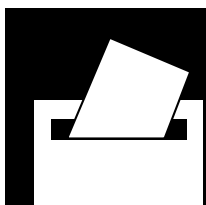




Electoral Law Reform in Africa

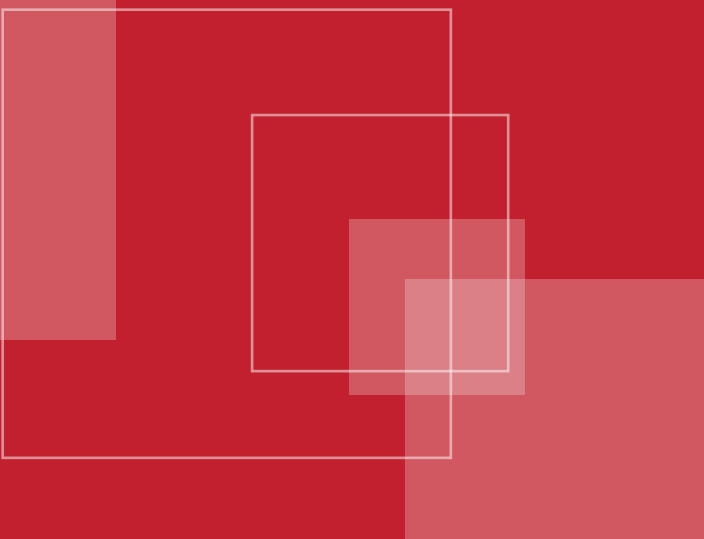
Insights into the Role of EMBs and Approaches
to Engagement

PolicyPaper
October 2014





Electoral law reform processes present EMBs with a series of dilemmas. To begin with, EMBs need to determine whether they should engage in such processes. ... if EMBs opt to engage, which principles ought to guide their involvement, and how could such principles be integrated into the daily work of the EMB on law reform issues? Considering that electoral law reform processes are both political and technical in nature, how should EMBs manoeuvre in this sphere?



International IDEA at a glance

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

The objectives of the Institute are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy.

What does International IDEA do?

The Institute's work is organized at global, regional and country level, focusing on the citizen as the driver of change. International IDEA produces comparative knowledge in its key areas of expertise: electoral processes, constitution building, political participation and representation, and democracy and development, as well as on democracy as it relates to gender, diversity, and conflict and security.

IDEA brings this knowledge to national and local actors who are working for democratic reform, and facilitates dialogue in support of democratic change.

In its work, IDEA aims for:

- Increased capacity, legitimacy and credibility of democracy
- More inclusive participation and accountable representation
- More effective and legitimate democracy cooperation

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, the Institute has offices in the Africa, Asia and the Pacific, Latin America and the Caribbean, and West Asia and North Africa regions.



International IDEA resources on electoral processes



© International Institute for Democracy and Electoral Assistance 2014

International IDEA publications are independent of specific national or political interests. Views expressed in this publication do not necessarily represent the views of International IDEA, its Board or its Council members.

Applications for permission to reproduce or translate all or any part of this publication should be made to:
International IDEA
Strömsborg
SE -103 34 Stockholm
Sweden

International IDEA encourages dissemination of its work and will promptly respond to requests for permission to reproduce or translate its publications.

The electronic version of this publication is available under a Creative Commons Licence Copyright (CC) — Creative Commons Attribute-NonCommercial-ShareAlike 3.0 Licence. You are free to copy, distribute and transmit the publication as well as to remix and adapt it, provided it is for non-commercial purposes, that you appropriately attribute the publication, and that you distribute it only under a licence identical to this one. For the full conditions of this CCI, see: <<http://creativecommons.org/licenses/by-nc-sa/3.0/>>.

Graphic design by: Turbo Design, Ramallah
Printed by: Bulls Graphics, Sweden
ISBN: 978-91-87729-77-5

Contents

Key recommendations.....	2
Executive summary	3
1. Introduction.....	5
2. The electoral law reform environment.....	7
Trigger factors.....	7
The relevance of politics	11
3. EMB roles	13
Formal mandate.....	13
Role in practice and scope of work.....	13
4. EMB approaches.....	15
Activities.....	15
Relationships	20
5. Challenges and risks.....	28
Challenges	28
Risks.....	29
6. Recommendations for EMBs engaging in electoral law reform.....	32
References and further reading	34
Acronyms and abbreviations.....	35
Acknowledgements.....	36

Key recommendations

- 1 Give priority to engagement in thorough post-election review processes:** Electoral management bodies (EMBs) ought to use post-election review processes as a window of opportunity to identify and analyse the need for electoral law reform.
- 2 Establish clear plans and timelines for EMB engagement:** EMB engagement in the area of electoral law reform requires careful planning and conscious consideration of timelines. Planning may also entail reflections regarding when, and under what circumstances, an EMB should withdraw from the reform arena altogether.
- 3 Ensure that adequate and timely funding is in place:** EMBs need to engage closely with their respective government and parliament and, where appropriate, with assistance providers and donors to ensure that adequate funding is in place to implement the EMB's plan of engagement in a given electoral law reform process.
- 4 Undertake research to ensure adequate knowledge/capacities:** It is essential that EMBs that are engaged in the area of electoral law reform are thoroughly informed regarding the subject matter.
- 5 Involve stakeholders by organizing wide-ranging and inclusive consultations:** EMBs need to engage in consultations with a broad range of stakeholders to promote credibility—based on mutual trust, cooperation and transparency—of the electoral law reform process and of its outcome.
- 6 Work closely with interparty platforms:** Interparty platforms offer a valuable entry point for EMB relations with political parties on issues that concern electoral law reform. By providing a space for politicians to informally meet, discuss and identify shared positions, interparty platforms may provide EMBs with solid ground to resolve issues related to a particularly important stakeholder constructively and collaboratively.
- 7 Engage regularly with decision-makers:** EMBs should engage closely with their respective government and parliament to promote and nurture political commitment to reform processes.
- 8 Stay neutral—and be perceived as such:** The issue of electoral reform is a politically sensitive matter. EMBs need to navigate carefully when engaging in a reform process to avoid situations in which they are perceived by one or the other party as taking sides.
- 9 Incorporate a gender perspective:** When working in the area of electoral law reform, EMBs need to incorporate a gender perspective at both the process and the outcome levels.
- 10 Remain true to fundamental principles:** Electoral reform processes ought to be guided by an overarching concern to protect and promote the electoral rights of citizens.

Executive summary

Electoral management bodies (EMBs) generally play a key role in electoral law reform processes. While acknowledging that electoral law reform can only be realized within a framework agreed with the government and the legislature, EMBs have crucial expertise and hands-on experience regarding election-related matters, as well as an extended network of partners that are relevant for legal review processes.

The overall goal of this policy paper is to provide guidelines for EMB engagement in the area of electoral law reform processes. Following a brief introduction to the issue at hand, the paper discusses the electoral law reform environment before exploring EMB roles and approaches, as well as challenges and risks linked to EMB involvement. The paper concludes with a set of ten elaborated recommendations intended to guide EMB engagement on issues concerning electoral law reform in Africa.

Research carried out for this paper shows that EMBs in Africa have played an important role in electoral law reform processes on the continent through, among other things, review, research, consultative processes and advocacy. Based on more than two decades of experience, there are important best practices and lessons learned to be extracted from the work that has been carried out to inform and guide the future engagement of EMBs in this area.

First and foremost, EMBs need to ensure that they have sufficient capacities to engage effectively in law reform processes. In simple terms, such capacities can be divided into human and financial resources. EMB decisions to get involved ought to be followed by consciously thinking about the need for the internal redistribution of resources and possibly also contemplating the pros and cons related to working with external actors such as electoral assistance providers and donors.

Provided that sufficient capacities are in place, EMBs can engage in a wide variety of activities, e.g. organize post-election review processes and consultations, carry out targeted and comparative research, etc. To effectively gather views on challenges that need to be addressed, explore alternatives for change and promote reform among key decision-makers, EMBs ought to maintain a good relationship and work closely with a broad range of stakeholders such as political parties, civil society, media institutions, public commissions, etc. In order to promote political will and commitment to the reform agenda, it is particularly important that EMBs consult regularly with the government and the parliament.

EMB engagement ought to be guided by underlying principles related to inclusiveness, neutrality and transparency. Broad consultations and inclusive participation of typically marginalized groups, such as women and ethnic or religious minorities, to name a few, are essential for electoral reform processes. Furthermore, it is crucial for EMBs to preserve their neutrality in such processes. Electoral reforms are sensitive matters, and perceptions of EMB partiality could jeopardize the outcome of any reform process. Closely linked to this, transparency—including information sharing—is key to ensuring that EMB engagement is well perceived by all stakeholders.

In order to promote the overarching goal of enhancing the integrity of elections, EMB recommendations on law reform need to be guided by fundamental principles related to the right of every citizen to participate in political life, as well as to cast a vote in elections that are genuine, credible and peaceful.

1. Introduction

Electoral reform is an integral part of democratic development. In broad terms, electoral reforms are undertaken to improve the electoral process by promoting the electoral rights of citizens and by operationalizing key principles such as impartiality, inclusiveness, transparency, integrity and accuracy. Continuous reflection, reform and adaptation of the legal framework governing electoral processes that are based on experiences, reviews and assessments are necessary in both old and new democracies.

What is electoral reform?

International IDEA's handbook on electoral management design (2014a) divides electoral reforms into three categories:

- Political
- Administrative
- Legal

Political electoral reform refers to changes in the political environment that an EMB operates within, e.g. reforms that bestow more autonomy on EMBs. Administrative electoral reform involves changes that are related more to the day-to-day work of an EMB, such as the introduction of new strategies, policies and structures. Finally, legal electoral reform refers broadly to changes to the constitution, electoral laws and rules and regulations.

Falling under the latter category, electoral law reform explores changes to constitutional provisions and election-related legislation, including not only laws pertaining exclusively to elections but also laws closely associated with elections such as political party laws, media laws, etc. Notably, electoral law reform requires parliamentary consent to take effect or, alternatively, is passed by government decree.

Electoral law reform processes present EMBs with a series of dilemmas. To begin with, EMBs need to determine whether they should engage in such processes. EMBs are first and foremost mandated to manage elections. In Africa, most EMBs lack formal directives to be involved in law reform. At the same time, EMBs possess valuable information about how electoral laws work in practice, and have an interest in ensuring that an adequate legal framework is put in place to facilitate the organization of elections. Where EMBs choose to get involved, they may also need to consider under what conditions they should withdraw from the reform arena.

Moreover, if EMBs opt to engage, which principles ought to guide their involvement, and how could such principles be integrated into their daily work on law reform issues? Considering that electoral law reform processes are both political and technical in nature, how should EMBs manoeuvre in this sphere?

This policy paper explores EMB involvement in the area of electoral law reform in Africa and aims to provide guidelines for EMB engagement. More specifically, it presents EMBs with key issues that need to be taken into consideration in addition to

hands-on experience and lessons learned from EMBs that have previously undertaken work in this area. It should be noted that the technical details of recommendations and law proposals and the substantive outcomes of reform processes are not addressed in detail. Rather, the paper takes a process-oriented approach that emphasizes key principles of engagement and provides a menu of how such principles can be realized in the preparation and implementation of an EMB electoral law reform engagement plan in terms of activities and stakeholder relations.

The paper is divided into six sections. Section 1 briefly presents the dilemma facing EMB engagement in electoral law reform processes. The second section introduces the environment in which electoral reforms take place, and explores trigger factors and the relevance of political context for reform developments. Section 3 looks into the role of EMBs in electoral law reform processes, focusing on formal mandates as well as engagement in practice. The fourth section provides insights into EMB approaches, with particular emphasis on activities and stakeholder relationships. Issues concerning key underlying principles of EMB engagement are included in this overview. In Section 5, risks and challenges to EMB engagement are explored. Finally, an elaborated version of key recommendations for EMB engagement in electoral law reform processes is outlined in Section 6.

2. The electoral law reform environment

Electoral law reform has been prominent in African politics since the ‘third wave’ of democracy washed over the shores of the African continent in the early 1990s (Huntington 1991). Since then, some countries have made changes to voter registration rules and electoral system design; introduced gender quotas and other affirmative action measures to enhance the participation of typically marginalized groups such as the disabled, young people or ethnic minorities; brought about and amended legal frameworks governing party and campaign finance and out-of-country voting; and adjusted legislation to pave the way for the use of new technologies. In addition, quite a few countries have reformed legislation pertinent to electoral commissions themselves, i.e. in terms of their composition, the appointment of members, their functions and their independence.

Trigger factors

A wide range of trigger factors, and usually a combination thereof, may help an electoral reform process get under way. First and foremost, the failure of an election to deliver acceptable results, often coupled with allegations related to misconduct and fraud, and potential conflict emanating from disputed elections frequently lead to the emergence of reform debates. The list of contested election results in Africa has grown longer and longer over the past years, including, among others, Kenya in 2007 and 2013, Zimbabwe in 2008, Côte d’Ivoire in 2010, the Democratic Republic of the Congo in 2011, Seychelles in 2011, Ghana in 2012, Mali in 2013, Guinea Bissau in 2014 and Mauritania in 2014.

Failed elections are particularly detrimental in post-conflict and transitional countries, where such outcomes can further destabilize a volatile political situation. The announcement of conflicting results by the Independent Electoral Commission and the Constitutional Council in Côte d’Ivoire following the 2010 electoral contest resulted in more than 460 people being killed and 750,000 people displaced due to widespread violence between the two political camps (Carter Center 2011). In countries where a democratic culture is more firmly rooted and democratic practices are entrenched, such situations are more likely to give way to potentially protracted court battles, as was the case in Ghana following the 2012 elections. That said, due to the high stakes involved in elections, seemingly stable democracies are at risk when election results are disputed—the aftermath of the 2007 elections in Kenya is the most serious cautionary tale.

The inadequacy of the existing legal framework and law harmonization efforts are other triggers for electoral reform in Africa. EMBs and stakeholders in the electoral process may discover that the existing framework, due to being created in an incremental manner, is overly complex and possibly also inconsistent, as amendments to various laws have not been harmonized. It may also identify gaps in certain areas that need to be addressed in legal terms. Alternatively, there may be a need to provide clarity to certain aspects or terms.

Electoral violence leads to constitutional and electoral reform in Kenya

Mathieu Merino, Electoral Expert

The 2007 Kenyan elections were marked by violence of such an unexpected intensity that it took national and international observers by surprise. The violence that swept the country for several weeks had a far-reaching impact on the Kenyan social, economic and political fabric. More than 1,200 people were killed and some 600,000 displaced from their homes, and damages of USD 1.5 billion were recorded. The lack of reliability and impartiality of the modalities of election organization (electoral boundaries, registration on voter rolls, the compilation process, and the transmission and verification of results) largely contributed to unleashing the violence. These failures do not, however, fully explain the intensity and the ethnic dimension of the clashes, which must be understood in the context of Kenya's history and social and economic situation.

The Kofi Annan-led dialogue conducted at the start of 2008 to stall the violence and tension resulted in the formation of a coalition government between the main political opponents. In February 2008, the main parties in the electoral dispute signed the Agreement on the Principles of Partnership of the Coalition Government. One of the responsibilities of the coalition government was to spearhead fundamental reforms. Key among these reforms was the enactment of a new constitution, which Kenyans approved by a two-to-one margin in a 4 August 2010 referendum organized in a free and fair manner by the Interim Independent Election Commission.

Following the adoption of the new constitution, the legal framework governing electoral processes was revised in 2011 to include:

- The Elections Act, which deals with the organization and management of elections;
- The Political Parties Act, which is aimed at reforming existing legislation to take into account the consequences of constitutional reforms;
- The Campaign Financing Bill, which is aimed at governing the sources of funding, expenses and expenditure limits for candidates for primary elections; and
- The Independent Electoral and Boundaries Commission Bill, which focuses on the organization and functioning of the Electoral Commission.

Addressing gaps in the existing legal framework represented one of the main triggers for electoral reform in Sierra Leone in 2012 (Conteh 2014). Among other things, there were no specific laws for the organization of referendums or local government elections or for boundary delimitation. In the run-up to the 2014 elections in Malawi, the EMB, in collaboration with international partners, engaged in a reform exercise to harmonize the legal framework governing elections in the country, which had evolved in a piecemeal fashion since 1993 (Patel 2014).

Judicial processes and court cases may also trigger electoral reform. Numerous activities undertaken in the electoral process as a whole may be subject to challenges in the court system. Processes related to, for example, boundary delimitation, registration of parties and candidate lists, campaign conduct, out-of-country voting and accreditation

of election observers represent some examples of areas that may be taken to court. EMBs have on occasion brought new legislation to the courts. In 2002–3, for example, the Independent Electoral Commission of Nigeria took the 2002 Electoral Act to the courts to test the constitutionality of certain new provisions related to its authority to determine the date and order of the elections (Akinduro 2014).

Court cases triggered electoral reform in South Africa

Mette Bakken, Programme Officer, International IDEA

Two Constitutional Court cases provide the backdrop to the amendments of the legal framework governing elections in South Africa ahead of the 2014 elections. First, a number of cases consolidated in the so-called Richter case were brought before the Constitutional Court to challenge section 33(1) of the Electoral Act, which is related to voting rights for people out of the country on election day. The case challenged an article specifying that only members of the diplomatic corps and their families, as well as people temporarily abroad for holidays or business trips, visits to tertiary or educational institutions, or participation in international sporting events, were allowed to vote outside the country. In March 2009, the Constitutional Court ruled that ‘all South African citizens who are registered voters and who will be abroad on polling day will be entitled to vote’. While the court ruling ensured that all people registered to vote were enabled to do so in the 2009 elections, accessibility to the ballot box remained limited for people residing abroad who were not on the voters’ roll. In an effort to expand voting rights, the Independent Electoral Commission proposed offering citizens abroad an opportunity to also register outside the country.

Second, amendments to the Electoral Act promulgated in 2003 that affected the rights of prisoners to take part in elections were put to the test at the Constitutional Court in the *Minister of Home Affairs v. NICRO and Others* case. The 2003 amendments established the right for prisoners to register and vote, but excluded a specific group of prisoners, those ‘serving a sentence of imprisonment without the option of a fine’ (Electoral Act of 2003: sections 8 and 24B). The Ministry of Home Affairs argued that the amendment should remain unchanged due to costs and logistical constraints, and also claimed that ‘making special provisions for convicted prisoners to vote...would send an incorrect message to the public that the government is “soft” on crime’. The Constitutional Court, however, ruled in favour of the defendant and highlighted that:

... given the history of disenfranchisement in our country, the right to vote occupies a special place in our democracy. Any limitation of this right must be supported by clear and convincing reasons.

In this context, the electoral reform process initiated in 2013 primarily aimed to bring the legal framework governing the electoral process into line with constitutional provisions as clarified in the rulings of the Constitutional Court.¹

¹ Sources: Constitutional Court of South Africa, *Richter v. The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)*, ‘Media Summary’, 12 March 2009, <<http://www.saflii.org/za/cases/ZACC/2009/3media.pdf>>, accessed 29 May 2014; Constitutional Court of South Africa, Case CCT 03/04, *Minister of Home Affairs v. NICRO and Others*, ‘Media Summary’, <http://www.sentencingproject.org/doc/publications/fd_lit_southafrica-summary.pdf>, accessed 29 May 2014.

International and regional treaties and instruments have spurred countries to introduce electoral reforms. In Africa, numerous treaties address issues related to the organization and management of elections, as well as related areas such as human rights and gender. In the process of domesticating obligations stemming from international and regional treaties, electoral reform may take place to enhance compatibility between national laws and treaty obligations.

Key international treaties in this regard include the Universal Declaration of Human Rights (1948) and the International Convention on Civil and Political Rights (1966), as well as the African Charter on Human and Peoples' Rights (1981) and the African Charter on Democracy, Elections and Governance (2007). The latter, for example, obliges ratifying states to 'Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections' (article 17). In Africa, there are several regional instruments that also cover elections. The Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance (2001) is binding on its signatories, whereas the South African Development Community (SADC) Principles and Guidelines Governing Democratic Elections (2004) is of a non-binding nature.

Many countries in Africa have also ratified treaties to promote the participation of women in democratic processes. The Convention on the Political Rights of Women (1952), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) and the Solemn Declaration of the African Union on Gender Equality in Africa (2004) all include commitments related to the rights of women in politics and elections (International IDEA 2014b). These instruments urge the integration of the key principle of gender equality and non-discrimination into legal frameworks governing electoral processes and related laws. It is worth mentioning that, at the regional level, the SADC Protocol on Gender and Development of 2008 calls on state parties to ensure that 50 per cent of the decision-making positions in both the public and private sectors are held by women by 2015 and to adopt legislative measures to promote the effective participation of women in electoral processes (articles 12–13).

Aligning regional obligations on gender with constitutional frameworks in Tanzania

Emmanuel Kawishe, Legal Advisor, National Electoral Commission of Tanzania

Tanzania's draft constitution (as of July 2014) paves the way for greater representation of women in politics. In line with the country's obligations vis-à-vis the SADC Gender Protocol, the draft constitution guarantees women 50 per cent representation in parliament, which represents an increase from the current quota of 30 per cent. While abolishing the 1977 constitutional provisions for special seats for women, Tanzanians will be asked to vote for two representatives in each electoral constituency—one man and one woman.

The recommendations made following an election observation mission often outline proposals for legal reform to promote credible and legitimate elections. Such recommendations, emanating both from citizens (or domestic) as well as international

election observation groups, may prompt reform debates by pinpointing specific areas where legal review is required. When Seychelles amended its constitution in 2011 to institute a fully fledged electoral commission, this was partly in response to recommendations made by election observers.

External pressure tends to influence national reform agendas in Africa, whereby international partners may push governments and legislators to engage in reforming the electoral framework. Such pressure may be linked to vital donor support. The Electoral Reform Bill that was passed by the National Transitional Legislative Assembly in Liberia in 2004 exemplifies how diplomatic pressure from foreign missions and international and regional bodies influenced the passage of a bill that was in line with international standards. Pressure from international and regional institutions may be closely linked with observer recommendations and treaty obligations/commitments.

Personal agendas may also impact reform processes. Individuals within the government, parliament or within EMBs themselves may have certain ideas that they want to raise. For example, the chairperson of the electoral commission in Namibia appointed in 2011 had a particular interest in promoting women's participation in decision-making structures, which ensured a stronger commitment to gender mainstreaming in the 2011–4 electoral law reform process. In this case, explicit support and commitment from the top ranks provided institutional recognition of the relevance of gender equality to the EMB's work, as well as the impetus to address this issue in the legal reform process (Kandawasvika-Nhundu 2014).

The relevance of politics

The political context is crucial to understanding the evolution of an electoral reform initiative—from its initiation to its promulgation in parliament. As electoral reforms may influence who wins and who loses elections, they determine the life and living of politicians who at the same time sit in parliament with a mandate to make new laws. This explains why some major electoral reforms have a hard time coming about. Once established, the framework entrenches the interests of the incumbents, who benefit from the status quo and may therefore not be interested in reform (Norris 1995).

In countries where one party dominates the political landscape, electoral law reform may be less likely. On the one hand, incumbents have, over a period of time, adapted to the existing rules of the game and do not have any incentive to change. On the other hand, the opposition is weak and, while it may want change, it lacks the strength in parliament to reform the system that is in place. In countries where two large parties alternate in power, change may also seldom occur. While a party may argue that reform is necessary while it is in opposition, such ideas are often abandoned as soon as it regains power. Change may be more likely where there are several parties represented in parliament and where there is a degree of distribution of powers among them.

Notably, the relevance of political context is affected by the nature of the reform issue in question. Some reform initiatives are potentially more politically explosive than others. Electoral system reforms, for example, have considerable implications for who

wins the presidency or a majority in parliament. Once a political party comes to power under a specific system, it is less likely to be in favour of changing the system that led to its success. Parties have adapted to the existing rules of the game and know how to position themselves strategically according to those rules. Similarly, reform initiatives aimed at party and campaign financing represent another area in which the vested interests of the political elite may obstruct change. Another contentious issue in countries emerging from conflict is out-of-country voting. In Africa, conflicts have resulted in the emigration of certain groups such as ethnic and religious minorities. If such minorities belong to the losing party to a conflict, the government may follow partisan interests and disallow out-of-country voting—using administrative, operational or financial reasons for justification—thus stripping those citizens of their basic political right to vote.

Other reforms may be of a more technical nature. For the sake of harmonization, changes to the boundaries of administrative districts may result in changes to the boundaries of electoral districts. While changes to electoral boundaries can be highly political, when a decision has already been made to adjust administrative boundaries, changing boundaries for electoral districts is likely to be more of a technical exercise. Similarly, legal amendments that follow court decisions may be less politically contentious, as the battle has already been fought within the judiciary. Changes to election dates due to practical considerations such as logistics or weather may also have a relatively easy passage through parliament. Other technical changes to legal frameworks governing elections may include, for example, the introduction of definitions of certain terms.

Political context and the nature of the issue at hand are likely to impact EMB engagement in electoral law reform processes. Where political will and commitment to reform is lacking, EMBs may choose not to get involved simply because recommendations are not likely to yield results. Where reforms under debate are highly politicized, EMBs may opt out due to neutrality concerns. More often than not, however, EMBs in Africa do engage. Their role and approaches to electoral law reform therefore actively integrate strategies that mitigate the risks and challenges represented by the political context in which the process unfolds.

3. EMB roles

Formal mandate

The formal mandate for EMBs to engage in legal reforms can be instituted in the constitution or in the specific legal framework governing elections, such as laws on elections or electoral commissions.

The EMBs operating in Seychelles and Zimbabwe have a constitutional mandate to engage in electoral law reform. Following an amendment to the Constitution of Seychelles, a fully fledged electoral commission of five commissioners was established with a mandate to, among other things, ‘review the existing legislation governing electoral matters and make recommendations to the Government’ (article 116(1)). In Zimbabwe, the constitution put into force after a popular referendum in 2013 specifies that ‘[n]o amendments may be made to the Electoral Law, or to any subsidiary legislation made under that law, unless the Electoral Commission has been consulted and any recommendations made by the Commission have been duly considered’ (article 157(4)).

The National Assembly Electoral Act (2011) of Lesotho states that the EMB shall have the powers to ‘continuously review legislation and other matters relating to elections and referenda and to make appropriate recommendations’ (article 135). Similarly, the New Elections Law (1986) of Liberia establishes that the EMB has the power to ‘propose to the National Legislature for enactment, amendment to, and repeal of, any provision of the Election Law’ (section 2.9(c)). The amended Act on the Composition, Functions and Operations of the Independent Electoral Commission (2001) of Côte d’Ivoire specifies that the EMB may make recommendations to the government on all matters within its jurisdiction (article 39).

In other countries, such as Malawi, Sierra Leone, South Sudan, Swaziland, Togo and Zambia, EMBs have no formal mandate to engage in legal reform defined in a narrow sense. They may, however, have a mandate to make subsidiary regulations that have implications for the organization of elections. The EMB in Zambia, for example, is mandated to ‘by statutory instrument, make regulations providing for the registration of voters for the purposes of elections and for the procedure and manner of conducting elections; separate regulations may be made in respect of each category of elections’ (Electoral Act 2006: section 129).

Role in practice and scope of work

In practice, EMBs across the continent are—notwithstanding their formal mandates, and almost without exception—considerably engaged in electoral law reform. While recognizing that legal reform by nature can only be carried out within the framework agreed with the government and the legislature, EMBs, due to their hands-on experience in preparing and organizing elections, serve as a knowledge hub for how laws play out in practice. They know what works and what does not work, where there are gaps and where there are overlaps, as well as what new challenges need to be addressed in legal terms. The pivotal role of EMBs was highlighted in a keynote speech given at the

16th Annual General Conference of the Electoral Commissions Forum of the SADC countries in August 2014:

Electoral Commissions, regardless of their status in relation to the Executive, need to carve out a space, where their expertise is not only recognised, but also valued in the reform process. Claiming that space is easier when the legal framework of a country spells it out and protects it. Where it is not spelt out, the election authorities need to be constantly working to ensure that the reform process is anchored on expertise and know-how of the Commission (Nackerdien 2014).

In addition, and in the context of their primary task of managing elections, EMBs have established formal and informal relationships with key partners that can provide further insight into reform processes, including political parties, civil society, media, regional and international networks and, of course, the public at large. Provided that relationships are built on trust and transparency, EMBs are in a good position to collect information and opinions from the various stakeholders, to build consensus around policy options and to feed consultation outcomes into their final recommendations.

The EMB's formal mandate and role in practice in Sierra Leone

Mohamed N. Conteh, Commissioner, National Electoral Commission in Sierra Leone

The National Electoral Commission (NEC) in Sierra Leone does not have a formal mandate to engage in electoral law reform, i.e. to draft bills and introduce them directly in parliament. However, section 33 of the constitution and section 166 of the Public Elections Act 2012 authorize the NEC to make regulations by statutory instrument. But in order for any statutory instrument/regulation made by the NEC to have the force of law, it must be published in the national gazette and laid before parliament, after which it 'shall come into force at the expiration of a period of twenty-one days of being so laid unless Parliament, before the expiration of the said period of twenty-one days, annuls any such orders, rules or regulations by the votes of not less than two-thirds of the Members of Parliament' (article 170(7c) of the constitution).

Parliament has the power to make all laws, including those related to electoral reform. In practice, since it was restructured in 2005, the electoral law reform process has been initiated by the NEC through the Office of the Attorney-General, the Ministry of Justice and the Law Officers Department, and in collaboration with the Law Reform Commission. Notably, the latter has the formal mandate to review all national legislation and make recommendations for reform.

The legal reform process that culminated in the passage of the Public Elections Act in 2012 was initiated by the NEC in collaboration with the appropriate authorities and bodies, such as the Law Reform Commission, the Law Officers Department, civil society organizations concerned with elections.

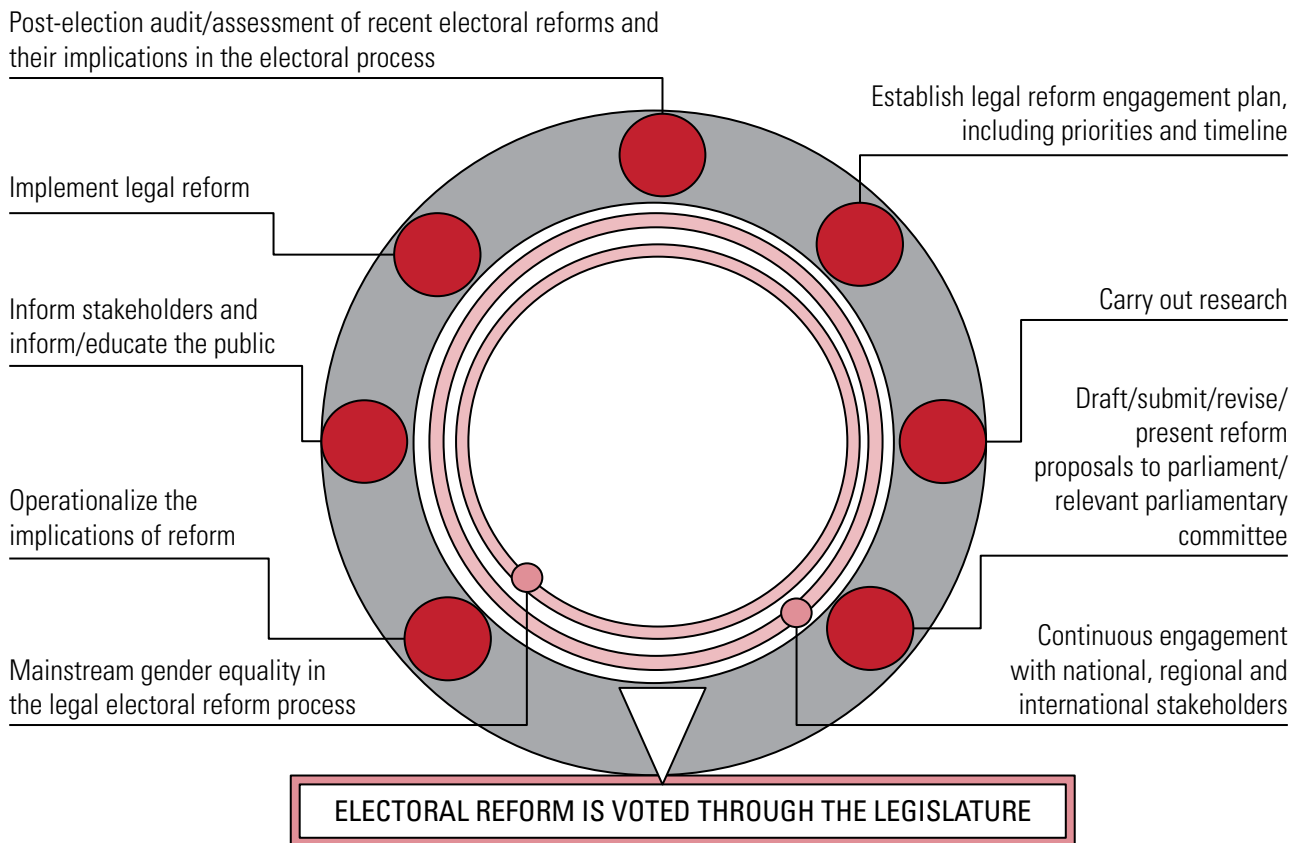
4. EMB approaches

EMB approaches to electoral law reform can be divided into two areas that focus on: 1) activities that EMBs undertake; and 2) key relationships that EMBs establish and manage that are of concern to their engagement in legal reform.

Activities

EMBs' engagement in the area of electoral law reform can be viewed from an electoral cycle perspective. Typically, a reform process is initiated in the post-electoral period with an assessment or evaluation of the previous election. In the early pre-electoral period, a range of activities needs to be performed, such as planning, research, engaging with stakeholders, development of concept papers and policy positions, and presenting recommendations or draft bills to the government and/or parliament. Finally, when a new law has been adopted, the EMBs need to operationalize the implications of the reform, inform and educate stakeholders on the change, as well as implement the actual reform.

Figure 1: EMB involvement in legal electoral reform processes



The legal reform process typically starts out with a post-election review process. Post-election reviews are used by EMBs to ‘assess the adequacy of the legal and management structures for elections, and of their performance in delivering credible elections’ (International IDEA 2014a).

Hence, a post-election review analyses what worked well and what did not during an electoral process. Moreover, it aims to uncover the causes behind the challenges experienced in order to improve conditions for future elections. In examining the strengths and weaknesses of the EMB itself, as well as the legal framework that the EMB operates within, such reviews provide valuable input for legal reform debates and give EMBs a good idea of what actions may be needed.

Post-election reviews can be undertaken internally or externally. Internal reviews would entail that the EMB itself undertake an assessment of its own performance and the circumstantial factors influencing its work in the context of a concluded election. External reviews, on the other hand, are undertaken by experts outside the EMB managing the elections in question. Such reviews can be undertaken by a team of election experts recruited internationally, regionally or nationally. Alternatively, post-election reviews may be undertaken in a peer-review fashion, e.g. by an EMB from another country or by a network of EMBs.²

Independent post-election performance audit in Nigeria

Olufunto Akinduro, Programme Manager, Electoral Institute for Sustainable Democracy in Africa

Following the 2011 elections, the Independent Electoral Commission of Nigeria decided to embark on an independent post-election performance audit process. The Registration and Elections Review Committee was established comprising eight members drawn from academia, civil society groups and independent election experts. The committee conducted its review through field visits to the EMB’s facilities at the national and state levels, interviews, focus-group discussions and a call for papers. Moreover, it received input from EMB staff, from stakeholders across the country and from the EMB’s technical partners.

The committee’s audit report was made publicly available in 2012. The timeliness of the release of the report, which came out less than a year after the elections, ensured that it contributed to the commission’s planning processes ahead of the 2015 elections, and that the issues identified could feed into the EMB’s work in the area of legal reform.

Guided by the outcome of a review process, EMBs establish plans for their engagement in electoral law reform. As a first step, EMBs need to develop priorities for their work. Having identified key challenges based on post-election reviews and observation reports, EMBs may need to pick their battles, recognizing that they might not be able to accomplish everything they would like to, taking into consideration constraints in

² For example, the Association of African Electoral Authorities has undertaken work in this area for its member EMBs.

the areas of political will as well as financial and human resources. When priorities are clear, EMB plans typically outline a set of activities and a dedicated timeline and, in addition, provide an initial overview of the stakeholders that the EMB intends to work with in the reform process. To ensure that potential reforms are enacted well in advance of elections, EMBs need to put considerable effort into establishing a realistic timeline that takes into account external factors beyond their control.

An inclusive approach to the planning stage may promote trust and credibility in the electoral reform process. This is particularly important if the EMB assumes a prominent role in the reform process. EMBs often view such plans as internal business. By inviting stakeholders to review and provide input into the plan itself, however, EMBs demonstrate openness and transparency and may thereby win important buy-in from stakeholders, including political parties.

Development of a roadmap for electoral reform in Seychelles

Mette Bakken, Programme Officer, International IDEA

After the conclusion of the 2011 National Assembly elections, the Electoral Commission of Seychelles developed its Roadmap for Electoral Reform 2011–3, outlining the background to, main objectives of and strategy for the overall reform process. The reform process was foreseen to be completed within 14 months and comprised three distinct phases:

1. national consultations: literature review, stakeholder invitations, public meetings/workshops, recording/analysing/summarizing stakeholder input, publication of reform debate progress;
2. national consensus: identification of best practices, organization of workshops, public consultations; and
3. way forward: agreement within the EMB on the key recommendations to be made, production and submission of a final report, publication of reform proposal.

Toward the end of October 2011, the Electoral Commission presented the roadmap to the government and thereafter invited all political parties to a meeting to discuss the document. However, the opposition alliance refused to take part in the meeting, arguing that the stakeholders should have been invited to take part in the development of the roadmap in the first place. This situation created a first hurdle for the reform process and required the Electoral Commission to open up the roadmap for deliberation in order to bring the opposition back to the table. In the end, very few changes were made, but it proved to be an important undertaking to build trust among the different stakeholders and especially the opposition parties.

In the phase that follows, EMBs typically engage in comprehensive research to establish possible legal alternatives that could remedy existing shortcomings. The research phase includes a thorough review of relevant documents, including the laws themselves, observation reports, international/regional obligations, global and regional best practices and comparative experiences. It may also entail a compilation of electoral laws.

In the cases of Sierra Leone and Ghana, for example, the respective EMBs produced compendiums that assembled relevant legislation into one document that facilitated the reform processes *per se*.

The research phase requires comprehensive expertise on a wide range of issues that may not always be available in-house. EMBs may therefore seek external support through the recruitment of election experts who work with the EMB for a shorter period of time. Regional and international experts have the advantage of having extensive experience from other countries within and outside the region and may offer alternatives and solutions that the EMBs may not have thought of. It is worth noting that temporarily strengthening an EMB's legal reform capacity during a reform debate may be an advantage in itself, as many African EMBs lack sufficient human resources to engage adequately in this area.

Integral to the research process are consultations with key electoral stakeholders. Such consultations may take different forms, from one-to-one exchanges to small-group meetings with particular actors, and from workshops to national, multi-stakeholder conferences.

The objectives of such consultations are twofold. First, they offer EMBs an opportunity to provide information on the work they are carrying out with regard to the reform debate, as well as to present their research on what legal amendments are necessary and test their views and policy positions *vis-à-vis* the stakeholders. Second, consultations are held in order to bring experience and knowledge from outside the EMB to the table and hence to add value to the specific content of the final recommendations that EMBs develop and present to the government or parliament.

Consultations require careful planning. EMBs map the stakeholder environment to make sure that consultations benefit from the representation of a broad segment of political actors in the country. When establishing the list of invitees, EMBs may consider inviting representatives from all relevant political parties, various geographical locations, minority and/or religious groups, as well as representatives of women's and youth groups and networks. Notably, EMBs may also choose to open consultative meetings to the public, as was done by the Electoral Commission in Seychelles in the 2011–3 reform process. Of course, invitations to consultative meetings and events need to be sent in a timely fashion and ought to specify the exact contribution of the representative, if such a contribution is expected.

Consultative workshop organized by the Electoral Commission in Namibia

Rumbidzai Kandawasvika-Nhundu, Senior Programme Manager, International IDEA

In the context of the 2011–4 electoral reform process in Namibia, the Electoral Commission organized a consultative workshop with stakeholders on electoral law reform in March 2013. The workshop brought together a diverse group of stakeholders and representatives from community-based and civil society organizations all registered political parties in Namibia, members of parliament, government ministries, academic and policy institutions, media, churches, traditional leaders, and representatives of international and regional organizations. The EMB held the consultative workshop with the aim of engaging different national stakeholders and raising their awareness of the electoral reform proposals being made by the Electoral Commission, as well as building consensus on the commission's key reform proposals. The consultative workshop focused on the following issues:

- overview of the concept paper produced by the EMB on legal electoral reform proposals;
- lessons and good practices from regional and international law reform processes;
- constitutional protection and executive authority of the EMB;
- key issues I: voter registration, political liaison, tendered ballots, political party agents, political party funding, voter assistance in polling stations, voting abroad, by-election notices and other administrative issues;
- key issues II: gender in elections, code of conduct for political parties and the media; and
- key issues III: electoral dispute and conflict resolution for Namibia.

Based on research and consultations, the EMB establishes its final recommendations, which may be presented as advice or as a draft bill. When establishing these recommendations, the EMB analyses evidence and input from research and stakeholder consultations and makes its own determination regarding the type of amendment that is necessary to promote democratic development in the country. Only by adequately explaining why it opted for one alternative instead of another can an EMB demonstrate its neutrality in the reform process.

In cases where electoral law reform touches upon national constitutions, EMBs may be involved in the management of referendums, whereby amendments to the legal framework governing the electoral process are presented to the electorate. For example, constitutional referendums in Liberia (2011) and Zimbabwe (2013), as well as the upcoming referendum in Tanzania (expected to take place before the 2015 elections), all feature(d) provisions relevant to the electoral framework. Notably, EMBs' engagement in this area falls under their usual mandate to manage elections and referendums and is hence not linked to their role as a key partner in legal reform as such.

Finally, given their mandate to manage elections and referendums according to existing laws, EMBs are instrumental at the implementation stage of the new laws. To abide

by the new laws, EMBs may need to produce new regulations and procedures and train their staff and poll workers accordingly. Moreover, EMBs need to undertake considerable efforts in the area of civic and voter education. Effective civic and voter education strategies need to be established and rolled out well in advance of elections to make sure that voters are not only informed about but also understand the implications of the new laws. In the context of the amendments to the laws concerning out-of-country voting enacted prior to the 2014 elections in South Africa, the EMB engaged extensively with the country's diplomatic missions abroad to make sure that the new procedures were understood. Moreover, information about the possibilities for new segments of the electorate to register and vote abroad was disseminated via the EMB website.

Relationships

The success of an EMB's engagement in the area of electoral law reform processes depends on its ability to establish and manage a myriad of relationships with stakeholders that are integral to decision-making or that have an interest in the outcome of the reform process more generally.

Effective management of key stakeholder relationships is crucial to build trust in, and the credibility of, the EMB's engagement in providing input into the legal framework governing elections. By not including stakeholders in the discussions or by not paying enough attention to stakeholder views, EMBs run the risk of distancing themselves from, and creating a barrier between, themselves and other actors with vested interests in the process. Moreover, the degree to which an EMB manages to influence new laws depends on its ability to foster a good working relationship with decision-makers. In the end, EMBs do not make electoral laws—this is in the mandate of parliaments, which usually make decisions based on the tabling of new laws by the executive. Whether EMBs manage to get their recommendations through depends on good collaboration with key state entities. The table below provides a non-exhaustive overview of the myriad of stakeholders with which EMBs may engage when working in the area of electoral law reform.

Key principles for EMBs' relationship with stakeholders when engaging in electoral reform:

- inclusiveness;
- transparency;
- responsiveness;
- independence;
- impartiality;
- communication;
- information sharing; and
- equality.

State actors	Non-state actors
<ul style="list-style-type: none"> • government (e.g. Department of Justice, Finance, etc.); • parliament (including Committee of Legal Affairs, Home Affairs, etc.); • attorney-general's office; • judiciary; • public commissions (e.g. law reform, constitutional review, human rights, gender, media, etc.); and • (international diplomatic community.) 	<ul style="list-style-type: none"> • political parties and interparty networks; • civil society organizations and networks; • faith-based organizations/religious leaders; • the public/the electorate; • media institutions; • international/domestic election observers; • regional/international EMB networks; • international assistance providers; • development partners/donors; and • elections experts.

Good collaboration with parliament is essential for EMBs engaging in legal reform due to its role in passing laws. More often than not, a particular parliamentary committee—such as the Committee of Legal Affairs or the Committee of Home Affairs—will review a proposal for amendments before it is tabled in parliament. It is crucial that EMBs have access to this arena to promote their views on reform. Hence, an EMB ought to develop a good system for informing parliament about its activities and progress, and should also make itself available to provide input into reform debates upon request.

In some countries, EMBs are able to make proposals for amendments directly before parliament. This is the case in Ghana, for example, where the leader of the House can propose draft laws on behalf of the EMB in his/her capacity as the leader of government business (Dowetin 2014). In other countries, such as South Africa, EMBs submit their recommendations and are invited to parliamentary committee meetings to discuss the need for reform and to provide clarifications on the different alternatives available and their implications, etc. More informally, the electoral commission in Sierra Leone met with members of parliament in pre-legislative meetings to discuss a draft electoral bill before it was finally debated and passed in parliament. In Ghana, the electoral commission has also met with parliamentary representatives in closed-door meetings to determine the direction of legal reform proposals in response to court cases and recommendations.

In a similar fashion, it is important for EMBs to foster cooperation with the government and relevant ministries. Experience shows that communication and advocacy are key. It is essential that EMBs inform relevant entities of their work and advancements in the reform area. Moreover, EMBs need to undertake serious efforts to sensitize relevant entities within the government as to why certain reforms are needed and what sort of challenges their recommendations are responding to. By establishing regular and constructive exchanges, EMBs can promote political will and commitment in government corridors in relation to their recommendations made on politically neutral ground.

The government often serves as a gatekeeper for EMB input, as recommendations may be filtered through the president/prime minister's office and/or relevant ministries before being forwarded to parliament as an executive bill. This is the case in Seychelles, for example, where the recommendations of the electoral commission were submitted to the president as opposed to directly to lawmakers in parliament. In other cases, electoral law reform may be pushed through by governmental or presidential decrees. This was the case in Zimbabwe in 2013 when President Mugabe bypassed parliament and fast-tracked legal amendments in order to pave the way for the organization of elections in July as ordered by the Constitutional Court.

Notably, if EMB engagement in electoral law reform processes entails extra-budgetary allocations, a request for such an allocation is usually submitted to the Ministry of Finance. It would therefore be advisable for EMBs to foster a mutually collaborative relationship with this branch of the executive.

An EMB may also engage with public commissions. In some countries, EMBs working in the area of electoral law reform need to take into account the work of specific law reform commissions tasked with formally providing input to reform processes to the government and/or parliament. This was the case, for example, with regard to the processes undertaken in Sierra Leone prior to the 2012 elections and in Nigeria prior to the 2009 elections. Mutual information flows as well as collaboration on activities related to the reform process, such as the organization of joint stakeholder workshops, could promote such relationships. Without good collaboration with the law reform commission, the EMB's recommendations and advice may not be seriously considered and may not be part of the final advice that the law reform commission submits to the government or parliament. EMBs also need to take into account the work that is or has been undertaken by constitutional reform commissions. Recommendations from such entities ought to inform the EMBs' work, and EMBs may also provide input to such commissions in their area of competence. For example, the Interim Independent Electoral Commission that was instituted following the violent elections in Kenya in 2007 engaged closely with the Committee of Experts tasked with consolidating constitutional reform proposals. Finally, an EMB may also engage with other commissions, including those tasked with gender, human rights and media issues, etc., depending on what entities are in place in the country in question and their relationship to electoral processes. Such commissions may be invited to consultations and/or to provide written input for draft recommendations/bills as established by the EMB.

An inclusive and trusting relationship with political parties is also crucial to EMBs' work in the area of electoral law reform. EMBs need to think carefully about which parties they engage with. In some cases, EMBs have chosen to engage with all registered political parties to maximize inclusiveness and consensus building. In others, where, for example, there have been too many parties to engage effectively with all of them or where some parties are evidently inactive, EMBs have established criteria for their engagement with political parties. In such cases, it is important that EMBs make their criteria known, especially to the parties that are not invited to events organized by the EMB on reform issues. EMB engagement with political parties usually targets

leadership structures, but they may also take actions to ensure that minority voices within parties, such as women and youth, are given a chance to provide input into the reform process.

Political parties may provide valuable input into the electoral reform debate. For example, they may raise issues and challenges that have not been identified or prioritized by EMBs and thus impact the reform agenda. Moreover, political parties may also table constructive solutions to existing challenges and thus strengthen the reform outcome. When assessing proposals from political parties, however, EMBs must take into account that they are dealing with entities that have direct interests in reform outcomes. For example, a political party may call upon the EMB to propose changes to the electoral system and put forward a series of arguments for why such changes would benefit democratic development while, at the same time, those changes would most likely increase their numbers in parliament. EMBs must therefore listen to, but also carefully assess, proposals presented by political parties

Interparty platforms offer a valuable entry point for EMB relations with political parties. By providing a space for politicians to informally meet, discuss and identify shared positions on contentious issues such as electoral reform, interparty platforms offer a forum in which to resolve issues constructively. In countries with dominant-party systems, engagement in such dialogue forums can be critical for inclusiveness and broad consensus building.

Interparty dialogue has developed in different eras in response to different contexts and is shaped in a variety of ways. In Kenya, the EMB liaises with parties in a formally constituted political party liaison committee. In South Africa, the law requires that the EMB set up political party liaison committees at all levels of government, from the national to the local levels. In Ghana, the EMB initiated multiparty roundtables as early as 1994, with a particular view to achieving electoral reform. In Seychelles, there are no formal structures for interparty dialogue. During the electoral reform process, however, the EMB established the Electoral Reform Forum, which brought together party representatives and civil society to engage in weekly discussions on electoral reform.

Working with the Inter-Party Advisory Committee in Ghana

Theo Dowetin, Electoral Expert

The Inter-Party Advisory Committee has served as a platform for interparty dialogue, consultation and consensus building on electoral reform issues in Ghana. Some positive effects of the collaboration between the EMB and this forum include easing tensions among political parties with differing agendas and fostering settings in which healthy debate is encouraged and actively entered into. Interparty dialogue and cooperation also promotes the concept of 'loyal opposition', a tenet of liberal democracy that, in essence, means that all stakeholders share common democratic values and goals. While political opponents may disagree over certain issues, it is imperative that they tolerate one another and recognize the crucial role that healthy opposition plays in democratic processes.

In the run-up to the 2012 general elections and the introduction of biometric technologies in Ghana, a number of constitutional instruments related to the voter registration and voting processes were amended by the Electoral Commission in consultation with the Inter-Party Advisory Committee. Together with political parties, the Electoral Commission set up two joint committees—a Technical Committee and a Legal Committee. The committees were chaired by the EMB's deputy chairman of operations and deputy chairman of finance, respectively. The seven-member Legal Committee tasked with drafting legislation was composed of three representatives from the Electoral Commission, one representative from the governing party, one representative from the major opposition party and two representatives from the remaining 14 opposition parties combined. The Legal Committee drafted the constitutional instruments and presented them to the Electoral Commission. The latter was entitled to add to, subtract from or totally reject the draft, but, in this case, it only made minor changes before the constitutional instruments were sent to the attorney-general's office and finally tabled in parliament.

Civil society—broadly defined as civil society organizations (CSOs), faith-based and community-based organizations—is another major partner in electoral law reform processes. Based on the large numbers of CSOs in Africa—coupled with their in-country geographical reach and expertise on issues related to democratic development, human rights, gender and other topics relevant for electoral processes—EMBs ought to take civil society into account at the different stages of the reform process. First, civil society may provide important input into the identification of key challenges and priorities. Second, being closely connected at the grass-roots level, civil society may provide constructive input into the formulation of policy options that reflect broad public interests, opinions and demands and thus complement EMBs' direct interaction with the public, which is often more limited. Third, EMBs may find a useful partner in civil society networks to push the reform agenda, which is crucial where political commitment is unconvincing and hence where parties interested in reform need to engage extensively in advocacy and lobbying. Finally, at the implementation stage, civil society can play a key role in sensitizing the public to the reforms enacted and the way in which the changes affect how people vote.

CSOs engaged in citizen (or domestic) observation groups represent a particularly important group of CSOs. Through the systematic collection of information, thorough analysis and provision of recommendations, as well as engagement in promoting electoral reform through, for example, the organization of public or stakeholder meetings after elections have been held, such organizations possess valuable knowledge that needs to be fed into reform processes. EMBs need to take observation recommendations into consideration and establish structures for regular consultations and information sharing with CSOs engaged in this area.

Likewise, international election observation provides recommendations for electoral reform. The mandates of international observers are usually limited to observing and providing recommendations for improvement. EMBs ought to consult with international observer groups with regard to the recommendations on legal reform to get a better understanding of why they were made and clarify possible alternatives. International election observers have increasingly become aware that recommendations made in one election are often replicated in the next. This indicates that recommendations do not effectively feed into policy debates in the inter-election period after the international missions have left the country. To further push recommendations from paper to action, the European Union recently started deploying so-called follow-up missions that are aimed at taking stock of measures undertaken to follow up on recommendations provided in the previous election.

Working with the EU election observers in Malawi

Nandini Patel, Chairperson, Institute for Policy Interaction

The European Union (EU) has served as a crucial partner to the Electoral Commission in Malawi. The EU deployed election observation missions to the last three elections organized in 2004, 2009 and 2014. Moreover, in 2012, it deployed its first so-called EU follow-up mission (EUFUM), which was tasked with 'assessing the status, usefulness, and viability of EU EOM recommendations, as well as with programming a roundtable to reanimate debate on idle recommendations' (EUFUM Report 2012). At the time when the EUFUM was deployed, the decision had been made that local elections would be organized simultaneously with the next presidential and parliamentary elections scheduled for May 2014. This situation prompted the EUFUM to review the recommendations, and help the Electoral Commission set priorities and identify risks and mitigation strategies related to holding the tripartite elections. In addition to technical support, the EU also extended financial support for the legal reform process.

Through the media, EMBs have the opportunity to sensitize the electorate to their electoral reform work. The media are, of course, also crucial for EMBs to build awareness of the substance of new reforms once passed into law, and to address how reforms may impact where/how voters cast their ballot, register to vote, etc. Moreover, EMBs need to scrutinize the media debate on the substance of reform. For example, political parties and CSOs may express or debate reform recommendations and/or put forward their grievances regarding the reform process in the media rather than bring issues directly to the EMB.

EMBs may also directly engage with the public through, for example, organizing public meetings, whereby EMBs can inform the public about their work, on the one hand, and where participants from the public can provide direct input concerning reform issues, on the other hand. Furthermore, EMBs need to plan for and roll out voter education and information campaigns to promote awareness of legal reforms when enacted. Depending on the size of the country in question, direct engagement with the public may require the engagement of EMB structures at the local or regional levels that can channel information to the national level. Notably, EMBs' engagement with civil society and the media provides an indirect link with the public at large.

EMBs may work in close collaboration with the attorney-general's office to ensure that proposed recommendations are in line with the country's existing constitutional and legal frameworks. Collaboration between the EMB and the attorney-general's office is therefore of a technical nature. In a similar fashion, EMBs may seek advice from judicial institutions before recommendations and/or draft amendments are presented to decision-makers. As mentioned, EMBs may also bring cases to court if they believe that adopted legal amendments conflict with constitutional provisions.

International and regional assistance providers are often key to EMB electoral reform work.³ Assistance providers may provide expertise in terms of hands-on personnel or consultants to help EMBs undertake research and stakeholder consultation efforts. Having worked on similar issues in other countries, experts may give EMBs access to valuable comparative data. Experts coming from the outside, who have no direct interest in the outcome of the reform process, may also serve as neutral brokers in situations in which EMB neutrality in the reform process is questioned by the political parties.

When engaging with international and regional assistance providers, EMBs ought to think ahead and consider where international and regional assistance providers—such as the UNDP, IFES, International IDEA and EISA—can provide the most added value. Taking the relevant EMB's plan for engagement in electoral reform as the starting point, EMBs ought to identify gaps in internal capacities and consider when support is needed. International and regional assistance providers may, for example, help by recruiting short-term consultants, in which case it is crucial for the EMB to identify the expertise required and determine a timeline.

³ International organizations such as the United Nations Development Programme (UNDP), the International Foundation for Electoral Systems (IFES), the Commonwealth, International IDEA and others provide technical expertise and capacity building in the area of electoral reform. Regional organizations in Africa are also gaining ground. One organization that is worth mentioning is the Electoral Institute for Sustainable Democracy in Africa (EISA), which specializes in election-related issues. Notably, regional organizations such as the African Union and the Regional Economic Communities are increasingly providing technical support for elections beyond recommendations in the context of their election observation efforts.

Working with international partners in Nigeria

Olufunto Akinduro, Programme Manager, Electoral Institute for Sustainable Democracy in Africa

The Independent Electoral Commission of Nigeria maintains a good relationship with international partners that provide technical support for its work. These partners include the International Foundation for Electoral Systems (IFES) and the UNDP through its Democratic Governance for Development Project, which is funded by the Joint Donor Basket Fund. These partners have provided technical support to the EMB by hiring experts to provide input into specific aspects of the commission's work. For instance, IFES provided significant input into the development of the commission's approach to the legal framework for party and campaign financing in the 2005 Electoral Reform Bill. IFES organized conferences at which international experts provided comparative perspectives on international best practices. The Joint Donor Basket Fund supported the work of the Registration and Elections Review Committee in the post-2011 election audit process by providing technical support.

EMBs may also need to work with donors when engaging in the area of electoral reform. It should be noted that, in some countries (e.g. Zimbabwe), donor support for electoral processes in general is off limits, as elections are considered to be integrally linked to national sovereignty. In these countries, donor support may, for example, be used exclusively for capacity building and training. In other countries (e.g. Sierra Leone and Liberia), donors are welcome to support electoral processes more generally, including electoral reform processes. Where this is the case, EMBs may receive financial support to recruit consultants and experts, organize public meetings and stakeholder conferences, print materials, undertake advocacy campaigns, etc. While making it possible for EMBs to undertake comprehensive electoral reform work, EMBs that are heavily reliant on donor funding need to carefully plan their activities and communicate closely with the donors to make sure that adequate funding is allocated in a timely fashion. Also, EMBs need to take donor expectations into consideration and communicate reasonable and realistic goals for interventions that are funded by donors.

5. Challenges and risks

There are a variety of challenges and risks related to EMB engagement in electoral law reform processes that can be divided into two broad categories—political and technical.

Challenges

A crucial challenge to the work of EMBs is related to political will and political commitment to the legal reform agenda. Legal reforms eventually need to be adopted by politicians themselves—either by the government through decree procedures or through parliamentary lawmaking structures. In the end, EMBs can go as far as to provide recommendations or draft amendment bills and engage with government and parliamentary stakeholders to advocate and sensitize them to the need for reform and the rationale behind the recommendations made by the EMB. If reform proposals are not seen as benefiting the incumbents, and where incumbents are strong enough to block reform proposals in parliament, the work that EMBs undertake may become redundant.

Formal and procedural obstacles may also pose a challenge to EMB work in this area. First, where EMBs do not have a formal mandate for engagement, this may result in a situation in which their engagement is questioned. This is more likely to happen when coupled with a lack of political will or commitment to the reform agenda, such as may be the case if reform proposals are of a highly political (rather than technical) nature. Second, procedural rules, particularly with regard to how electoral amendments are presented in parliament, may impact EMBs' possibilities to advocate effectively for their reform proposals. In countries where the EMB submits recommendations via the government or specific parliamentary committees before bills are tabled, reform bills may be watered down before they reach the final decision-makers. Generally, this is less likely to happen in countries where EMBs are authorized to table amendments directly in parliament.

Procedural obstacles in Nigeria

Olufunto Akinduro, Programme Manager, Electoral Institute for Sustainable Democracy in Africa

One challenge associated with the work on reform issues carried out by the Independent Electoral Commission of Nigeria is related to how it submits draft bills to the National Assembly. According to procedural rules, bills are to be presented in the National Assembly either by a member of parliament or by the executive. When the EMB submitted a draft bill in 2005, the status of the bill was questioned by members of the National Assembly. Eventually, when the bill was adopted, it had to be presented as originating from the Parliamentary Committee on Electoral Matters. This situation enabled the committee to adapt the content of the bill before presentation.

Electoral law reform may take considerable time. EMBs need to take into account that research and consultations are time-consuming activities. In particular, the development of consensus among multiple actors on issues as intrinsic to democracy as electoral reform requires not only time but also patience. Ideas need to take root and grow among the stakeholders involved. Moreover, EMBs need to take into account that certain stages of the reform process are beyond their control. This is particularly so for the promulgation of amendments through governmental and/or parliamentary structures, but also whenever recommendations need to pass through a legal reform committee or the equivalent before making their way to decision-makers. Careful planning and time management are therefore essential.

As a best practice, EMBs' engagement should be initiated in the early post-election stage to allow enough space for discussions and debate before recommendations are finally made. Undertaking such work when experiences from the previous election are still fresh should advance the debate.

The funding for EMB engagement in legal reform, which usually takes place between elections, may present another challenge to EMBs' work. During this period, state budget allocations are likely to decrease and, likewise, donor fatigue sets in after heavy investments in the organization of electoral events. That said, electoral reform work can be carried out even with relatively restricted budgets. Provided that EMBs maintain a good relationship with the ministries responsible for the EMB budget and/or assistance providers and donors and make a clear plan for their engagement in the legal reform debate in the post-election period, it may be possible to attract the needed funds to conduct activities related to the reform processes.

In order for EMBs to do this effectively, a certain level of in-house capacity is required. In particular, access to staff with an adequate legal background to lead the EMB's effort is crucial. If EMBs do not have in-house capacities, international/regional assistance providers may offer expert consultants for specific periods of time to undertake important background research on existing frameworks, international and regional obligations and best practices, comparative knowledge, etc., as well as the drafting of recommendations and/or amendment bills. Closely related to this, EMBs may have a hard time retaining in-house legal capacity. More often than not, this work is undertaken by one or two key staff. It goes without saying that if such key people leave their post, the work of the EMB is seriously undermined. There is therefore a need to build institutional memory related to reform processes that can alleviate such circumstances.

Risks

The main risk to EMB engagement relates to (perceptions of) neutrality. Electoral reform is a highly politically sensitive matter. It is of utmost importance that EMBs do not take sides in the politics of electoral reform, but that recommendations and draft bills are based on judgements that connect with what the EMB believes is best to further strengthen and entrench democratic practices in the country. To do so,

EMBs need to gather information, conduct thorough research and integrate regional or international trends and best practices, and provide clear linkages between them and the recommendations/draft amendments made.

Closely linked to the above, EMBs are not only required to make unbiased recommendations but also to be perceived as doing so by the stakeholders—be that the public, political parties or others. Such perceptions are not necessarily built only on the outcome of the EMB's work in terms of the recommendations made, but also on the process by which it produced these recommendations. Key to this is the development of stakeholder relationships that are built on mutual trust, inclusiveness and information sharing.

In terms of task priorities, EMBs are first and foremost there to manage elections, and their role in electoral reform is often considered of secondary importance. This is particularly the case where many EMBs do not have a formal mandate to engage in electoral reform, although they may carry out such tasks upon request and/or when time and human resources allow. However, if EMBs need to engage in the organization of by-elections, referendums, snap elections, etc., there is a risk that their work in the area of electoral reform—whether or not it is supported by a formal mandate—may be distracted, come to a halt or be discontinued altogether.

Related to the above is issue priority. With multiple issues on the table, there is a risk that some of them will fall between the cracks and eventually be forgotten—possibly unintentionally. Issues that are aimed at confronting legal challenges to the enhanced political participation of marginalized groups are typical in this regard.

The risk of gender evaporation in Namibia

Rumbidzai Kandawasvika-Nhundu, Senior Programme Manager, International IDEA

Though Namibia's Electoral Commission had expressed a commitment to take gender-equality issues into account in its electoral legal reforms, the risk of so-called gender evaporation was apparent in the electoral law reform process that took place from 2011 through 2014. This was due to the fact that, while gender inequalities and gaps in electoral processes and the outcome of these processes would be acknowledged, gender equality tended to give way to competing priorities such as political party funding/finances, levelling of the playing field between political parties, and authority and independence/autonomy of the Electoral Commission, even though gender is a cross-cutting aspect of all these issues. However, the risk of evaporation provided an opening for the constant reiteration of the need to address areas of concern from a gender perspective.

Timing is also a risk factor. When legal amendments are passed close to elections, there is a risk that EMBs may not be given adequate time, for example, to inform the public and train polling staff workers about the change and its implications for those involved. In such cases, when time is limited but amendments are expected, EMBs can establish parallel structures to build in the eventuality that new laws may be passed. This was

done, for example, by the electoral commission in South Africa when new laws related to out-of-country voting were expected and finally promulgated in November 2013, ahead of the elections organized in May the following year. The importance of timely reform is underlined in the ECOWAS Protocol on Democracy and Good Governance (article 2(1)), which stipulates that ‘No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors.’

An EMB’s dependence on external resources for engaging in electoral reform represents another risk to its work in this area. Bureaucratic processes linked to extra-budgetary government allocations and/or donor funding may be tedious and take more time than expected, thus jeopardizing the EMB’s plans and timelines for engagement. Likewise, processes for assistance providers to identify and recruit experts and to ensure their presence in the country to work with the EMB may take longer than expected.

Another risk factor affecting EMBs’ engagement in electoral reform is staff turnover. The number of people with legal expertise working on reform issues is often limited. Whenever individuals with experience in drafting legal reform recommendations or amendment bills leave their job, it may slow the pace of the process, as EMBs need to recruit and possibly train new personnel to take over the task.

6. Recommendations for EMBs engaging in electoral law reform

1. **Give priority to engagement in thorough post-election review processes:** EMBs ought to use post-election review processes as a window of opportunity to identify and analyse the need for electoral law reform. Such processes ideally combine input from several sources such as internally and/or externally produced EMB performance assessments/audits, election observation reports, post-election stakeholder workshops/conferences, etc.
2. **Establish clear plans and timelines for EMB engagement:** EMB engagement in the area of electoral law reform requires careful planning and conscious consideration of timelines. Work plans and timelines need to take into account the modus operandi of key stakeholders that EMBs engage with and the entities that recommendations need to pass through before any changes can be signed into law. Notably, in order for EMBs to impact legal reform, their recommendations need to be submitted to the relevant authorities well in advance of the next elections. Finally, planning may also entail reflections regarding when and under what circumstances an EMB should withdraw from the reform arena altogether.
3. **Ensure that adequate and timely funding is in place:** EMBs need to engage closely with the government and parliament and, where appropriate, with assistance providers and donors to ensure that adequate funding is in place to implement their plan of engagement in a given electoral law reform process. Where assistance is channelled to EMBs through the provision of expertise instead of, or to complement, direct funding, EMBs ought to think ahead and communicate closely with assistance providers to ensure that such expertise comes on board in a timely fashion.
4. **Undertake research to ensure adequate knowledge/capacities:** It is essential for EMBs that are engaged in the area of electoral law reform to be thoroughly informed regarding the subject matter. What is the current legal framework implying, what are the challenges, what are the possible alternatives and how would these alternatives play out in practice, taking into consideration the country's socio-political context EMBs are likely to meet with stakeholders—political parties, CSOs and others—with potentially strong research departments and elaborated arguments and proposals. Through research and analysis, EMBs will be capable of engaging effectively and constructively.
5. **Involve stakeholders by organizing wide-ranging and inclusive consultations:** EMBs need to engage in consultations with a broad range of stakeholders to promote credibility—based on mutual trust, cooperation and transparency—of the electoral law reform process and its outcome. Moreover, through such consultations, EMBs may become aware of additional issues and challenges that need to be addressed, and have the opportunity to hear possible solutions presented by the stakeholders.
6. **Work closely with interparty platforms:** interparty platforms offer a valuable entry point for EMB relations with political parties on issues that concern electoral law reform. By providing a space for politicians to informally meet, discuss and identify shared positions, interparty platforms may provide EMBs

with solid ground to resolve issues related to a particularly important stakeholder constructively and collaboratively. In countries with dominant-party systems, engagement with such dialogue forums can be critical to ensuring that the process is truly inclusive and that it promotes broad consensus building.

7. **Engage regularly with decision-makers:** EMBs should engage closely with their respective government and parliament to promote and nurture political commitment to reform processes. Without the buy-in of the government and parliament, EMB efforts to develop a better legal framework to govern electoral processes are likely to fail. Key to promoting political will is for EMBs to establish a good system for communication and information sharing.
8. **Stay neutral—and be perceived as such:** The issue of electoral reform is a politically sensitive matter. EMBs need to navigate carefully when engaging in a reform process to avoid situations in which they are perceived by one or the other party as taking sides. Perceptions of biased EMB engagement will jeopardize the credibility of the outcome of electoral law reform processes.
9. **Incorporate a gender perspective:** When working in the area of electoral law reform, EMBs need to incorporate a gender perspective at both the process and outcome levels. In terms of process, EMBs need to ensure that opinions from both men and women are solicited and addressed in the recommendations made. When it comes to outcomes, EMBs need to actively address legal policy issues that promote equal participation and representation. In order to prevent a situation in which gender equality becomes simply an add-on, gender issues need to be explicitly tackled from the onset in the planning process.
10. **Remain true to fundamental principles:** Electoral reform processes ought to be guided by an overarching concern to protect and promote the electoral rights of citizens. When making recommendations for creating new laws or amending existing ones, EMBs need to carefully scrutinize the extent to which their proposal guarantees that this higher objective is achieved.

References and further reading

- ACE: The Electoral Knowledge Network, 'Encyclopaedia', <<http://aceproject.org/ace-en>>
- The Electoral Knowledge Network, 'Regions and Countries', <<http://aceproject.org/regions-en>>
- Akinduro, Olufunto, 'Electoral Reform in Africa: Case Study—Nigeria', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- Bakken, Mette, 'Electoral Reform in Africa: Case Study—South Africa', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- 'Electoral Reform in Africa: Case Study—Seychelles', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- Carter Center, 'International Election Observation Mission to Cote d'Ivoire—Final Report', 2011
- Conteh, Mohamed N. 'Electoral Reform in Africa: Case Study—Sierra Leone', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- Democracy Reporting International, 'Electoral Law Reform Processes: Key Elements for Success', Briefing Paper, 12 May 2011
- Dowetin, Theo, 'Electoral Reform in Africa: Case Study—Ghana', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- EU Election Follow-Up Mission [EUFUM], Final Report, 2013, <http://aceproject.org/ero-en/regions/africa/MW/malawi-final-report-election-follow-up-mission-eu/at_download/file>, accessed 10 July 2014
- Hartmann, Christof, 'Paths of Electoral Reform in Africa', in M. Basedau, G. Erdmann and A. Mehler (eds), *Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa* (Uppsala: Nordic Africa Institute, 2007)
- Huntington, Samuel P., *The Third Wave: Democratization in the Late Twentieth Century* (Norman, Okla. University of Oklahoma Press, 1991)
- International IDEA, *Electoral Management Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2014a)
- Political Parties in Africa through a Gender Lens* (Stockholm: International IDEA, 2014b)
- Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (Stockholm: International IDEA, 2014c)
- Political Finance Regulations Around the World: An Overview of the International IDEA Database* (Stockholm: International IDEA, 2012)
- Stockholm University and Inter-Parliamentary Union, 'Quota Project', 2014, <<http://www.quotaproject.org>>
- Kandawasvika-Nhundu, Rumbidzai, 'Electoral Reform in Africa: Case Study—Namibia', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- Leyenaar, Monique and Hazan, Reuven Y., 'Reconceptualising Electoral Reform', *West European Politics*, 34/3 (May 2011), pp. 437–55
- Merino, Mathieu, 'Electoral Reform in Africa: Case Study—Kenya', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>
- Nackerdien, Rushdi, Keynote Address delivered at the 16th Annual General Conference of the ECF SADC, Mauritius, 12-13 August 2014
- Norris, Pippa, 'The Politics of Electoral Reform in Britain', *International Political Science Review*, 16/1 (January 1995), pp. 65–78
- Patel, Nandini, 'Electoral Reform in Africa: Case Study—Malawi', ACE: The Electoral Knowledge Network, 2014, <<http://aceproject.org/ace-en/topics/lf/default>>

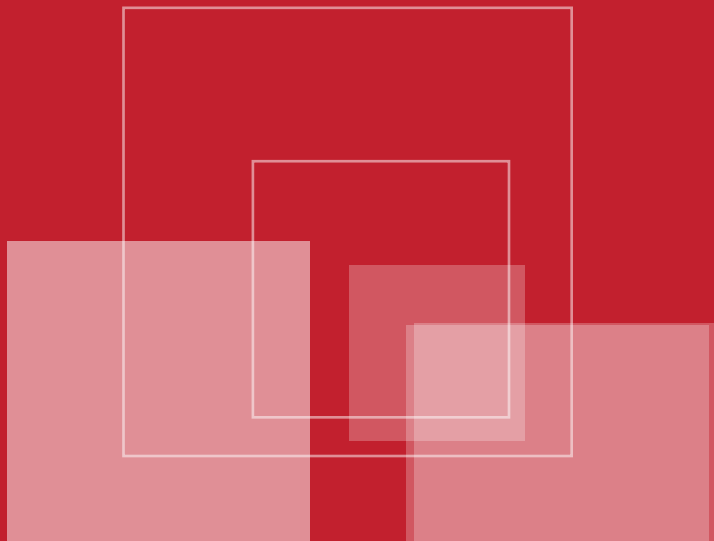
Acronyms and abbreviations

CSO	Civil society organization
ECOWAS	Economic Community of West African States
EMB	electoral management body
EU	European Union
EUFUM	European Union follow-up mission
International IDEA	International Institute for Democracy and Electoral Assistance
IFES	International Foundation for Electoral Systems
NEC	National Electoral Commission
SADC	South African Development Community
UNDP	United Nations Development Programme

Acknowledgements

A special acknowledgement goes to the lead author, Mette Bakken, who conceptualized and developed this paper in the context of the ongoing 'Electoral Reform in Africa' initiative that is being rolled out by IDEA's Africa Programme. Special thanks go to the authors of the individual case studies developed under the initiative: Olufunto Akinduro, Mohamed N. Conteh, Theo Dowetin, Rumbidzai Kandawasvika-Nhundu, Emmanuel Kawishe, Mathieu Merino and Nandini Patel.

In addition, a number of individuals and International IDEA colleagues provided thoughtful comments and valuable input on earlier drafts of this paper, including Raúl Ávila, Anne Sofie Holm Gerhard, Stina Larsrud, Naomi Marilyn Ngalula, Seema Shah and Domenico Tuccinardi. Thanks also to Curtis Budden for editing the final text. Last but not least, we also thank International IDEA's publications officer, Lisa Hagman, for coordinating the production and publication of this paper.



INTERNATIONAL IDEA
International Institute for Democracy and Electoral Assistance
SE-103 34 Stockholm
Sweden
Tel +46 8 698 37 00
Fax +46 8 20 24 22
E-mail info@idea.int

ISBN 978-91-87729-77-5