – particularly with respect to the rules and processes followed by quasi-judicial institutions. IFES has also found that significant attention is often paid to the independence and impartiality of judges or arbiters making decisions on election cases, while the mechanisms through which these cases are managed are often overlooked (and hence are examined in this paper).

#### Procedural Justice Principles

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the Universal Declaration of Human Rights (UDHR) guarantee the right to due process (or otherwise discussed in this paper as “procedural justice”). That is, all people are equally entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>17</sup> This right to

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<sup>16</sup> Icelandic Human Rights Centre, *The Right to Due Process*, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> (last visited Aug. 28, 2017). In addition, one of the core standards identified in 1990 by the U.S. Commission on Trial Court Performance Standards is the requirement for expeditious, fair, and reliable court functions, so that “the public has trust and confidence that basic trial court functions are conducted expeditiously and fairly, and that court decisions have integrity.” See David Steelman, *Caseflow Management: The Heart of Court Management in the New Millennium*, xvi (NCSC, 3 ed. 2004).

<sup>17</sup> UNHCR General Comment No. 32 U.N. Doc. CCPR/C/GC/32, ¶ 9 (2007): “Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access

procedural justice is well recognized in traditional court systems, but is an equally essential right in the adjudication of electoral disputes. It must be respected regardless of whether an election complaint or irregularity is dealt with administratively (for example, by an EMB or other administrative tribunal), or through the court system.<sup>18</sup> This is an important consideration, given the unique EDR context in which jurisdiction is commonly shared by different institutions. For example, in Kenya jurisdiction over various types of electoral disputes and violations resides with both the Independent Electoral and Boundaries Commission (IEBC) and Political Parties Disputes Tribunal (PPDT), while jurisdiction for electoral offenses is with the Office of the Director of Public Prosecutions (ODPP), and jurisdiction for post-election petitions is with the judiciary.<sup>19</sup> Despite this shared jurisdiction, each body has responsibility to provide due process protections when resolving complaints and disputes of all types.

Where there is overlap in jurisdiction, principles of procedural justice are even more important to ensure parties, candidates and other complainants and respondents can understand the correct avenue for challenging an outcome or decision or reporting a violation. The right to procedural justice also applies throughout administrative and criminal proceedings – that is, from the filing of an election complaint or dispute through to its disposition. It is not limited to a fair hearing, but encompasses the full process through which a claim is considered and resolved.

### Open Justice Principles

Complementing the right to individual due process or procedural justice is the principle of open justice,<sup>20</sup> an emerging area of jurisprudence that emphasizes the importance of courts and tribunals conducting their business publicly to safeguard against judicial bias, unfairness and incompetence, as articulated in Article 14(1) of the ICCPR and the UNHRC General Comment 32 of 2007.<sup>21</sup> The principle of open justice means that any institution dealing with the adjudication and resolution of election disputes must operate with a high degree of transparency, independence and accountability. While due process/procedural justice applies to the individuals involved in a case or claim, open justice applies to the wider public and the requirement for transparency of judicial proceedings, particularly in election cases where the public interest may be at stake. This transparency can help with the overall legitimacy of the election process.

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to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.”

<sup>18</sup> The European Court of Human Rights (ECtHR) has also affirmed that the right to a fair trial and access to a remedy is not limited to the courts, but applies to administrative proceedings. *See Öztürk v. Germany*, App. No. 8544/79, Eur. Ct. H.R. (1984).

<sup>19</sup> Depending on the type of election, first instance jurisdiction may reside with the High Courts, Court of Appeal, or Supreme Court.

<sup>20</sup> *Gannet Co v. Depasquale*, 443 U.S. 368, 420 (1979).

<sup>21</sup> UNHCR General Comment No. 32 U.N. Doc. CCPR/C/GC/32 (2007): “The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits...”

According to legal scholar Emma Griffith, open justice encapsulates a range of transparency measures, including: “the principle that an interested citizen may attend court as a spectator; the interest in promoting full, fair and accurate reporting of court proceedings; the convention that a judge publishes reasons for decisions; the capacity to access the textual records kept by a court; or the capacity to access documents filed but not yet used in court.”<sup>22</sup> In 2014, for example, the Constitutional Court in Indonesia ensured maximum transparency in its proceedings, providing live-streamed testimony of the presidential election petition proceedings, and publicly reading out the core findings from its unanimous verdict.

The principle of open justice is essential for the maintenance of public confidence in the judiciary and the administration of justice.<sup>23</sup> In 2014 and 2015 respectively, IFES worked with the Electoral Complaints Commission (ECC) in Afghanistan and the Union Election Commission (UEC) in Myanmar to hold open hearings on election disputes for the first time, as an effort to provide more transparency and accountability in the EDR process. This was particularly important in these two countries where faith in judicial proceedings has traditionally been low, and each country was dealing with significant public trust issues as a result of their particular post-conflict and post-transition environments. As the chief justice of Canada has observed, open justice is important for four key reasons: first, it assists in the search for truth; second, it plays an important role in informing and educating the public; third, it enhances accountability and deters misconduct; and fourth, it has a therapeutic function, offering an assurance that justice has been done.<sup>24</sup> For these reasons, open justice can be both a protective measure for judges – in that it shines a light on judicial proceedings in a way that can mitigate political pressure or intimidation – and a measure for litigants and the wider public to hold judges and arbiters accountable for their decisions.

### **Procedural Justice and Open Justice in Practice**

Procedural justice and open justice are necessarily intertwined, and can at times be in tension. For example, the right to be treated fairly can be impacted by a lack of transparency that makes it difficult to track a complaint through investigation, adjudication, decision and enforcement, while the right to receive an effective remedy can be undermined by unreasonably short deadlines that leave cases unresolved or see them summarily dismissed without proper investigation. There are also certain principles that cut across the elements of procedural justice and open justice – for example, open hearings for election cases are important for transparency to the public at large, but also to ensure fairness for individuals in proceedings. The four key elements of fairness, efficiency, effectiveness and transparency are a useful lens through which to understand the components necessary for procedural justice and open justice, and to further explore how the principles of procedural justice and open justice are necessarily intertwined.

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<sup>22</sup> Emma Cunliffe, *Open Justice: Concepts and Judicial Approaches*, 40 FED. L. REV., 389 (2012).

<sup>23</sup> James Spigelman Hon. J., “Seen To Be Done” or “Seem To Be Done”?, Address at the Honk Kong Chapter of the International Law Section of the Law Council of Australia (Mar. 10, 2016).

<sup>24</sup> Rt. Hon. Beverley McLachlin PC, Chief Justice of Canada, Speech on Open Justice and the Rule of Law (2014).

Because procedural justice and open justice encompass both the rules in place and the way they are applied in practice, we frame our discussion of comparative EDR examples by first examining in section III of this paper the importance of rules of procedure for electoral disputes, the emerging field of case management, and how emerging case management process and platforms can assist institutions to protect procedural justice. Section IV of this paper then goes on to examine the four elements of fairness, efficiency, effectiveness and transparency and how they encompass key principles of procedural justice and open justice. The key principles of procedural justice and open justice selected for examination are those most relevant to electoral disputes – service of notice; the provision of reasonable time to prepare a response; reasonable deadlines for filing and resolution; an expeditious process from filing to judgment; written, reasoned decisions; access to an appeal mechanism; the provision of effective remedies; open hearings; and publicized decisions.<sup>25</sup>

## **IV. Management of Election Disputes and Violations**

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### **Rules of Procedure**

Rules of procedure are the foundation for the effective management of disputes, as they set out how each complaint or dispute must be handled. These rules should also generally define the various steps in the EDR process such as registering complaints, assigning cases, collecting and cataloging evidence, providing notice, scheduling hearings (as appropriate), and recording decisions. Procedural justice must be protected in how the rules of procedure are drafted, and by the process or system through which the rules are implemented for each individual case (usually managed by administrative staff of a court, tribunal or administrative body). Judge Suzanne Baer of the Federal Constitutional Court of Germany has noted that judicial independence requires courts to have power over their own procedural rules. Without this power, government can modify procedure in a way that “can turn a court into a lame duck.”<sup>26</sup> In the electoral context, this can have significant implications for the independence and impartiality of election arbiters, or the ability to provide procedural justice in electoral disputes.

As noted earlier in this paper, often the institution responsible for resolving many sensitive categories of election disputes (such as nomination disputes or campaign violations) is the EMB operating in a quasi-judicial capacity. As such, traditional court mechanisms that protect due process and open justice may be missing, such as rules of procedure. This lack of due process protections is something that IFES has observed globally. IFES has conducted in-depth examinations of EDR systems in multiple countries through a standardized Electoral Integrity Assessment (EIA) methodology or stand-alone EDR methodology. These examinations have found that, uniformly, challenges exist with the provision of clear and consistent procedures and processes for the resolution of election grievances.

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<sup>25</sup> This paper will not exhaustively cover all elements of due process, particularly those of relevance to criminal proceedings, for example the right to legal advice (if detained), a presumption of innocence, and the right to call and examine witnesses.

<sup>26</sup> Suzanne Baer, “Challenges to Constitutionalism: The Role of Constitutional Courts,” report to the 16<sup>th</sup> meeting of the Joint Council on Constitutional Justice, July 2017, CDL-JU (2017)002, 4.

## Excerpts from IFES Electoral Integrity Assessments (EIA) and Election Dispute Resolution (EDR) Assessments

*“Due to the absence of codified procedures...there was no common process used by election complaints centers.” - IFES Sri Lanka EIA 2016*

*“There is no formal mechanism for filing pre-election/campaign complaints, and the Election Day complaints process remains unclear.” - IFES Myanmar EIA 2015*

*“Material gaps and confusion in the regulatory framework related to the points of entry, filing process, investigation procedures and decision-making process.” - IFES Pakistan EIA 2013*

*“Interlocutors advised that while they received written notification of decisions, they were often copied and pasted, without a substantiated explanation or outlining any results of investigation.” - IFES Cambodia EDR 2014*

*“...[a]ttempts...to bring consistency and transparency to the process are not matched by all relevant adjudication bodies.” - IFES Georgia EIA 2015*

*“The rules governing the resolution of other types of disputes and violations...are essentially non-existent.” - IFES The Gambia EIA 2017*

*“Individual arbitrators administer cases as they see fit rather than according to a publicly disclosed and consistently applied procedural framework.” - IFES Jordan EDR 2016*

### Managing Election Cases

Case management encompasses the tools and techniques through which a dispute or violation is processed and tracked, with the aim of facilitating the supervision, administration and disposition of the case. In elections, the importance of reasonable deadlines and efficient proceedings is acute, since the holders of power and the functioning of government might be in question. Studies of case management in the United States have also found that impetus for the accelerated development of the court management profession included “uneven trial court performance...; the chronic underfunding of trial courts...; weak and even corrupt local court management; ever-worsening backlogs, times to disposition and waiting times; and undue and inappropriate interference in trial court functions by local executive and legislative agencies and personnel.”<sup>27</sup> All of these factors undermine the provision of procedural justice.

The U.S. National Center for State Courts has examined the link between the expeditious and well-managed administration of justice and the provision of justice outcomes (i.e., the purpose for which courts and tribunals exist): “Justice is lost with the passage of time...No matter how you look at it, whether it’s a civil or a criminal matter, time destroys the purposes of courts. We study case management because case management is the way we get rid of the waiting time, [by] which we control

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<sup>27</sup> Geoff Gallas and Edward Gallas, *Court Management Past, Present and Future: A Comment on Lawson and Howard*, 15 Just. Sys. J. 605, at 605-609 (1991).

delay, [and by] which we enhance the purposes of courts.”<sup>28</sup> Case management of electoral disputes is an important tool by which principles of procedural justice can be put into practice to enhance public confidence in judicial outcomes and safeguard procedural justice.

### **Case Management Systems and Platforms**

The adoption of an election case management system can streamline the implementation of rules of procedure, ensuring these rules are effective in practice and not just in law. In turn, this can enhance the efficiency, accountability, and transparency of the complaints resolution process (outlined in figure 1 below). The Judicial Conference of the U.S. has asserted that “[m]anaged cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants.”<sup>29</sup> In practical terms, a case management platform can help adjudicators: manage their process to meet deadlines; schedule hearings; ensure adequate notice; track who is investigating, collecting or corroborating evidence, and deciding each case; and how different types of cases are resolved, the remedies that were chosen and why. A case management process also supports effective triage of complaints and summary dismissal procedures, which can be critical when dealing with a large number of complaints in a compressed timeframe as is often the case in the elections context.

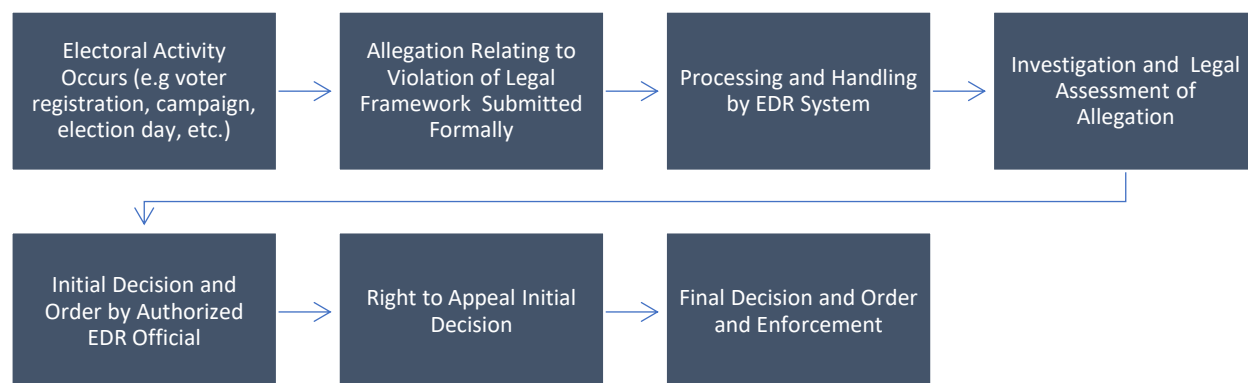
To establish a case management platform, the EDR body would need to consider: the volume of election complaints and objections; information that will be tracked; data that will be published or kept confidential; existing methods of information sharing; human resources available (personnel and hours needed to design, test, manage, and maintain a database); hardware and software development costs (which can vary greatly depending on the level of sophistication required or desired); and data security. Responsibilities of personnel, polling staff, election committees, monitoring teams or other bodies should be determined to ensure efficient and smooth flow of information for each part of a case management process. Standardized forms can be developed to better collect and track information relating to complaints.

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<sup>28</sup> Videotape: The Delay Problem and the Purposes of Courts in National Center for State Courts (Ernest C. Friesen 1991) (Institute for Court Management, Caseflow Management Principles and Practices: How to Succeed in Justice).

<sup>29</sup> Judicial Conference of the U.S., The Civil Justice Reform Act of 1990: Final Report 10 (1997).



**Figure 1: Basic case flow for an election dispute or violation**

As noted above, weak case management procedures and practices can impact the provision of procedural justice and open justice. As a practical illustration, open justice requires not just sufficient courtrooms to accommodate members of the public who wish to attend trials, but also administrative techniques that make judicial information easily accessible.<sup>30</sup> As one solution to this challenge, a case management database allows an EDR body to quickly share information on ongoing complaints and appeals (for example, the nature of allegations, the total number and types of complainants, the resolution of complaints, and the remedies or sanctions applied) with stakeholders, voters, election observers and the media. This helps balance against partisan allegations and media statements about the number and type of complaints filed, the basis of claims, and how they are being resolved. Example specifications for a case management database are set out in Annex II.

IFES' analysis of common challenges to EDR globally revealed a need to better understand how specific case management practices can better ensure the uniform provision of justice in the resolution of different types of electoral disputes. To address this knowledge gap, IFES conducted preliminary comparative desk research on the case management of election dispute resolution in six countries: Mexico, Tunisia, Kenya, Macedonia, Kosovo, and the Philippines. The aim of these comparative country studies was to better understand how case management processes and platforms can help translate established procedure in actual practice, and ultimately how these elements – procedure, process and platform – can protect the right to due process/procedural justice and realize the principle of open justice.

The EDR models and systems in place in each country are outlined in the table below, along with select strengths and weaknesses.

<sup>30</sup> UNODC, Resource Guide on Strengthening Judicial Integrity and Capacity (2011), 86

**Table 1: Comparative EDR Systems and Procedures**

Country and EDR Model	Jurisdiction	Procedures	Case Management System	Strength	Weakness
<b>Mexico</b> Permanent electoral tribunal	The highest authority on electoral matters is the Electoral Tribunal of the Federal Judicial Branch ( <i>Tribunal Electoral del Poder Judicial de la Federación</i> , TEPJF) with a Superior Court in Mexico City and six permanent regional or specialized courts. The TEPJF ensures that all electoral acts and rulings comply with the Constitution and laws, and rules on challenges made to actions or regulations of the Mexican EMB. <sup>31</sup> Election crimes fall under the jurisdiction of the Specialized Prosecutor's Office for Electoral Crimes ( <i>La Fiscalía Especializada para la Atención de Delitos Electorales</i> , FEPADE), an institution under the auspices of the attorney general's office. <sup>32</sup>	There are extensive provisions governing rules of procedure for electoral cases laid out in Mexican law. These include the Electoral Recourses Law of 1996 ( <i>Ley General Del Sistema de Medios de Impugnación en Materia Electoral</i> ) and an extensive body of jurisprudence, all deriving their guiding principles from the Mexican Constitution.	The screening, sorting, tracking and archiving of cases as well as the gathering and publication of statistics on the work and rulings of the Tribunal falls to the General Secretariat of Agreements (SGA). The adjudication process at the federal, regional and state level relies on comprehensive open source case management software developed by the Tribunal, called SISGA ( <i>Sistema de información de la secretaria general de acuerdos</i> ).	Decisions issued by the Tribunal must include a synthesis of the challenge and facts of the case, an expression of the legal grievance, an assessment of the evidence, reference to the applicable law that sustains the decision, justification for the application of that law to the decision as well as the ruling itself. The ruling must include a time period during which the ruling and any concurrent sanction or remedy must be complied with, in keeping with the principles of access to justice.	The continued refinement of due process happens through jurisprudence rather than being published in the law or rules. Tracking this evolving jurisprudence necessitates a detailed following of the rulings of the court, which can lead to a lack of understanding of current procedure.
<b>Tunisia</b> Regular courts	The "Courts of First Instance" have original jurisdiction over electoral disputes, <sup>33</sup> and the Administrative Tribunal acts as an appeals court	Procedures relevant to case management are found in the texts of the Administrative Tribunal, the Codes of Civil and Commercial Procedure and	The Administrative Tribunal has a case management database that is managed by the Tribunal's registry ( <i>greffe</i> ). The registry	The judgment must indicate parties' names and personal details, the purpose of the complaint, a summary of the facts, a summary of the evidence	The decisions of the Administrative Tribunal are published in the <i>Journal of Electoral Dispute Decisions</i> , but these cases are

<sup>31</sup> Constitutional Policy of the United States of Mexico [CPEUM], art. 41 § V, Diario Oficial de la Federación [DOF][Official Journal of the Federation] Feb. 05, 1917, final reform DOF Mar. 20, 2014 (Mex.); See also Electoral Tribunal of the Federal Judicial Branch, *About Us*, <http://www.trife.gob.mx/en/contenido/about-us> (last visited Jul. 12, 2017).

<sup>32</sup> Constitutional Policy of the United States of Mexico [CPEUM], art. 102 § VI,

<sup>33</sup> Décret-loi n° 2011-27 du 18 avril 2011, portant création d'une instance supérieure indépendante pour les élections [Law-decree 2011-27 of April 18, 2011 on the Creation of the Independent High Authority for Elections] Journal officiel de la République Tunisienne [J.O.] [Official Gazette of Tunisia], 484 (2011).

Country and EDR Model	Jurisdiction	Procedures	Case Management System	Strength	Weakness
	for electoral disputes. <sup>34</sup> If there is a lack of clarity over jurisdiction between the judicial or administrative courts, the case goes before the Council of Conflict of Competencies ( <i>Conseil de conflits de competences</i> ).	the Code of Criminal Procedure. Tunisia's electoral law contains special provisions relating to case management.	records the case information, summons, investigation, trial, order/judgment, and the composition of the judicial body.	and the parties' pleadings, the defense's memoranda, the relevant legal texts, the reasoning of the judgment, the statement of the judgment, and the magistrates' names and signatures.	published up to a year and a half after the date of judgment. The decisions are not available online, as the Administrative Tribunal has no website. Copies of the decisions of other courts may only be accessed at the court.
<b>Kenya Mixed</b>	The Independent Electoral and Boundaries Commission (IEBC) is responsible for resolving electoral disputes, except "election petitions and disputes subsequent to the declaration of election results," <sup>35</sup> which are the responsibility of the judiciary (High Court, Court of Appeal, and Supreme Court). <sup>36</sup> The Political Parties Disputes Tribunal (PPDT) has jurisdiction over disputes between political parties, party members, candidates, and coalitions, as well as appellate jurisdiction regarding the	The IEBC has adopted Rules of Procedure on Settlement of Disputes (2012) and the PPDT also developed and adopted specific rules of procedure <sup>38</sup> ahead of the 2017 general elections. The judiciary has developed the Elections (Parliamentary and County Elections) Petition Rules and Supreme Court (Presidential Election Petition) Rules. These rules provide elaborate, time-specific procedures within which election petitions	Both the IEBC and the PPDT launched new case management platforms in 2017. Previous basic online systems existed, but were not effectively utilized. In the new software platforms, when a case is filed with the PPDT or IEBC, information will be organized into several sections: 'Case Details', 'Payments', 'Parties', 'Advocates', 'Witnesses',	Parties to complaints before the IEBC may appear in person or be represented by an advocate. Those subject to a complaint have the right to present their evidence and to cross examine witnesses. The Dispute Resolution Committee may conduct investigations to enable it to "arrive at a reasonable decision". <sup>39</sup>	The PPDT and IEBC are highly centralized. Consequently, as complainants may not have the resources to travel to Nairobi to file a case, they may have to instead rely on alternative dispute mechanisms. Unfortunately, the lack of available remedy may lead to increased tension and violence and place significant pressure on alternative

<sup>34</sup> Loi organique n° 2017-7 du 14 février 2017, modifiant et complétant la loi organique n°2014-16 du 26 mai 2014 relative aux élections et référendums [Law n° 2017-7 February 14, 2017, modifying and supplementing the Law n° 2014-16 of May 26, 2014 on elections and referenda] Journal officiel de la République Tunisienne [J.O.] [Official Gazette of Tunisia], 731 (2017).

<sup>35</sup> Elections Act 2016 § 74 <https://www.iebc.or.ke/uploads/resources/kqI5cmgeyB.pdf>; Independent Electoral and Boundaries Commission Act (2016), § 4; Rules of Procedure on Settlement of Disputes (2012) rul. 4.

<sup>36</sup> Constitution of Kenya (2010), art. 88(4).

<sup>38</sup> Political Parties Disputes Tribunal (Procedure) Regulations, No. 26 (2017) Kenya Gazette Supplement No. 60 (2017) reg. 4, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNoticeNo.67PoliticalPartiesTribunal.pdf>.

<sup>39</sup> Rules of Procedure on Settlement Disputes 2012 rul. 17.

Country and EDR Model	Jurisdiction	Procedures	Case Management System	Strength	Weakness
	decisions of the Registrar of Political Parties and “disputes arising out of party primaries.” <sup>37</sup>	must be conducted. The rules outline the format of petitions, the service and response to petitions, notification of the public, joined respondent, fees for filing and costs.	‘Documents’ and ‘Stages’.		dispute mechanisms to solve complex legal grievances. <sup>40</sup>
<b>Kosovo</b> Permanent electoral tribunal	The electoral dispute resolution process is managed by the Electoral Complaints and Appeals Panel (ECAP), <sup>41</sup> an independent institution which adjudicates complaints and appeals concerning the electoral process. <sup>42</sup> The ECAP is composed of Supreme Court and District Court judges, <sup>43</sup> and hears appeals from Central Election Commission (CEC) decisions. Certain ECAP decisions may be appealed to the Supreme Court of Kosovo. <sup>44</sup>	Case management is governed by the legislation regulating general administrative conflicts and the ECAP Regulation no. 3 on Internal Case Management System. <sup>45</sup>	A dedicated Case and Appeals Management System (CAMS) was developed in 2015, and provides for a case tracking module, public access to CAMS reports, and an English language web page. CAMS records information on the complainant, time and location of violation, parties, type of dispute, case number, remedy sought, evidence, penalties and relevant institution.	Evidence is logged in the case management system through scans and uploads of documents and multimedia. Decisions and judgments (including dissenting opinions) are tracked and updated with the relevant data and files.	The ECAP accepts complaints which are “well-grounded” and dismisses those that suffer formal or procedural irregularities. <sup>46</sup> Deadlines for filing and deciding on complaints and appeals are extremely short.

<sup>37</sup> Political Parties (Amendment)(No.2) Act, No. 21 (2016) Kenya Gazette Supplement No.112 (2016).

<sup>40</sup> K. Ellena. and T. Roblot, Election Dispute Resolution Assessment White Paper, (Nov. 2016) at 9.

<sup>41</sup> Formerly known as the Elections Complaints and Appeals Commission. Established pursuant to article 115 of the Law no. 03/L-073 on General Elections in the Republic of Kosovo (LGE), Law no. 03/L-256 amending the Law no. 03/L-073 and the Law on Local Elections in the Republic of Kosovo Law no. 03/L-072.

<sup>42</sup> Law No. 03/L-073 On General Elections in the Republic of Kosovo, Official Gazette of Kosovo (2008).

<sup>43</sup> Law No. 03/L-256 On Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo, art. 9, Nov. 01, 2010, <http://www.kuvendikosoves.org/common/docs/ligjet/2010-256-eng.pdf>.

<sup>44</sup> If they involve fines higher than €5,000 or a fundamental right. Law No. 03/L-256, arts. 12 and 15

<sup>45</sup> <http://pzap.rks-gov.net/wp-content/uploads/2016/02/Rregulla-Nr.03-2015-PER-SISTEMIMIN-DHE-MENAXHIMIN-E-BRENDSEHEM-TE-LENDEVE-2.pdf> (In Albanian).

<sup>46</sup> Law No. 03/L-073 On General Elections in the Republic of Kosovo, art. 118, Jun. 15, 2008, [http://www.kuvendikosoves.org/common/docs/ligjet/2008\\_03-L073\\_en.pdf](http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L073_en.pdf).

Country and EDR Model	Jurisdiction	Procedures	Case Management System	Strength	Weakness
<b>Macedonia</b> Mixed	Macedonia’s 2015 Electoral Code empowers the State Election Commission (SEC) to address electoral complaints and disputes in addition to its election administration functions as EMB. The Administrative Court, which does not act as a court of first instance, has appellate jurisdiction over the rulings of the SEC. <sup>47</sup>	The EDR process is governed by the 2015 Electoral Code, as modified by a 2017 by-law, and the 2016 Rulebook on the Manner and Procedure for Deciding upon Complaints. The SEC officially endorsed this Rulebook – the first of its kind for Macedonia – in November 2016. <sup>48</sup>	A web-based SEC complaint tracking system was developed in 2016, but was not implemented in time for the December 2016 elections. The system is designed to track information registered with the complaint, summons, cooperation with state authorities, referrals, decisions, suits, appeals, and supplementary documents.	The SEC’s complaints tracking system was the trigger for initiating the development of the Rulebook, as a complaints tracking system was one of the legal requirements introduced in the 2015 amendments of the Electoral Code. <sup>49</sup> This kind of explicit legal requirement is unusual for such a system, and is a progressive measure for electoral dispute resolution in Macedonia. <sup>50</sup>	Legal deadlines for SEC decisions are extremely short – requiring a decision within 48 hours of receiving a complaint. <sup>51</sup> Complaints relating to campaigns must be resolved within seven days of receipt, <sup>52</sup> while complaints relating to violations of voting rights on Election Day are resolved within four hours of receiving the complaint. <sup>53</sup>
<b>The Philippines</b> Mixed	Original jurisdiction for complaints at the regional, provincial and city levels belongs with the Commission on Elections (COMELEC), which also has appellate jurisdiction over rulings of the trial courts pertaining to municipal and village positions. <sup>54</sup> Contests involving the president	Rules of procedure for trial courts ruling on election contests involving municipal and barangay offices are laid out in law, <sup>57</sup> but crafting the rules of procedure for COMELEC is the responsibility of two different departments	COMELEC is developing case management software to organize and expedite access to case information. When operational, the case management and information system (CMIS) will track cases	The necessity of providing “due notice and hearing” is consistently noted throughout the electoral law <sup>58</sup> and what constitutes adequate notice is spelled out in detail in a provision	There is a general perception that COMELEC’s rulings, though fair and in full accordance with due process, are often slow in coming. Parties to a case receive copies of decisions, but decisions

<sup>47</sup> ELECTORAL CODE art. 150(1) (MACED.)

<sup>48</sup> Both the process of developing the instruction and the creation of a tracking system for complaints were supported by IFES Macedonia.

<sup>49</sup> Electoral Code art. 31, paragraph (2), point 28-a (Maced.).

<sup>50</sup> “The State Election Commission shall: establish electronic system for case and complaints management;”

<sup>51</sup> This timeframe applies to complaints relating to voting procedures and vote counting, complaints relating to campaign financing.

<sup>52</sup> Electoral Code art. 69-a (Maced.); Rulebook on the Manner and Procedure for Deciding upon Complaints art. 21(1) (Maced.).

<sup>53</sup> Electoral Code art. 149-a (Maced.); Rulebook on the Manner and Procedure for Deciding upon Complaints art. 21(2) (Maced.).

<sup>54</sup> Constitution of the Philippines, Article IX, Part C, Section 2(2)

<sup>57</sup> Omnibus Electoral Law Article XXI Section 254

<sup>58</sup> Phrase occurs 18 times in the Omnibus Law

Country and EDR Model	Jurisdiction	Procedures	Case Management System	Strength	Weakness
	<p>or vice president are determined by the Supreme Court (sitting as the Presidential Election Tribunal).<sup>55</sup> When a contest involves members of the House of Representatives or Senate, three members of the Supreme Court and six members of the respective legislative body has jurisdiction as either the House of Representatives Electoral Tribunal or Senate Electoral Tribunal (SET).<sup>56</sup> Within COMELEC, post-election disputes are handled by the Election Complaints and Adjudication Department (ECAD), election offenses are investigated by the Law Department for potential prosecution in the trial courts, and pre-election procedural complaints related to registration or eligibility issues are directed to the Clerk of the Commission.</p>	<p>within COMELEC for the respective types of case that those two departments handle. The various rules of procedure have been amended repeatedly since 2010 and as a result can be fragmented and difficult to understand.</p>	<p>from filing to execution for use exclusively within COMELEC. Until then, commissioners continue to track cases via analogue spread sheets, reports and matrices submitted by clerks of the court.</p>	<p>related to providing notice to challenged voters.<sup>59</sup></p>	<p>are not currently available to the general public as a matter of course, though they can be requested. Lengthy legal decisions are written by commissioners, and there has been movement toward publishing an annual compendium of COMELEC decisions.</p>

<sup>55</sup> Constitution of the Philippines, Article VII, Section 17

<sup>56</sup> Constitution of the Philippines, Article VI, Section 17

<sup>59</sup> Omnibus Electoral Law Article XXII SECTION 143(b) "Notices to the members of the board of election inspectors and to challenged voters shall state the place, day and hour in which such petition shall be heard, and such notice may be made by sending a copy thereof by registered mail or by personal delivery or by leaving it in the possession of a person of sufficient discretion in the residence of the said person or, in the event that the foregoing procedure is not practicable, by posting a copy in a conspicuous place in the city hall or municipal building and in two other conspicuous places within the city or municipality, at least ten days prior to the day set for the hearing."

As this table illustrates, institutional arrangements for addressing electoral disputes vary significantly among countries, and the types of case management platforms in use are similarly variable. Even in Mexico, which, as will be discussed further below, has the most extensive and established case management platform of these six countries, adoption at the sub-national level is recent and ongoing. The variety and complexity of EDR processes presents a challenging landscape for comparative evaluation of procedural justice and open justice protections, and the case management practices and platforms that support them. However, the value of these case studies is capturing details of complex procedures and practices in a comparative context that enables similarities, opportunities and challenges to emerge. Ultimately, these comparative country studies provide useful examples that illuminate how different country contexts and different EDR models are faring in providing disputes resolutions proceedings that are fair, efficient, effective and transparent.

## V. Protecting Procedural Justice and Open Justice in Election Cases

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The following four sections explore the principles behind each aspect of procedural justice and open justice defined earlier in this paper – fairness, efficiency, effectiveness and transparency – and illustrate how these principles are addressed in each case study country. These examples by no means represent an exhaustive exploration of all aspects of each country’s EDR processes, but they do reveal the ways in which the successes and shortcomings of case management serve or hinder procedural justice and open justice.

### Fairness



Fair administration of justice includes the right to receive reasonable notice of a claim, reasonable opportunity to prepare a defense, and the right to a fair and impartial fact-finding process, hearing, and decision.

Fair administration of justice is required to protect the fundamental right to equality before the law and equal treatment by the law. How justice is actually administered is also critical to overall *perceptions* of the fairness of the process and the institution in question. In discussing the administration of justice in cases involving human rights, the Office of the High Commissioner for Human Rights (OHCHR) has emphasized both equal *treatment* by justice institutions<sup>60</sup> and equal *access* to the institutions mandated to provide justice.<sup>61</sup> This right to access the courts is further affirmed in a United Nations Human Rights Council (UNHRC) opinion in the

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<sup>60</sup> This is often termed “equality of arms,” a jurisprudential principle developed by the European Court of Human Rights as a component of the right to a fair trial. Essentially, it requires that there be a fair balance between the opportunities afforded to each party involved in legal proceedings.

<sup>61</sup> OHCHR, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,” (2003) Chapter 6, 218, <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>. “The principle of equality before the courts means in the first place that...every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned...Secondly, the principle of equality means that all persons must have equal access to the courts.”

case of *Oló Bahamonde v. Equatorial Guinea*. In this case, the plaintiff's claims of discrimination on the basis of political opinion at the hands of a judiciary that was not independent or impartial were upheld, with the UNHCR finding that "...the notion of equality before the courts and tribunals encompasses the very access to the courts" and systematic frustration of this access constituted a violation of Article 14 of the ICCPR.<sup>62</sup>

A common thread across many of the six case studies is overlapping jurisdiction for electoral disputes, which could lead to confusion, inconsistencies, and in some instances forum shopping – all elements that can undermine a fair process and access to the courts. Multiple cases from the 2013 Kenyan elections illustrate the ease with which problematic forum shopping can occur;<sup>63</sup> in some instances voters or candidates opened cases directly before several jurisdictions to seek the most favorable decision.<sup>64</sup> In the Philippines, mandates are clearly defined for each of the bodies that resolve election disputes, but despite the complex distribution of adjudication functions across multiple bodies, there is no referral mechanism for cases filed in the wrong jurisdiction. Furthermore, because of the strict adherence to filing deadlines, if a case is filed in the wrong jurisdiction it is unlikely that the party would have another opportunity to submit their claim before the deadline expires. By contrast, in Mexico, a referrals system built into the case management process ensures that legitimate complaints are not unduly dismissed because they are filed in the wrong jurisdiction. This referrals process also has the potential to prevent complainants from taking advantage of a lack of communication amongst EDR bodies to file multiple complaints with different bodies in the pursuit of a preferential outcome.

The rejection of legitimate complaints on procedural grounds can also limit access to courts and impacts the fair administration of justice. In Kosovo, the Electoral Complaints and Appeals Panel (ECAP) accepts complaints that are "well-grounded" and dismisses those that suffer formal or procedural irregularities. Observers in 2014 noted that ECAP adopted a formalistic approach to complaints, rejecting many claims without proactively seeking additional evidence.<sup>65</sup> In Tunisia, where courts can reject a case based on its merits or on procedural grounds, procedural errors during the 2014 elections, such as failure to hire a lawyer (for more serious claims and appeals to the higher court) and failing to serve a notice of appeal on the Independent High Authority for Elections (ISIE), tended to be the most frequent causes of rejection.<sup>66</sup>

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<sup>62</sup> Communication No. 468/1991, *A. N. Oló Bahamonde v. Equatorial Guinea* (Views adopted on 20 October 1993), UN doc. GAOR, A/49/40 (vol. II), p. 187, para. 9.4.

<sup>63</sup> Political Parties Act, No.11 (2011) The Laws of Kenya § 40(2), [HTTP://KENYALAW.ORG/KL/FILEADMIN/PDFDOWNLOADS/ACTS/POLITICALPARTIESACT.PDF](http://kenyalaw.org/kl/fileadmin/pdfdownloads/acts/politicalpartiesact.pdf). This requirement does not apply to disputes between an independent candidate and a political party, and appeals from decisions of the Registrar of Political Parties. Additionally, parties can proceed without a determination if thirty days have elapsed, or if they have received permission from the Tribunal.

<sup>64</sup> In an attempt to limit this kind of forum shopping, the IEBC's rules of procedure do require each complainant to declare that there is no pending case regarding the same matter before another jurisdiction. Independent Electoral and Boundaries Commission Rules of Procedure for Settlement of Disputes, rul. 9 (4) (i)(i, ii).

<sup>65</sup> EU EOM 2014, p 18 [http://www.eods.eu/library/eu-eom-kosovo-2014-final-report\\_en.pdf](http://www.eods.eu/library/eu-eom-kosovo-2014-final-report_en.pdf)

<sup>66</sup> Narjess Tahar, Study of the Case Law on Electoral Disputes Relating to Presidential and Legislative Election Results of 2014 15 (2016). Other causes had to do with failing to comply with formalities such as filing disputes within time limits and having legal standing.



The service of reasonable notice is another essential element of fairness. One illustration of this principle is a 2014 ruling of the High Court of Kenya in the case of *Patrick Ngeta Kimanzi v. Marcus Mutua Muluvi & 2 Others*, which dismissed a petition challenging the election of the first respondent on the grounds that he was not served with adequate notice. The court concluded that “[w]ithout service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-worn rules of natural justice... service of the petition is not a mere procedural requirement that can be dispensed with...”<sup>67</sup> In this case, the petitioner was a candidate agent challenging the election of the first respondent, and the petition was dismissed due to a lack of service on the respondent. As the court noted, “it is service of process that triggers all the other steps in the election petition,” illustrating the fact that various elements of procedural justice are necessarily interlinked.

The principle of equal access to justice can be violated by a failure to provide due process, even when this omission does not result in a material inequality in outcomes. For example, in the case of *Bulut v. Austria*, the European Court of Human Rights (ECtHR) found that the defendant, who had been convicted of bribing civil servants at an employment agency, was not given notice during an appeal of relevant submissions on the case made by the Attorney General, and thus had not been given an opportunity to provide a response.<sup>68</sup> The court noted that “it is a matter for the defense to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defense.”<sup>69</sup> The court went on to note that unfairness in the administration of justice “does not depend on further, quantifiable unfairness flowing from a procedural inequality.”<sup>70</sup>

In several case study countries, the service of notice is established in law and in practice. In the Philippines, the necessity of providing “due notice and hearing” is consistently noted throughout the electoral law.<sup>71</sup> In Tunisia, for complaints regarding ISIE decisions during legislative elections, the ISIE must be provided with notice via a court bailiff, and this must include both a copy of the complaint and the relevant accompanying evidence. In Mexico, cases must be publicized by the receiving authority immediately upon receipt, in order to allow interested third parties to become involved in the case.<sup>72</sup>

Providing notice of a complaint to a defendant or respondent can be a casualty of expedited proceedings. For example, Macedonia has no provisions for service of notice in the legal and regulatory

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<sup>67</sup> *Patrick Ngeta Kimanzi v. Marcus Mutua Muluvi & 2 Others*, Election Petition (Machakos) No. 8 of 2013, ¶ 30 and 34.

<sup>68</sup> Eur. Court HR, *Case of Bulut v. Austria*, judgment of 22 February 1996, Reports 1996-II, p. 359, ¶ 47. While this case did not concern an election dispute, the conclusions of the court on due process apply equally to the EDR context. The court found that Mr. Bulut’s right to a fair and public hearing under Article 6 of the European Convention on Human Rights (ECHR) had been violated because the principle of “equality of arms” had not been respected.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Phrase occurs 18 times in the Omnibus Law

<sup>72</sup> Federal Electoral Recourses Law, 1996, Article 17.1

framework, and deadlines for filing and decision-making are so short as to make it virtually impossible for a respondent to receive notice and prepare a defense. For complaints relating to voting procedures and vote counting, the State Election Commission (SEC) is required to make a decision within two hours of receiving a complaint.<sup>73</sup> The lack of notice and tight deadlines within which appeals can be submitted continue to impact the ability of a respondent to prepare a defense, and prevents interested parties from appealing. Similar challenges exist in Kosovo, where notice of a complaint is provided to all involved parties within 24 hours in hard copy only,<sup>74</sup> but short deadlines make it challenging for respondents to properly prepare a defense.

In *Namat Aliyev v. Azerbaijan*, the ECtHR acknowledged the tension between a fair process and a fast process, with implications for the protection of due process in electoral cases. The court ruled that time limits designed to expeditiously resolve a case “may not serve to undermine the effectiveness of the appeal procedure, and it must be ensured that a genuine effort is made to address the substance of arguable individual complaints concerning electoral irregularities.”<sup>75</sup> In this case, the complainants were candidates in the 2005 parliamentary elections in Azerbaijan, who alleged that domestic authorities did not adequately investigate complaints of electoral irregularities. The ECtHR found that actions by the electoral commissions and domestic courts were arbitrary, including rejecting complaints that had alleged breaches of electoral law, cancelling candidate registration, and annulling elections in the constituencies of certain candidates without sufficient reason and without affording procedural safeguards to the parties.<sup>76</sup> Ultimately, the court determined these arbitrary actions constituted a violation of Article 3 of Protocol No. 1 of the ECHR, which requires “free elections.”

A unique challenge related to the compressed timelines for the resolution of election cases is petitioners’ lack of access to evidence to prepare a defense or substantiate a claim. IFES has observed this challenge across the globe, and it can present a particular procedural barrier to petitioners – most often a candidate, party agent or voter – as the burden of proof generally rests, at least initially, with the individual or group making the claim. Because an electoral process is a very specific exercise generally managed by an EMB, the relevant evidence, such as results sheets, rejected ballots, official forms, and voter registry documents, may not be easily obtainable by an individual outside the EMB, or at least not within the tight deadlines that usually exist for election petitions (it can also be a challenge for the EMB as a respondent, as discussed further below). A petitioner is often required to produce evidence supporting his or her claim at the time of filing, and in some countries the complaint will not be considered valid if insufficient evidence is submitted, or it may be dismissed without the adjudicatory body seeking further evidence via an investigation.<sup>77</sup> The requirement for at least some kind of evidence

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<sup>73</sup> This timeframe applies to complaints relating to voting procedures and vote counting, complaints relating to campaign financing.

<sup>74</sup> Rregullat Dhe Procedurat, arts. 6.6. and 6.7., Official Gazette of Kosovo (2015).

<sup>75</sup> *Namat Aliyev v. Azerbaijan*, App. No. 18705/06, Eur. Ct. H.R. para. 90 (2010)..

<sup>76</sup> *Ibid* at ¶ 90 and 91

<sup>77</sup> Rule 11(b)(3) of the U.S. Federal Rules of Civil Procedure provides that a complainant must certify that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”

at the time of filing is not unreasonable, as in IFES' experience globally, frivolous complaints and false allegations can be common in elections. However, the dismissal of legitimate complaints due to unreasonable evidentiary standards at the filing stage, or because of a failure to shift the burden of proof from the petitioner to the investigative body, violates a fundamental tenet in the fair administration of justice. In *Namat Aliyev v. Azerbaijan*, the ECtHR charged domestic courts with the responsibility of taking reasonable measures to investigate alleged irregularities when the evidence provided by an applicant is insufficient to decide the case but nonetheless strong enough to warrant additional inquiry.<sup>78</sup>

Once a claim is accepted by a court or tribunal, a respondent must be provided a reasonable opportunity to submit evidence to refute the allegation.<sup>79</sup> Often the EMB will be a respondent in the case, requiring it to collect materials from polling stations across the country. This can be a significant undertaking made further challenging by tight deadlines and multiple concurrent petitions. In Kenya, the EMB has only 48 hours from the date of service to provide the Supreme Court with certified copies of the documents used to declare the results.<sup>80</sup> This involves collecting materials from 40,883 polling stations across 292 constituencies.<sup>81</sup> Ultimately, EDR proceedings should be structured so that these challenges are accounted for or mitigated in such a way that still allows for a fair hearing.

A lack of notice, an inability to prepare a defense, and short deadlines for resolving complaints can also impact the proper investigation of legitimate grievances. Election disputes can present unique challenges with respect to uneven access to evidence and compressed timelines for investigations. To ensure a fair fact-finding process, these challenges must be addressed within the EDR process. In Kenya, for post-election petitions in the courts, the burden is on the petitioner to prove his or her case. However, depending on the effectiveness with which she is able to do so, the evidential burden can be lessened to ensure a legitimate grievance is properly investigated, or if a legitimate grievance is demonstrated, the burden would shift to the EMB. This approach helps to ensure any inequalities in terms of access to evidence can be mitigated. Guidelines on what constitutes evidence varies by country, with some countries publishing detailed guidelines on evidential requirements and others leaving definitions more open-ended. In Tunisia, the evidence must have a "sufficient degree of

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<sup>78</sup> *Namat Aliyev*, supra 65, paras. 88-89. "[i]n terms of initial evidence necessary for examination of this specific issue, the courts had to do nothing more than request the electoral commissions to submit those protocols to them for an independent examination. If such examination indeed revealed inconsistencies, a more thorough assessment of their impact on the election results would be necessary."

<sup>79</sup> A fair hearing is not necessarily the same as a fair trial, as in election cases a hearing might be an administrative one, and certain court formalities may not need to be strictly complied with in order for a proceeding to be considered a fair hearing (and this is particularly important given the different EDR models that exist). Ultimately, a "fair hearing" requires reasonable opportunity for an individual to be present at the designated time and place for a hearing, during which time he or she may offer evidence, hear the evidence provided by the other side, cross-examine opposition witnesses, and offer a defense or response.

<sup>80</sup> Section 11(1) of the Kenya Supreme Court (Presidential Election Petition) Rules 2017

<sup>81</sup> <https://www.iebc.or.ke/registration/?stats>. To add further challenge, there are currently hundreds of other election-related petitions ongoing across Kenya, as is commonly the case in many countries after a general election.

precision and clarity” to verify the serious nature of the plaintiff’s allegations.<sup>82</sup> In contrast, Mexico has clear and specific guidelines for what constitutes evidence and the acceptable manner of providing evidence.<sup>83</sup>

Access, notice and evidence are foundational concepts in the practice of fair administration of justice, and these components are all in operation in a fair and impartial hearing. Hearings that adhere to the fair administration of justice also require an unbiased arrangement of logistics related to the case. In Kenya, to facilitate a fair hearing, the PPDT and courts can hold scheduling conferences (an element of case management), which are intended to assess the possibility of alternative dispute resolution, documents that the Tribunal may order to be produced, compliance with regulations and consolidation of complaints or appeals and a settlement, as well as identify contested and uncontested issues and create a timetable for the proceedings.<sup>84</sup> Introducing mechanisms to ensure the impartial assignment of cases also serves the goal of fair hearings. In the Philippines, the Commission on Elections (COMELEC) has a unique ‘raffle’ system whereby a filed case is assigned randomly and impartially through an automated system that ensures both divisions have a similar caseload. A second raffle occurs to determine which commissioner will be charged with drafting the decision. These measures are designed to support the efficient and impartial consideration of cases and drafting of decisions. Similarly, the Mexican case management software includes features that manage the blind assignment of cases to individual magistrates. This is done according to rules that ensure caseloads are balanced and that interested parties cannot influence the assignment of cases.

Fairness necessitates not only that EDR laws and practices are consistently applied across time, but also that they are consistently applied across different jurisdictions and levels of appeal. Though examples from our case studies suggest that courts of first instance are more likely to apply uneven standards of law, this harm can be mitigated by a clear appeals process that brings disputed cases before bodies with more specialized EDR knowledge. For cases that come before the trial courts in the Philippines, for example, elections expertise and training varies among members of the judiciary, leading at times to uneven and inconsistent jurisprudence. In the course of appellate review of trial court decisions, one COMELEC commissioner noted instances of misapplication of the rules, particularly in cases involving new voting technology. However, a strong appeals process enables COMELEC to have oversight over lower court rulings and remedy misapplications of the law. In Kenya, a handbook on election disputes published by the Law Society of Kenya stressed the inconsistency of some decisions in the courts, and the Law Society urged the Court of Appeals to harmonize this contradictory jurisprudence “to ensure

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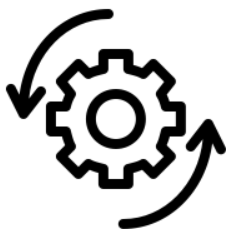
<sup>82</sup> The Administrative Tribunal, Electoral Dispute, the First Appellate Chamber, No. 201420039 dated Nov. 8, 2014.

<sup>83</sup> Electoral Recourses Law, 1996, Article 9. Evidence should be presented at the same time as the lawsuit, or within four days of filing the suit, with certain exceptions being granted for evidence that was unknown at the time or presenting the case. Expert reports are only permitted when the expert is not related to the electoral process and the time available for the case allows the report to be executed. A justice can ask for expert reports or judicial inspections when time allows and it is deemed necessary to the resolution of the case, though this is rare.

<sup>84</sup> Political Parties Disputes Tribunal (Procedure) Regulations, No. 26 (2017) Kenya Gazette Supplement No. 60 (2017) § 15, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNoticeNo.67PoliticalPartiesTribunal.pdf>.

that jurisprudential cohesion is nurtured.”<sup>85</sup> During the 2014 elections in Tunisia, observers found that a “significant” number of the decisions made by courts of first instance displayed an inconsistent approach to the interpretation of the electoral law.<sup>86</sup>

## Efficiency



The efficient administration of justice includes the requirement for an expeditious process, with reasonable deadlines for filing and disposition of different types of electoral disputes and complaints.

As the election process is tightly time-bound – rights are tied to the electoral calendar, and results dictate the transfer of power<sup>87</sup> – the administration of justice must be extremely efficient to ensure an effective remedy is provided.

For example, candidate nomination disputes must be settled in a timely manner to allow for candidate lists and ballots to be finalized ahead of an election. This can be a challenging process given the right of appeal that must be available to complainants. In general, the time-sensitivity of elections requires dispute resolution proceedings to take place “within a reasonable time” or “without undue delay.”<sup>88</sup> However, the prompt resolution of electoral issues must be balanced with the requirement to ensure other elements of due process are met.

One element that can impact both the fair and efficient administration of justice is when parties to a dispute choose to represent themselves. This can result in an asymmetric engagement with the adjudication process, where the party represented by a lawyer may have an advantage in proceedings. It can also cause delays, as a self-represented litigant may be unfamiliar with the procedural requirements and deadlines in place. This can be a common scenario for various types of pre-election disputes heard by an EMB, where proceedings may be more informal but requirements for procedural justice are no less imperative. Adjudicatory bodies have a responsibility to try and address any imbalance or delays to ensure fair and efficient administration of justice can still be provided. For example, legal scholar Robert Yegge suggests that courts must “seek to reduce the complexity of the law and procedures with which self-represented litigants must deal; provide procedural assistance through means such as court-approved forms and instructions and assistance to litigants at the courthouse; provide substantive assistance through means such as bar-sponsored clinics, pro bono representation, or reduced fee

“Slow justice is bad, but speedy injustice is not an admissible substitute.”

*Professor Maurice Rosenberg*

“Court Congestion: Status, Causes, and Proposed Remedies,” in *American Assembly, The Courts, the Public, and the Law Explosion* (Englewood Cliffs, N.J.: Prentice-Hall, 1965), p. 58

<sup>85</sup> Handbook on Election Disputes in Kenya, Context, Legal Framework, Institutions and Jurisprudence, published by Law Society of Kenya with support from GIZ and Judiciary October 2013

<sup>86</sup> Carter Center, Legislative and Presidential Elections in Tunisia: Final Report 101 (2014).

<sup>87</sup> Katherine Ellena and Chad Vickery, “Measuring Effective Remedies for Fraud and Administrative Malpractice” in the ABA’s International Election Remedies (John Hardin Young, Ed. 2016), 105

<sup>88</sup> ICCPR, supra note 5 at art. 14 § 1(c); European Convention for Protection of Human Rights & Fundamental Freedoms, art. 6, § 1 and the American Convention on Human Rights, art. 8.

representation...and relaxing requirements that filings be typed (as long as they are legible)...”<sup>89</sup> These measures are particularly important in election cases, which involve fundamental political rights, and to ensure equal access to the EDR body for all types of electoral complainants.

The emergence of new methods of case management are a result of the common challenge of delays in legal proceedings of all types, and this is not an issue unique to electoral disputes, nor to the countries examined in this paper. However, as already discussed, the timeliness of legal proceedings is of unique importance in election cases. These challenges are illuminated across the six countries examined, with some countries facing delays in the resolution of cases well beyond legal time limits, while in other countries deadlines for filing and resolving cases are so short as to make proper investigation and deliberation of legitimate complaints impossible. A positive revelation across the six countries is an emerging interest in case management systems and platforms that assist with the efficient administration of justice, although this is being achieved with varying levels of success.

In Tunisia, interlocutors have advised that each court manages its time to ensure that election cases are resolved within the statutory time limit. Strategies include the establishment of a registry office dedicated to the receipt of electoral disputes, suspending the processing of non-electoral disputes while electoral disputes are being resolved, and grouping similar complaints together into a single case.<sup>90</sup> To save time, the tribunal may also order oral pleadings for disputes relating to candidacy during legislative elections<sup>91</sup> and voter registration appeals.<sup>92</sup> In addition, the case management database used in Tunisia facilitates the automatic production of documents such as party summons and administrative forms, which are then sent directly to the president of the Tribunal, chambers and magistrates adjudicating the case, reportedly improving efficiency in case processing.

In Mexico, the Tribunal hears thousands of cases in any given year within a condensed timeframe. The screening, sorting, tracking and archiving of cases, as well as the gathering and publication of statistics on the work and rulings of the Tribunal, falls to the General Secretariat of Agreements (SGA). The SGA administers the case management software platform used by the Tribunal, and this platform is a tool to facilitate the timely processing of cases as it tracks compliance with all filing deadlines outlined in the law. Every step of a case that has set windows of time for compliance is logged in the system, including the date and exact time when a complaint is registered, since some steps must be completed in as little time as 24 hours. Elements of the case management process that have defined time limits are flagged using a traffic light system that highlights cases in green, yellow or red.<sup>93</sup> However, there are different

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<sup>89</sup> Robert Yegge, “Divorce Litigants Without Lawyers: This Crisis for Bench and Bar Needs Answers Now,” *Judges’ Journal* 33, no. 2 (spring 1994): 8, at 10-13.

<sup>90</sup> During the 2014 elections in Tunisia, the Administrative Tribunal also compiled like cases into one ruling where the objects of the complaint and arguments were the same. Narjess Tahar, *Study of the Case Law on Electoral Disputes Relating to Presidential and Legislative Election Results of 2014* 35 (2016).

<sup>91</sup> Law n° 2014-16, art. 28.

<sup>92</sup> Law n° 2014-16, art. 18.

<sup>93</sup> Cases that are not in immediate danger of exceeding time limits are highlighted in green, those that are about to pass a deadline are highlighted in yellow and those that have missed a deadline are in red.

funding levels for local courts across the country, with some receiving adequate funding and others receiving funding so insufficient that they do not even have an office.

In the Philippines, the law and rules of procedure contain clear deadlines for filing cases. Though there is variation, post-election complaints must generally be filed within 10 days of the election.<sup>94</sup> Filing deadlines are strictly adhered to; failing to meet a filing deadline is grounds for summary dismissal of the case. Deadlines for rendering a decision range between six hours in cases relating to corrections of the voter list<sup>95</sup> to three months for all election cases received by COMELEC.<sup>96</sup> In practice, these deadlines are not always met, particularly in complex post-election challenges, which can take as long as two years to proceed through each stage of preliminary conference, presentation of evidence, preliminary order, preliminary recount, preliminary determination, full recount and final resolution. Conversations are ongoing within COMELEC regarding ways to improve efficiency, notably through the new case management software which is designed to organize and expedite access to case information.

Timelines for the resolution of electoral disputes in Kosovo are extremely tight. For example, Central Election Commission (CEC) decisions must be appealed to the ECAP within 24 hours of the CEC's decision, and the ECAP has 72 hours to make a decision.<sup>97</sup> According to interlocutors, complaints "go by order" to the data entry clerk (rather than being randomized or prioritized in terms of the gravity of the complaint). Then, the legal officer assigns the complaints to one of 79 categories based on their nature and relevant phase of the electoral process. Stakeholders have called for better sorting procedures.<sup>98</sup> Deadlines in Macedonia are similarly tight. For example, complaints filed by a party representative regarding voting, tabulation, or the establishment of results, must be submitted within 48 hours of the termination of voting or following the announcement of preliminary results. An individual voter alleging a violation of their rights has only 24 hours to file a complaint from the moment the violation is alleged to have occurred.<sup>99</sup> Legal deadlines for State Election Commission (SEC) decisions are also extremely short – requiring a decision within 48 hours of receiving a complaint.<sup>100</sup> International organizations such as the Venice Commission and the Organization for Social and Economic Co-operation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) have praised the shorter deadlines as providing "for more effective legal redress,"<sup>101</sup> but in reality cases are not adjudicated within the relevant legal deadlines or are summarily dismissed. During the 2016 parliamentary elections, 470 complaints were submitted to the SEC regarding voter roll issues; the SEC reviewed 355 complaints by the end of polling day and rejected them all.<sup>102</sup> The Macedonia and Philippines examples illustrate how

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<sup>94</sup> Omnibus Electoral Law Article XXI Sections 250, 251, 252, 253

<sup>95</sup> Omnibus Electoral Law Article XII Section 143(g)

<sup>96</sup> Omnibus Electoral Law Article XX1 Section 257

<sup>97</sup> Law No. 03/L-256 On Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo, art. 15, Nov. 01, 2010, <http://www.kuvendikosoves.org/common/docs/ligjet/2010-256-eng.pdf>.

<sup>98</sup> IFES, Training Needs Assessment for Election Complaints and Appeal Panel 7 (2016).

<sup>99</sup> Rulebook on the Manner and Procedure for Deciding upon Complaints art. 7-9 (Maced.).

<sup>100</sup> This timeframe applies to complaints relating to voting procedures and vote counting, complaints relating to campaign financing.

<sup>101</sup> OSCE/ODIHR, OPINION NO. 851/ 2016, Joint Opinion on the Electoral Code § 57 (2016).

<sup>102</sup> OSCE/ODIHR, Election Observation Mission Final Report 22 (2017).

the balance between fairness and efficiency is critical to ensure cases do not exceed legal deadlines (impacting an effective remedy), or are quickly dismissed without investigation (impacting the right to a fair hearing)

## Effectiveness



The effective administration of justice includes the right to a written, reasoned decision that is not capricious, unreasonable or arbitrary, the right to appeal/judicial review, and the right to an effective remedy.

The effective administration of justice ensures that the fundamental right to redress is provided in practice. As IFES has written about previously,<sup>103</sup> the right to redress requires adequate processes to pursue a claim. As such, EDR mechanisms must provide for judicial review of administrative decisions, the ability to appeal decisions, and the prospect of an effective remedy.<sup>104</sup> The fundamental right of redress also requires that a petitioner be informed of the reasons why the claim was dismissed or denied.<sup>105</sup> Hence, an EMB, tribunal or court should clearly set out the legal basis used and factual determination made when ruling on a particular case, to help parties understand the reasoning behind the decision, to facilitate enforcement, and to help in establishing the legitimacy of the final electoral results.<sup>106</sup>

In *Castañeda Gutman v. México*, the Inter-American Court of Human Rights found that “it is a minimum guarantee for anyone who files a remedy that the grounds for the ruling deciding it are stated; otherwise the ruling will violate the guarantee of due process.”<sup>107</sup> In that case, the former Mexican minister of foreign affairs tried to participate in the 2006 presidential elections without being affiliated with a political party. The Court found that, in failing to provide justification for the candidate disqualification, the state violated the American Convention on Human Rights as it “neither provided an accessible or effective judicial procedure for an individual to contest the electoral authority’s judgment nor protect his political right to be elected.”<sup>108</sup>

Reasoned decisions are important to ensure that cases are not dismissed in an arbitrary manner, that electoral grievances are litigated through the courts and not the media, and that judgments are ultimately accepted. The former chief justice of Australia has observed that “the general acceptability of

<sup>103</sup> Chad Vickery (ed.), *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)*, 2011

<sup>104</sup> UDHR, *supra* note 10, art.8; ICCPR, *supra* note 11, art. 2, § 3(a),(c); African Charter, *supra* note 14, art. 7, § 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, C.E.T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter *European Convention*], *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>105</sup> Chad Vickery (ed.), *Guidelines for Understanding*, *supra* note 95, ch. 1

<sup>106</sup> Chad Vickery (ed.), *Guidelines for Understanding*, *supra* note 95, ch. 1

<sup>107</sup> *Castañeda Gutman v. México*, Inter-American Court of Human Rights, Judgment of August 6, 2008, ¶ 93

<sup>108</sup> *Castañeda Gutman v. México*, Inter-American Court of Human Rights, Judgment of August 6, 2008, ¶ 93



judicial decisions is promoted by the obligation to explain them.”<sup>109</sup> This includes an obligation to publish reasons for decisions to the public, not merely the provision of reasons to the parties.<sup>110</sup> The chief justice notes that “people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions.”<sup>111</sup> The importance of providing written, reasoned decisions is spelled out in a criticism of the Afghan Independent Electoral Complaints Commission (IECC)’s failure to provide reasoned decisions during the 2014 elections: “[o]ne of the most critical failures was that the IECC announced its decisions without a clear and substantiated reason for each decision...Parties may not agree with a particular decision, but if the adjudicating body offers a rational basis for a decision the party adversely affected is more likely to accept the decision. If the party does not accept the decision, it proves far more difficult to litigate the matter extra-judicially to the public—typically through the media—against a reasoned basis.”<sup>112</sup>

In Mexico, written decisions issued by the Tribunal must include a synthesis of the challenge and facts of the case, an expression of the legal grievance, an assessment of the evidence, reference to the applicable law that sustains the decision, justification for the application of that law to the decision as well as the ruling itself.<sup>113</sup> In Kosovo, the ECAP provides the legal and factual basis for its decision, in writing.<sup>114</sup> Decisions must include case description, decision on jurisdiction, timeliness of submission, procedural and factual background, evidence, legal reasoning, order and legal advice for appealing.<sup>115</sup> In the Philippines, decisions containing full legal justification for rulings are written by the COMELEC commissioners, and there is an expectation that these written decisions are stylistically more than a mere administrative summary of the ruling, to the degree that delays can come at this stage while waiting for commissioners to craft the decision well after the case has already been decided.

In addition to written, reasoned decisions, it is important that complainants have access to an appeals process. International human rights conventions all recognize, implicitly or explicitly, the fundamental value of an appeals mechanism,<sup>116</sup> and an appeals process can reinforce the right to an effective

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<sup>109</sup> Australian Chief Justice Gleeson, ‘Judicial Accountability’, quoted in *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J).

<sup>110</sup> See, e.g. *Public Service Board v Osmond* (1986) 159 CLR 656 at 666-667; *Pettit v Dunkley* (1971) 1 NSWLR 377 at 382; *Housing Commission of NSW v Tatmar Pastoral Co Limited* (1983) 3 NSWLR 378 at 385-386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, 277 and 281. For a detailed treatment of the relationship between open justice and judicial reasons, see Jason Bosland and Jonathan Gill “The Principle of Open Justice and the Judicial Duty to Give Public Reasons” (2014) 38 *Melb.Uni.L.Rev* 20.

<sup>111</sup> *Ibid.*

<sup>112</sup> Democracy International, *Afghanistan Election Observation Mission 2014 – Final Report*, 30

<sup>113</sup> Electoral Recourses Law, 1996, Article 22

<sup>114</sup> Law No. 03/L-256 On Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo, art. 12, Nov. 01, 2010, <http://www.kuvendikosoves.org/common/docs/ligjet/2010-256-eng.pdf>.

<sup>115</sup> Example decision <http://pzap.rks-gov.net/wp-content/uploads/2017/07/AI372-2017-Vendim.pdf> (In Albanian)

<sup>116</sup> ICCPR, *supra* note 11, art. 14, § 5; American Convention, *supra* note 14, art. 8(2)(h); Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 22, 1984, C.E.T.S. No. 117 (entered into force Nov. 1, 1988), *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm>; African Charter, *supra* note 14, art. 7(a); *Constitutional Rights Project v. Nigeria*, African Comm’n on Human and Peoples’ Rights, Comm. No. 60/91 (1995); UN Human Rights Comm., CCPR General Comment No. 32, Art. 14: Right To Equality Before Courts And Tribunals

remedy, in particular in election petitions in which the outcome of the election is at stake.<sup>117</sup> In *Petkov v. Bulgaria*, the ECtHR has stressed that “an effective system of electoral appeals is an important safeguard against arbitrariness in the electoral process.”<sup>118</sup> In this case, the applicants, who were candidates in the 2001 parliamentary elections in Bulgaria, alleged that they had been struck off the candidate list and prevented from running for office, despite a successful appeal to the Supreme Court which ruled that their disqualification to be null and void. The ECtHR ruled that the Bulgarian electoral authorities had an obligation to respect the Supreme Court’s judgment by allowing the applicants to stand for Parliament – thus affirming the inviolability of the appeals process.

In Tunisia, the right to appeal exists for all types of electoral complaints. There are usually two levels of appeal available, and for the higher-level courts a legal representative is required.<sup>119</sup> There is also a clear process of appeals in the Philippine electoral dispute resolution process. COMELEC has appellate jurisdiction over the rulings of the trial courts in municipal and *barangay* election contests. *En banc* decisions of the Commission can be taken up by the Supreme Court within 30 days through a petition for *certiorari*; the ruling of the Commission becomes final after 30 days if not taken up by the Supreme Court.<sup>120</sup> There is a well-established process of appeals in the Mexican system. If the initial complaint involves a decision issued by a political party, the case must first be decided by the political party’s internal dispute resolution process. This decision is then appealable to the relevant local electoral court, which can then be appealed to the regional federal electoral court. Decisions of an administrative electoral body are appealable to the courts, and rulings of a local electoral court can always be reviewed by the regional federal courts.

The effective administration of justice also requires proceedings that produce just outcomes that are effective *in practice*. In *Petkov*, the court ruled that a remedy must be “effective in practice as well as in law” by either preventing a violation, remedying the situation or providing redress appropriate to a violation that has already occurred.<sup>121</sup> This sentiment underpins the ECtHR’s ruling in *Namat* as well, which concluded that the provisions of the European Convention on Human Rights must be interpreted and applied in a way that is “not theoretical or illusory but practical and effective.”<sup>122</sup> In *Miyagawa v. Peru*, the complainant alleged that by arbitrarily and illegally preventing her from standing as a candidate, the National Elections Board had violated the rights of hundreds of thousands of Peruvian citizens who would have voted for her.<sup>123</sup> The Inter-American Court of Human Rights held that the obligation of the state is not limited to the mere existence of courts and tribunals, but must provide a

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And To A Fair Trial, ¶¶ 47-50, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter CCPR General Comment No. 32].

<sup>117</sup> Chad Vickery (ed.), *Guidelines for Understanding*, *supra* note 95, ch. 1

<sup>118</sup> *Petkov v. Bulgaria*, Eur. Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 63.

<sup>119</sup> Law n° 2017-7, art. 49 novodecies.

<sup>120</sup> Constitution of the Philippines – Article IX, A, Sec

<sup>121</sup> *Petkov v. Bulgaria*, Nos. 77568/01, 178/02, & 505/02, 5 Eur. Ct. H.R. ¶ 74 (2009).

<sup>122</sup> *Namat Aliyev v. Azerbaijan*, App. No. 18705/06, 2010 Eur. Ct. H.R. ¶ 72 (2010).

<sup>123</sup> *Higuchi de Fujimori v. Peru*, Case 11.428, Inter-Am. C.H.R., Report No. 119/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)

“real possibility” to receive a remedy.<sup>124</sup> These cases illustrate this essential component of the effective administration of justice: while it is important for remedies to be clearly set out in the legal framework, the application of these remedies must also be guaranteed. As the court noted in *Castañeda Gutman*, “winning the case is not the same as winning the remedy.”<sup>125</sup>

In some instances, the way the law has been crafted may not allow for an effective remedy in practice. For example, deadlines may be unrealistic and impact the provision of a corrective remedy, claims may be dismissed on procedural grounds without an opportunity to correct errors, or an adjudicatory body may have punitive measures available in the law to punish election violations, but choose not to impose them. The issue here is that procedural factors can render a remedy ineffective, not just impact the fairness of the process. In the 2015 parliamentary elections in Turkey, the Rights and Liberties Party lodged a complaint alleging that several media outlets had incorrectly reported that the party had withdrawn from the election, and the party requested that the Supreme Board of Elections (SBE) remedy the matter by corrective announcement.<sup>126</sup> The SBE informed international observers from the OSCE that it would not adopt a decision on the complaint and had no means to remedy the matter.<sup>127</sup> OSCE observers noted that while remedies existed in the law, ultimately the SBE did not provide an effective remedy for contestants in practice.<sup>128</sup> In Mexico, the case management process includes additional enforcement mechanisms. For example, in a media case in which the Tribunal has ruled that a candidate is campaigning outside of the allowed period and mandates that such activities stop, they can then enforce that ruling by imposing a fine. The case management process also continues beyond the judge’s issue of a resolution by tracking compliance with mandated remedies and sanctions. These mechanisms help ensure that for any remedy or sanction put in place, there are follow-up steps to ensure it is enforced and effective in practice.

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<sup>124</sup> The claim evoked the constitutionality of political rights and more specifically, the right to register as an independent candidate. *Castañeda Gutman v. Mexico*, Case 12.535, Rep. No. 113/06, Inter-Am. Comm’n H.R. ¶¶ 92,40 (2008).

<sup>125</sup> *Ibid.*

<sup>126</sup> OSCE, EARLY PARLIAMENTARY ELECTIONS, 1 NOV. 2015: FINAL REPORT (2015), <http://www.osce.org/odihr/elections/turkey/219201>.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

## Transparency



The transparent administration of justice requires access to case information (ideally in real time as an electoral dispute is being investigated and adjudicated), open hearings, and decisions that are publicly available (subject to limited restrictions).

Judicial transparency is recognized as an important principle under international human rights instruments<sup>129</sup> as it supports accountability in legal proceedings and builds public trust in the process, which is particularly important in election cases. As courts and tribunals face increasing pressure from political actors, the requirement to publicly explain their decisions can provide a measure of protection from attacks on their mandate. This is a pertinent consideration for many types of electoral disputes that deal with fundamental rights and constitutional issues, which often attract considerable public interest and, in some circumstances, political pressure on the body making the determination.<sup>130</sup> Hence, open justice is fundamental to election cases: there must be a higher level of transparency because – despite who the parties involved might be – the entire state has some interest in how election cases are resolved.

Transparency is foundational to open justice, but is also inextricably related to the other principles of due process and procedural justice – fairness, efficiency and effectiveness, as each of these principles can only be properly realized with sufficient information. For example, in Mexico, case information, including written legal decisions and judges’ voting records is freely available. In the Philippines, significant efforts are made to provide updated information on cases before COMELEC as they are being adjudicated via the commission’s website, including a summary of the decision once it has been made. There are strong standards for commissioners’ full written decisions, however, these written decisions are not currently made available to the general public, though they are available upon request. A project to annually publish COMELEC decisions as a compendium is once again under discussion. As disinformation becomes a more prominent issue, the need for accurate information on legal issues is acute. International IDEA has observed that: “[i]t is important for [the EDR body] to reach its decisions transparently and explain them to the parties involved and to society at large. This openness helps prevent the manipulation of information that could delegitimize the electoral process or weaken the electoral authority.”<sup>131</sup> International best practices further require transparency in the decision-making process, which is demonstrated through the publication of decisions. In Kenya, decisions of the PPDT are read out in court,<sup>132</sup> and while decisions are supposed to be published online, there is a lag in these being uploaded, demonstrating challenges in accessing PPDT judgments.<sup>133</sup> In Macedonia, a signed,

<sup>129</sup> Universal Declaration of Human Rights art. 10; ICCPR art. 14(1); ECHR art. 6(1); American Convention on Human Rights art. 8(5).

<sup>130</sup> “Transparency requires that adjudicatory bodies publish their decisions.” Chad Vickery (ed.), *Guidelines for Understanding*, supra note 95, p. 20.

<sup>131</sup> IIDEA, *Electoral Justice Handbook*, p.31, 2010.

<sup>132</sup> Kenya Political Parties Disputes Tribunal (Procedure) REGULATIONS reg. 29(4).

<sup>133</sup> *Ibid.*

written decision must be delivered by the SEC to the submitter of the complaint via email and immediately published on the SEC website.<sup>134</sup> However, decisions are not provided directly to any other parties, impacting the fairness of proceedings for respondents or other interested parties.

Transparency and open justice can enhance the acceptance of judicial decisions. As noted by the Virginia Supreme Court in *Richmond Newspapers Inc v Virginia*, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>135</sup> Conducting hearings in the open gives the public the opportunity to understand the system as a whole as well as the particulars of the case being heard.<sup>136</sup> The *Richmond* case concerned members of the media who had sought access to a courtroom during a murder trial, and the court was asked to consider whether a trial may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the right to a fair trial, or for some other overriding consideration. The court ultimately found that, absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. With respect to open hearings for electoral disputes, in both Macedonia and Mexico proceedings are not open to the public. Closed door proceedings can be a challenge for open justice, as transparency ties directly to the impartiality of judges and arbiters, an essential element of public confidence in the judiciary. As the U.S. Commission on Trial Court Performance Standards has observed: “independence of the judiciary is not likely to be achieved if a court does not manage itself...and account publicly for its performance.”<sup>137</sup>

In terms of access to judicial information more broadly, the UNHRC has stressed that states should proactively put information of public interest into the public domain ensuring “easy, prompt, effective and practical access to such information.”<sup>138</sup> In its *Guide to Strengthening Judicial Integrity and Capacity*, the United Nations Office on Drugs and Crime notes that transparency requires not just public and media access to court proceedings, but also access to court documents. The guide stresses that access to judgments, administrative information related to the court, as well as data on judicial caseloads, clearance rates, court fees and the use of budgetary allocations enables public scrutiny.<sup>139</sup> Positive follow-on effects with implications for procedural justice result from increased transparency. The media is better able to report court proceedings, maintain higher standards and counter misconception if they have access to better information.

Another side of the same coin is the dissemination of general legal information to judges and legal practitioners. Without reliable access to laws, regulations, jurisprudence and other primary legal sources, judges, lawyers and court users are left without clear guidance on how the law should operate

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<sup>134</sup> Rulebook on the Manner and Procedure for Deciding upon Complaints art. 43 (Maced.).

<sup>135</sup> *Richmond Newspapers Inc v Virginia* 448 US 444 (1980) at 571-572

<sup>136</sup> *Ibid.*

<sup>137</sup> BJA and NCSC, *Trial Court Performance Standards with Commentary* (1997), p. 18.

<sup>138</sup> See UNHRC General Comment no.34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 102nd session, Geneva, 11-29 July 2011, para. 19. The UNHCR explicitly acknowledges that this applies to the judiciary in addition to the executive and legislature.

<sup>139</sup> UNODC *Guide to Strengthening Judicial Integrity and Capacity*, 86-88

in any particular case.<sup>140</sup> In many countries where IFES works, access to legal documentation can be extremely challenging. Legal amendments may not be consolidated into the law but spread across numerous amendment acts, administrative rules or procedures may not be publicly available, and publishing of case law may be delayed or inconsistent.<sup>141</sup> This can present big challenges with respect to both knowledge of the law, and consistent application of the law. This in turn ties back to the fair administration of justice; that is, the application of procedure and law should be consistent across a country and across different courts. This is another example of how the different elements of due process and open justice are interlinked, and can be mutually reinforcing if legal proceedings for electoral disputes are managed well.

In the case of Tunisia, due process is guaranteed to a significant degree through litigation proceedings and case management, however interlocutors point to a lack of sufficient open justice protections. Transparency is limited by the absence of systematically published decisions, a lack of information on cases as they progress, and the absence of information which could facilitate public oversight of cases. While a case is being tried, parties can only track its progress through consultations with their lawyers and press conferences organized by the relevant courts. In comparison to 2011 elections, a fewer number of inadmissible cases and an improvement in the quality of complaints drafting was observed in 2014. Even so, no complaints were brought against the electoral list, despite its faults,<sup>142</sup> suggesting individuals might have lacked sufficient information to bring complaints. While interlocutors suggest that a lack of transparency is a contributing cause hindering individual's ability to bring complaints, this also has implications for the efficient administration of justice by ensuring a right to redress in practice. While the Administrative Tribunal creates a report containing information on its electoral dispute cases and cases linked to election operations, the report is only sent to the president of the republic, the president of the Parliamentary Assembly and the head of the government. It is not made public.

In Mexico, there is an active conversation around transparency at the Tribunal, which has identified open justice as a strategic priority. Several judges at the regional level and on the Superior Court are pushing for increased transparency and accessibility, providing institutional momentum for continued reform. The sophisticated case management platform used by the Tribunal provides a significant degree of public access to case information, enabling interested parties and the general public to track cases as they progress through the system. The information posted includes internal rulings, whether a case has been admitted or dismissed, whether evidence has been admitted, as well as notifications when new evidence or documents have been received, and any other relevant notifications. The case information

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<sup>140</sup> Ibid, 86.

<sup>141</sup> For example, in The Gambia the Constitution is publicly available only in its 2002 edition, which incorporates the 2001 amendments, but not those dating from 2004, 2006, 2007, 2009 and 2015 (some of which directly impact elections). The Local Government Act of 2002 is similarly difficult to access. It was amended in 2004, 2006 and 2007, but only the initial 2002 text is in wide circulation. The Gambia's Gazette is published and sold in photocopied paper format only, is not published with predictable periodicity, and editions are often sold out before demand is met.

<sup>142</sup> Narjess Tahar, Study of the Case Law on Electoral Disputes Relating to Presidential and Legislative Election Results of 2014 9, 15 and 21 (2016).

is updated regularly online and can be accessed by those who search for it. In addition to real-time case information, the Tribunal maintains a publicly available statistics page,<sup>143</sup> which aggregates and publishes data on hundreds of thousands of cases. Descriptive information about cases is also available, including information on how each judge voted, any dissenting opinions, and the decision itself containing justification for rulings and a summary of arguments and facts. As the Tribunal in Mexico works toward increasing open justice, one barrier that some judges at the Tribunal are working to address is the use of complex legal language in decisions that limits the ability of stakeholders to understand rulings. The effort to use simpler language is one that is, however, highly individualized. Language can be a barrier in some cases involving indigenous peoples, as all internal resolutions are issued in Spanish. Only the final resolution is required to be translated into the indigenous language of the parties to the contest.

In Kosovo, a dedicated Case and Appeals Management System (CAMS) was developed in 2015 that facilitates public access to reports. Interlocutors have suggested that awareness around the election dispute resolution process is increasing among external stakeholders, such as political entities, candidates, observers, NGOs and voters. The rules and procedure governing the ECAP are publicly available, and training manuals for political entities on electoral dispute resolution have been translated into English, Albanian and Serbian, and published on the website. A case summary is provided in simple language. However, stakeholders have called for improved analysis of case information.<sup>144</sup> In Macedonia, the SEC's website publishes the complaint, ordinal number of complaint, complainant, suit, location of the violation, meeting minutes of discussions on complaints, and the Administrative Court decision.<sup>145</sup> The information is published in Macedonian, in the format of a table. However, the OSCE noted that, during the 2016 early parliamentary elections, the SEC did not publish all decisions and minutes of the sessions on its website. This is contrary to the legal provisions of the Electoral Code and resulted in diminished transparency.<sup>146</sup>

As touched on earlier, complex or decentralized rules can hinder the fairness of the EDR process (particularly if they are inconsistently applied), but they also present a challenge in terms of transparency. Complex rules can be difficult for non-lawyers to understand and can then result in accessibility issues. It is a fundamental tenet of open justice that information is not just available, but it is accessible and understandable for a broad range of stakeholders, not just legal professionals. In the Philippines, the broad array of bodies and departments responsible for the adjudication of disputes is underpinned by a similarly broad array of rules of procedure specific to each body administering and deciding the dispute. As a result of repeated amendment, rules of procedure can be fragmented and difficult to understand for those outside of COMELEC, though complete and established rules specific to each body do exist. In Tunisia, interlocutors have acknowledged that the change of processes and procedures between the Courts of first instance and the Administrative Tribunal could result in an

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<sup>143</sup> <http://www.trife.gob.mx/turnos-sentencias/estadisticas> <Accessed Sept 1 2017>

<sup>144</sup> IFES, *Training Needs Assessment for Election Complaints and Appeal Panel*, June 2016, at 8.

<sup>145</sup> Rulebook on the Manner and Procedure for Deciding upon Complaints art. 18 (Maced.).

<sup>146</sup> OSCE/ODIHR, *Election Observation Mission Final Report*, at 7, Feb. 28, 2017.

increase of cases rejected due to procedural errors, and disincentivizes the public from engaging with the EDR process. Furthermore, the lack of specialized judges increases the chances of the law being misapplied or applied differently between cases.<sup>147</sup>

Looking at the benefits of open justice, in the Philippines, interlocutors observed that better communication by COMELEC with the public could be a way to boost the acceptance of electoral results. In relation to a controversial case involving allegations of vote miscounting in the vice-presidential contest: “If we had better communication initiatives explaining to the people the process of how they can verify and audit the votes, it would have made it easier for people not doubt the election results.” The general public’s ability to track the status of ongoing cases happens via updates posted manually to the COMELEC website. This avenue of communication is not foolproof, as the IT Department has no way of independently knowing if a case update has occurred in order to track whether or not it has been posted to the website, relying instead on the departments to notify them. There are no current plans to link the case management system to the public posting of information, and while lengthy legal decisions are written by commissioners, they are not publicly available. Nothing prohibits parties to the case from releasing a decision to the general public after they receive it, though this is rarely done in practice, except occasionally by politicians who wish to publicize their legal victories.

## VI. Conclusions

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As noted at the outset of this paper, public perceptions about the results of an election have tremendous implications for the peaceful transfer of power and the viability of governing institutions, particularly in fragile and transitional contexts. Tom Tyler’s research on citizen interaction with legal authorities – referenced at the outset of this paper – ultimately found seven underlying dimensions to perceptions of fairness: opportunity for representation, quality of decision, the honesty, ethicality and motivation of the authorities, lack of bias of authorities, and opportunities for correction.<sup>148</sup> Looking at two of these dimensions in particular – the quality of decisions being made, and the opportunity for correction – and applying them to the EDR context, any dismissal of complaints on procedural grounds without any opportunity to correct a claim, or any failure to provide a well-reasoned decision, may not only impact perceptions of fairness, but also the legitimacy of the EDR body and the legitimacy of any remedy provided. Hence, if a court or tribunal concludes an electoral dispute by affirming or overturning electoral results, but fails to ensure procedural justice during proceedings, and/or operates without high levels of transparency, the legitimacy of the judgment – and by extension the acceptance of election results – may be undermined.

Analysis of the component parts of procedural justice and open justice demonstrates a variety of strengths and opportunities for EDR institutions in the six countries examined. The principles of fairness, efficiency, effectiveness and transparency necessarily intertwine and occasionally conflict, but a balance

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<sup>147</sup> Democracy Reporting International, *The Competency of the Administrative Jurisdiction in Tunisia* 18 (2017).

<sup>148</sup> Tom R Tyler “What is Procedural Justice: Criteria used by Citizens to Assess the Fairness of Legal Procedures” (1988) 22 *Law & Society* 103, 128.



between all four of these elements is essential to procedural justice and open justice. These elements are mutually reinforcing and individually required. In working to achieve this balance, adjudicators must respect and uphold all of the principles, and not pick and choose those that they want to focus on or can deal with. In addition, EDR laws and practices should be consistently applied across different types of cases, different complainants, and different jurisdictions, and there should be a focus on what the EDR process produces – not simply the process itself. That is, the process must be set up and administered in such a way that it provides an effective avenue for redress in practice. All of these factors will affect the experience of individuals accessing the EDR process, and general perceptions of the credibility of the process, the body administering it, and the outcomes it produces.

As illustrated by the comparative country studies, case management practices and platforms can help strike a balance between the different and interlinked elements of procedural justice and open justice. For example, a case management platform can help adjudicators manage their process to meet deadlines, which can assist with providing an expeditious process and protecting procedural justice; it can help make sure parties have adequate notice of a claim, where the claim resides in the legal system, when hearings will take place, what complaints have been filed, and the ultimate disposition of each case. In addition, as we have seen in several of the countries examined, a case management platform can also support open justice principles by, for example, providing automatic case reports that can be publicly available in a timely manner, and releasing well-reasoned decisions to the public. These practices and platforms should be encouraged and adopted by institutions responsible for resolving electoral disputes.

Election arbiters face enormous responsibilities and challenges as election litigation increases. In an intensely political environment, and within the pressured and time-critical context of elections, EDR can often be seen as a last priority, particularly for EMBs who are also shouldering significant election administration responsibilities. It can also be an extremely difficult task to balance all the different components of procedural justice and open justice in a way that ultimately ensures a just and transparent process for all litigants. However, in spite of all of this, elections are about fundamental rights, and where there is a right there must be a remedy. As such, the right to vote and to stand for election must be protected by a complaint adjudication process that is fair, efficient, effective and transparent. This will, in turn, provide the EDR body with the public trust and legitimacy necessary to deliver decisions that are respected and – ultimately – contribute to the acceptance of election outcomes.

## **ANNEX I. Case Management Recommendations Checklist**

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*Below is a simple, non-exhaustive checklist to determine whether an EDR case management system is ensuring a fair, efficient, effective and transparent EDR process.*

### **Fairness**

- ✓ Do specific procedures exist for electoral disputes?
- ✓ Are there provisions and mechanisms in place for notifying a respondent of a complaint?
- ✓ Are there provisions and mechanisms in place that provide an opportunity for a respondent to prepare a defense or response?
- ✓ Do the rules of procedure and case management process provide for an investigation process to ascertain the facts of the case?
- ✓ Does the case management process allow for hearings to be scheduled to provide parties with an opportunity to present arguments?
- ✓ Does the case management process facilitate the development of a written, reasoned decision on the dispute?

### **Efficiency**

- ✓ Are reasonable deadlines in place for the filing, adjudication, and disposition of different types of electoral disputes and complaints?
- ✓ Do deadlines allow for proper investigation, adjudication, hearings, and decision-writing in practice?
- ✓ Does a case management system and platform exist to support the management and disposition of cases within the deadlines?

### **Effectiveness**

- ✓ Are written, reasoned decisions produced and made available to parties to the dispute?
- ✓ Is there a right to appeal a decision or seek judicial review, and is this right factored into deadlines for electoral cases?
- ✓ Are remedies clearly set out for different types of disputes, and are these remedies applied in practice?

### **Transparency**

- ✓ Do parties to a dispute have access to case information in real time as a dispute is being investigated and adjudicated?
- ✓ Does the case management process or platform ensure that information on the number and type of electoral disputes received and adjudicated is made public in a timely and accessible manner?
- ✓ If hearings are conducted, are they open to the public?
- ✓ Are written decisions made publicly available in an accessible format?

## ANNEX II. Example Specifications for an EMB EDR Case Management Platform

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*Below is an example of the types of information that could be tracked within a case management platform to facilitate the provision of procedural justice and open justice. Actual specifications would depend on the country context, legal framework, and adjudicating body.*

### **Case summary:**

- Case title
- Case number
- Type or level of election
- Adjudicating authority
- Date of filing
- Complaint location (if jurisdiction is different from where case is filed)
- Date of complaint registration
- Case category (case related to – for example, boundary delimitation, voter registration, candidate nomination process, campaign / Code of Conduct, campaign finance / abuse of state resources, polling process, counting and/or results, election offence, other)
- Grounds of accusation
- Remedy sought
- Evidence submitted (for example, witness testimony, EMB official documents, Government issued document, photo and/or video, other)

### **Complainant details:**

- Name
- Gender
- Age
- Voter number / ID
- Type of complainant (for example, voter, candidate, party representative, other)
- Contact information

### **Respondent details:**

- Name
- Gender
- Age
- Voter number / ID
- Type of respondent (for example, EMB, commissioner, secretary or CEO, returning officer, candidate, voter, political party, other)
- Contact information

### **Witness details:**

If witnesses are provided, similar information can be captured as for complainant and respondent.

### **Case Status:**

- Date of notice issued to respondent

- Date of response received (more detailed response information can be added in)
- Investigation / inquiry (more detailed information can be added in)
- Interim order
- Summary dismissal
- Date of hearing summons issued / hearing notice provided
- Hearing date
- Hearing summary

#### **Decision**

- Decision: confirm/dismiss
- Date of decision
- Decision summary
- Legal basis
- Remedy / sanction (for example, invalidation, recount, warning, fine, order to remove posters, disqualification of candidate, etc.)
- Referral to police or other EDR body
- Date of decision publication

#### **Appeal**

- Date of appeal
- Appeal authority
- Hearing date
- Hearing summary
- Decision type (invalidation, recount, fine, warning, referral to another court)
- Date of appeal decision
- Appeal decision
- Remedy/sanction

#### **Type of searches, reports and statistics that could be produced**

- Search engine (by petitioner's name or case title or adjudicating authority or by case number)
- Database view (by some or all case management variables)
- Graphical view (for example - by complainant type, by respondent type, by election, by case category, by court, and by verdict)



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