

Election Watch X

Produced by the Institute for Public Policy Research (IPPR)

Issue No. 3 2014

EFFECTIVE DISPUTE RESOLUTION STRENGTHENS ELECTORAL RIGHTS

Electoral disputes have become a common feature on the Namibian electoral landscape, not only at national level – where both the 2004 and 2009 national elections ended up in long-drawn out court disputes – but at sub-national levels as well. This has raised questions around what mechanisms are in place to adjudicate electoral disputes and how their functioning affects the realisation of electoral rights in Namibia.

Namibia has established specific provisions in its Constitution and domestic law to promote electoral and participatory rights by allowing any legal person to bring a challenge to a court against any electoral act or decision that it considers to be in violation of those rights. An efficient electoral dispute resolution mechanism therefore plays an important role in the realisation of those rights.

The case brought by opposition parties to contest the November 2009 National Assembly elections highlighted the need for Namibia to implement a more efficient system to resolve electoral disputes and realise electoral rights. Opposition parties approached the High Court to request that the elections be nullified and the results be set aside/and or recounted because of numerous alleged irregularities which included corruption and un-procedural election practices. The case ultimately reached the Supreme Court and was dismissed.

First and foremost the case highlighted the delays associated with High Court and its ability to consider cases and deliver judgements in a timely manner. The High Court decision was handed down after parliament that had been elected had already been in office for a period of 16 months and the final decision of the Supreme Court was only delivered in October 2012 – nearly three years after the disputed election. During this period MPs had been chosen and legislation had been passed in parliament. Had the court decided to uphold the request to declare the elections null and void, it would have created a multitude of constitutional problems.

Part VII of Namibia's Electoral Act allows for the High Court to accept applications of complaint within 30 days of the results being

declared. It also provides the timeframes and procedures to be followed when lodging a complaint. The current legal framework does not, however, provide for a specific timeframe within which courts need deliver judgements with regard to election disputes. Because regular courts are tasked to resolve electoral disputes, these cases need to be prioritised on the roll of the court. It is imperative that decisions are made before an elected body comes into office so that the dispute resolution framework provided for in the Act is efficient. The issue of time delays will continue to be an obstacle for parties who want to challenge the legitimacy of elections in the future if it is not effectively



resolved.

The High Court judgement highlighted the problems associated with the procedural requirements of an application to the High Court. The Court initially held that the application lodged by the opposition parties be struck from the roll because it did not comply with the statutory requirements of Article 110(2) and 110(3) of the Electoral Act. The rules of procedure to bring claims to the High Court and the statutory requirements of Part VII of the Electoral Act provide a platform where cases can be dismissed on technical grounds. It could therefore be argued that the case lodgement dispensation of the High Court is not conducive to the exceptional circumstances of electoral disputes.

Ways forward

Effective electoral justice mechanisms can play a vital role in Namibia's democratic process as they can ensure that each action, procedure, and decision of the electoral process complies with the law. Such systems

will also uphold the rights of the Namibian citizenry to have access to remedies when their electoral rights have been violated. A sound system should be able to prevent and identify irregularities in the electoral system and be able to provide appropriate mechanisms for correcting these irregularities.

Namibia's legal framework provides that electoral disputes should be resolved in the High Court. South Africa, for example, established the Independent Electoral Commission (IEC) which is empowered to adjudicate electoral disputes. The Electoral Court oversees the Electoral Commission and has jurisdiction in respect of all election disputes and complaints. It is a court of last resort and

has the same status as that of the Supreme Court. This ultimately means that the High Court and the Supreme Court do not have to consider any electoral disputes and the time delays associated with these courts do not affect the resolution of these disputes. Tasking the adjudication of these cases to a separate body makes the whole process more efficient.

The Electoral Commission of Namibia (ECN), which is the electoral management body of Namibia, has various functions such as to control and supervise elections fairly and impartially; to

register voters; to compile and publish voters' rolls; to register political parties; and to supervise, direct control and promote voter education on elections. Empowering the ECN to deal with election disputes would allow for the Commission to deal with disputes as they arise and avoid the associated time delays of the current system.

The time frames for electoral challenges should also be expressly defined in the legal framework of an electoral dispute resolution mechanism. That is because if a challenge is upheld, there needs to be time to implement a remedy that will efficiently remedy the violation. In Guatemala, the Supreme Court must deliver a judgement within three days when a party challenges election results and the Constitutional Court has five days to rule on an appeal. Some statutes have not included a specific time frame for a resolution to election results challenges, but rather provide that it must be resolved before an elected body takes office.

No 'one size fits all system'

Argentina

- Legislative and presidential elections disputes are resolved by a mixed legislative-administrative election dispute resolution (EDR) system
- All other electoral actions and decisions can be challenged before the National Electoral Chamber which is part of the judicial branch
- The final decision on the validity of elections is made by a political organ or assembly when the respective election boards have ruled on any challenge brought against the results
- National Congress resolves disputes regarding the direct election of the president or vice-president

Germany

- EDR system is run by parliamentary committee composed of 9 members of parliament and 9 deputies
- Members of committee are chosen by the parliament as a whole
- Committee is representative of the party composition of the current parliament
- All decisions are subject to appeal to the Constitutional Court
- Complaints can only be filed after the elections are over and the parliament has been formed, including pre-electoral challenges

Colombia

- The Council of State is an independent administrative law court with full jurisdiction to annul, rectify or modify decisions made by the election monitoring body, the National Electoral Council
- Any citizen can bring a challenge before the Council of State against actions and decisions of the independent
- Challenges can be related to the general vote count in any national election and the declaration of results

Adapted from Electoral Justice: The International IDEA Handbook 2010

ABOUT ELECTION WATCH

Election Watch is a bulletin containing electoral analysis and voter education, that will appear regularly in the run up to the 2014 National Assembly and Presidential Elections. It is produced as a PDF download and as a printed newspaper insert. Election Watch is a project of the Institute for Public Policy Research (IPPR). It is produced with the support of the European Union, Canadian Fund for Local Initiatives (CFLI) and *The Namibian* newspaper. The content of this edition of Election Watch was written and compiled by IPPR Research Associate Nelago Amadhila and IPPR Executive Director Graham Hopwood. The content of Election Watch is the sole responsibility of the IPPR.

Comments and feedback should be sent to the IPPR, PO Box 6566, Windhoek, Namibia.
Tel: (061) 240514; fax: (061) 240516; email: info@ippr.org.na. For more on Election Watch check <http://www.electionwatch.org.na>

THE AFRICAN UNION AND ELECTIONS

African Charter on Democracy, Elections and Governance

Chapter 7 of the African Charter on Democracy, Elections and Governance highlights the commitments made by member states of the African Union on the subject of democratic elections. Namibia has signed, but not ratified this Charter. Through its signature, Namibia accepted the following relevant article:

ARTICLE 17

State parties reaffirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's declaration on the Principles Governing Democratic Elections.

To this end, State Parties shall:

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

OAU/AU Declaration on the Principles Governing Democratic Elections in Africa

The AU Declaration on the Principles Governing Democratic Elections in Africa was adopted by the Assembly of Heads of State and Government at the 38th Ordinary Session of the Organization of African Unity on 8 July 2002 in Durban, South Africa. The Heads of State declared and reaffirmed the principles of democratic elections and committed to establish measures based on these principles:

III: Responsibilities of Member States

We commit our Governments to:

- a. take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of our respective countries;
- b. establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters, compilation of voters' registers, etc would be addressed;
- c. establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
- d. safeguard the human and civil liberties of all citizens including the freedom of

- movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes;
- e. promote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;
- f. take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security,;
- g. ensure the availability of adequate logistics and resources for carrying out democratic elections, as well as ensure that adequate provision of funding for all registered political parties to enable them organise their work, including participation in electoral process,;
- h. ensure that adequate security is provided to all parties participating in elections;

- i. ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/or other observers/monitors;
- j. encourage the participation of African women in all aspects of the electoral process in accordance with the national laws.



Kenya: the perils of lacking an effective dispute resolution system

Kenya's 2007 post-election violence demonstrated how the absence of an effective electoral dispute system could lead to conflict. The legal framework at the time provided that electoral challenges be resolved solely in the High Court. Various disputes arose at all the stages of the electoral cycle. The process of nominating candidates, for example was challenged by various parties. Complaints were submitted to the Electoral Commission of Kenya (ECK) which did not have any powers to hear these cases and could not offer any resolution to these challenges. A large number of the cases brought to the court were dismissed on the grounds that parties while others were only resolved long after the candidates had been gazetted.

It is therefore not a surprise that the system was not able to adequately resolve the disputes that arose during and after the 2007 elections. The Kenyan Constitution provided that challenges to the presidential and parliamentary elections would only be determined after the results had been declared. The constitution also provided that electoral disputes were to be expedited in the court but this did not guarantee a prompt resolution. A legally empowered tribunal or specialised court

could have dealt with disputes as they arose and would have been able to resolve disputes in a practical and quick manner.

Kenya's electoral dispute resolution system has since been reformed. The Election Act of 2011 established the Independent Electoral and Boundaries Commission (IEBC) and the Political Parties Dispute Tribunal (PPDT) to deal with disputes that arise during the nomination of candidates and other electoral offences. Disputes that arise from the declaration of results and election petitions are solely adjudicated by the courts. Disputes brought to the PPDT must be determined within a period of three months and the decisions of the Tribunal can be appealed to the High Court. The law also requires the exhaustion of internal mechanisms of resolving disputes within parties before the questions can be brought to the Political Parties' Tribunal, followed by the IEBC.

Observers have suggested that the legal framework is complex and involves multiple channels for appeals on electoral issues. Despite this, it can be said that the reforms have increased Kenya's capacity to effectively deal with electoral disputes through various judicial bodies.

Electoral Justice and the Electoral Cycle

Electoral disputes do not only arise during or after the electoral process. Parties bear the right to lodge a complaint at any period during the electoral cycle. An electoral dispute system needs to provide mechanisms to ensure that all electoral

actions and decisions in the different periods of the electoral cycle comply with the law. An efficient system must be able to provide mechanisms that deal with challenges that may arise from:

Pre-Electoral Process

- Decisions related to electoral district boundaries
- Updating of voter registration
- Information on the electoral process
- Determinations on whether to grant, reject or cancel the registration of political parties

Electoral Process

- The nomination or registration of lists of candidates
- The conduct of the campaign
- The distribution and placement of polling stations
- The appointment of polling officers
- The accreditation of election observers
- Process of voting
- Vote count
- Announcement and publication of results

Post-Electoral Process

- Political parties' funding and how they were used
- Reviews of the declaration of candidates' campaign expenses
- reviewing boundaries of electoral districts



Principal Electoral Rights

- Right to political association for electoral purposes
- Right to run for elective office
- Right to vote
- Right to freedom of expression of expression, freedom of assembly, petition and access to information related to political-electoral matters
- Political right to participate in the conduct of public affairs, directly or by means of representation

ENDING ABSURDITY

Namibia urgently needs to introduce a system for resolving electoral disputes that does not risk constitutional chaos.

The opposition court case against the result of the 2009 elections took almost three years to resolve – with the final judgement only being handed down by the Supreme Court in 2012.

The body elected by that election had started operating in March 2010 and in that time had passed numerous bills and motions, including laws that extended the terms of office for Electoral Commissioners, enabled the President to appoint Regional Governors and perhaps most fundamentally had set the spending levels for government in Appropriation Acts. So what would have happened if the Court had ruled that the election was null and void? Would all the sitting MPs have to be deseated? Would the legislation passed have any legitimacy?

None of the legal pundits had a clear answer. In such a scenario a constitutional crisis would appear to be inevitable. The only hope would be that the judges provide some path out of the legal quagmire by advising on the legitimacy of the previously elected body and on any transitional arrangements leading up to a new election. Because of the sheer confusion arising from a decision to delegitimise the sitting National Assembly, the common sense view would be to accept its decisions even though it may have been incorrectly, even corruptly, elected. But whether this would hold up legally is anybody's guess.

Such debates may seem academic in Namibia where the ruling party has won with 75 percent or more of the vote since 1994, but we cannot always presume that the winner will be that clear-cut. Hence we need a system that fairly and efficiently resolves disputes whether the margin of victory is large or small.

There are several aspects of the current system that have effectively landed us in uncharted waters holding the perils of constitutional chaos. First of all we have a system that demands those bringing election applications act within strict time limits, while the High Court seemingly has until eternity to hand down a final ruling. This is essentially because an election dispute is treated like any other High Court case and is therefore subject to numerous possible delays and a lengthy period while arguments are assessed and judgement reserved. Even then, as we know all too well from current experience, the case can go to appeal not just once but several times for rulings before there is final clarity. In addition all the costs associated with protracted High Court cases have to be borne by the various parties to the dispute. The unintended consequence is the possible bankruptcy of political parties just because they decide to take an election grievance to court.

Many countries around the world do use their regular court systems to hear electoral disputes, but the results are rarely satisfactory because of the time delays involved. In Africa Ethiopia, Tanzania and Uganda, as well as Namibia, rely on this method. There is always a risk that the Court will only come to a final opinion after the elected body has taken up office. Sometimes cases citing election regularities are thrown out because the time is not available to hear them and they risk upsetting the constitutional order.



Increasingly, however, countries are adopting systems in which a separate electoral court deals with election disputes. Sometimes these courts are staffed with dedicated judges and run almost as a special division of the High Court or Supreme Court. In other countries the electoral court is autonomous from the judiciary, legislature and executive. The electoral court option is often seen as a Latin American model with several of the countries that shifted to democracy during the 'third wave' of democratisation in the 1980s and 1990s using the system. In South Africa the Electoral Court has the status of the Supreme Court. Its members are appointed by the President upon the recommendation of the Judicial Service Commission and must include three judges and two other citizens. It must deal with cases quickly and appeals

against decisions of the Independent Electoral Commission have to be decided on within three days. In most of these countries the electoral court gives a final ruling in a limited timeframe. Some of these bodies are headed by judges while others have specially selected members. Dedicated electoral courts can either operate permanently or temporarily during the relevant times of the electoral cycle, but they do need adequate funding to operate properly. Perhaps the key aspect of electoral courts is that they can operate intensively to make decisions in shorter timeframes than normal courts. The judges that head them are able to put in long hours because they are free of other

cases. Electoral courts can set reasonable deadlines within the legal process and deliver judgements expeditiously and not after the elected body has already been installed in office. They can also relax rules for admission of evidence. Instead of affidavits and evidence being ruled out of order on technicalities a specialised court can minimise formal requirements. Hence an affidavit will not be rejected because it is phrased incorrectly. It can also ensure that parties' costs are reasonable and that any bonds or guarantees required do not undermine access to electoral justice.

In order to entrench the independence, credibility and functionality (particularly the funding) of such courts, a constitutional amendment may be needed on top of changes to the electoral law. Electoral courts are not the only game in town, but they are increasingly being seen as the most effective means of resolving electoral disputes. There are also other possibilities of setting up pre-court arbitration systems, making it possible for the Supreme Court to hear cases immediately and directly, or installing a new constitutional body to deal with conflicts.

There is no magic formula for resolving electoral disputes. Each country should come up with its own system depending on its legal traditions, its political culture and quite simply what works best in practice.

But in order to avoid a *deja vu* experience after the 2014 elections it is important that Namibia gets down to the business of discussing a way forward now.

**For more on election dispute resolution mechanisms see 'Electoral Justice: The International IDEA Handbook' which can be downloaded from <http://www.idea.int>*

CODE OF CONDUCT FOR POLITICAL PARTIES

An essential part of free and fair elections is freedom of political campaigning. Everyone has the right to express his or her political convictions and ideas, without threat or fear of intimidation. Freedom of political campaigning, however, also carries responsibilities which include the freedom of others to express their own and independent opinion.

The Namibian political parties, associations, organisations and independent candidates subscribe to the following voluntary code of conduct

- Intimidation, in any form, is impermissible
- No weapon of any kind, including any traditional weapon, may be brought to any political rally, meeting, march or other demonstration
- Parties shall avoid holding rallies, meetings, marches or demonstrations physically

cally close to one another during the same time of the day

- Parties shall refrain from utilising public address system, either fixed or mobile between 21h00 and 07h00 hours and which could constitute a public nuisance
- Speakers at political rallies may not use language which incites violence in any form against any other person or group of persons. Parties will not issue pamphlets, newsletters or posters which contain materials which incite people to violence
- Party members and supporters will not seek to obstruct other persons from attending the political rallies of other parties
- Party members and supporters will not disfigure or destroy political or campaign materials of other parties
- Party leaders will use their good offices to

seek to ensure reasonable freedom of access by all political parties to potential voters, including those at farms and on state owned properties, outside working hours

- Parties will establish lines of communication to one another at headquarters, regional and local levels, and will appoint liaison personnel who will be constantly on call to deal with problems that may arise
- The Director of Elections will meet party representatives on a weekly basis to discuss all matters of concern related to the election campaign and the election itself. Emergency meetings will be convened as and when necessary
- Designated members will attend their parties' rallies to ensure compliance with this Code

- All allegations of intimidation and other unlawful conduct in the election campaign will be brought to the attention of the Police and to the attention of Directorate of Elections at the place where they are alleged to have occurred
- Party leaders will issue directions to their members and supporters to observe this Code of Conduct, and take all other necessary steps to ensure compliance.
- The Electoral Commission of Namibia and party leaders undertake to publicise this Code of Conduct throughout Namibia by all means at their disposal
- Parties will in their advertising and propaganda efforts take care not to disfigure the environment.

This is the code from the 2009 elections. It may be changed or replaced during 2014

WHAT IS THE IPPR?

The Institute for Public Policy Research was established in 2001 as a not-for-profit organisation with a mission to deliver, independent, analytical, critical yet constructive research on social, political and economic issues which affect development Namibia. The IPPR was established in the belief that development is best promoted through free and critical debate informed by quality research. The IPPR is independent of government, political parties, business, trade unions and other interest groups and is governed by a board of directors consisting of Monica Koep (chairperson), Bill Lindeke, Graham Hopwood, Ndiitah Nghipondoka-Robiati, Daniel Motinga and Justin Ellis.

Anyone can receive the IPPR's research free of charge by contacting the organisation at 14 Nachtigal Street, Windhoek; PO Box 6566, Windhoek; tel: (061) 240514; fax (061) 240516; email: info@ippr.org.na. All IPPR research is available at <http://www.ippr.org.na>. Material related to Election Watch is available at <http://www.electionwatch.org.na>

Prevention of Electoral Disputes

An electoral justice system (EJS) has to establish measures to prevent electoral disputes. There are several measures that by which electoral disputes can be prevented. These measures are generated both externally and internally of the EJS.

External Sources (Outside of the EJS):

- Designing and implementing appropriate constitutional and statutory framework for democratic and representative government, human rights and electoral process
- Participation political parties and key sectors of society in designing or reforming the electoral legal framework
- The development of political culture and civic education
- The development of pluralistic political party system and internal democracy in political parties
- Gender and minority inclusiveness in government and the political arena
- The establishment of equitable conditions for elections, particularly with regard to financing and media access
- Development of the role of civil society, including its ability to monitor all stages of the electoral process
- The adoption of codes of conduct by the media, civil society, election observers and political parties
- Establishing a professional inclusive election monitoring board (EMB)
- The adoption of appropriate election procedures by the EMB

Internal Sources (Inside the EJS):

- Designing and implementing an appropriate constitutional and statutory framework for an accessible and effective electoral justice system (EJS)
- Appointment of members of the EMB and electoral dispute resolution mechanism (EDRM) at the highest level by consensus among the various political forces active in society, especially those represented in the legislative body
- An EMB and EDRM committed to democratic principles and values, especially those of independence and impartiality
- The ability of the EMB and the EDRM to make transparent decisions and willingness to explain and disseminate them
- Appropriate electoral training for EMB and EDRM staff
- The adoption of codes of conduct by the staff of the EMB and EDRM
- Gender and minority inclusiveness in the EMB and the EDRB
- The adoption security measures for receiving, counting and tallying the vote

Electoral Dispute Resolution Systems (EJS)

An electoral justice system (EJS) is a set of mechanisms within a specific jurisdiction that ensures and verifies that electoral actions, procedures and decisions comply with the legal framework of a state. When an electoral dispute arises, the EJS is meant to provide a mechanism that would allow for the affected party to bring a claim to a competent electoral dispute resolution body. Parties should be able to request that the competent body grant a remedy for the irregularity such as an annulment of the election or a modification of the result, depending on what is pro-

vided for in the legal framework.

Electoral dispute resolution mechanisms (EDRM) need to be independent and impartial for them to operate efficiently. They should also be transparent, accessible and inclusive if they are to be accepted as credible and legitimate tools for electoral justice. These mechanisms need to adhere to the fundamental principles of constitutionality, legality and judicial independence. Election disputes are resolved through procedural legal instruments which are provided for by the law.

State Obligations for Electoral Dispute Resolution in Democratic Elections

1. Right to an effective remedy

Individuals are entitled to an effective remedy for acts that violate their electoral and participatory rights. When a remedy is granted, it must be enforced and must provide adequate redress for the alleged violation. States are obligated to investigate alleged violations of electoral and participatory rights to give effect to an effective remedy.

2. Non-discrimination and equality before the law

All are equal before the law and are entitled to the equal protection of the law without discrimination. All persons are also equal before courts and everyone shall have access to the courts without any unreasonable restrictions or discrimination.

3. Right to a fair and public hearing

Everyone has the right to a fair and public hearing in the determination of his or her rights. Everyone should be guaranteed access to a competent, impartial and independent court/tribunal at least at one stage

of the proceedings. A fair hearing is expeditious, free from influence and open to the public.

4. Access to information

Everyone has the right to seek and receive information, which includes information about how to file complaints, essential information about the findings, evidence presented and the legal reasoning of the court.

Source: *Electoral Dispute Resolution Discussion Paper. Experts Meeting, Atlanta GA – February 2009*

THE CONSTITUTION OF NAMIBIA AND ELECTORAL RIGHTS

The Namibian Constitution reflects fundamental human rights and freedoms. Article 5 of the Constitution explicitly provides that the rights and freedoms expressed in the Constitution should be upheld by the executive, legislature and judiciary and shall be enforced by the courts. The establishment of an effective electoral dispute resolution system can play a vital role realising these fundamental rights. A poor system would limit the ability for parties to access mechanisms that could remedy the violation of their electoral rights.

Article 17(1) provides that all citizens have the right to participate in peaceful political activity intended to influence the composition and policies of the government. All citizens also bear the right to form and join political parties and to participate in the conduct of public affairs through freely chosen representation. Article 17(2) provides for the right to vote. These provisions reflect international and regional human rights norms, specifically the right to participation and electoral rights.

Article 25(2) of the Constitution provides that aggrieved persons who claim that a fundamental right or freedom that has been guaranteed by the Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom. Article 25(3) provides that the competent court shall have the power to make such orders necessary and appropriate to secure these rights if they are found to have been unlawfully denied or violated, or that ground exist for the protection of such a right by interdict.



Find us on Facebook



www.facebook.com/electionwatchnamibia

Follow us on Twitter



twitter.com/electionwatchnamibia

ELECTION WATCH IS SUPPORTED BY THE

The European Union



THE FREE PRESS OF NAMIBIA (PTY) LTD



still telling it like it is!

Activity supported by the Canada Fund for Local Initiatives
Activité réalisée avec l'appui du Fonds canadien d'initiatives locales

