

The cycle of electoral manipulation and its links to electoral justice systems

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Integrity of elections

The importance of the integrity of elections, along with the threats to electoral integrity of both a political and technical nature, has begun to reemerge onto the international political agenda. It has been increasingly recognised that electoral fraud and malpractice may take place throughout the electoral cycle. Birch (2011) has developed a comprehensive framework for categorising electoral malpractice. She considers malpractice as falling into three broad categories: malpractice through the manipulation of electoral institutions through the drafting of electoral legislation and regulations, malpractice through the manipulation of the formation and expression of voter choice, and manipulation of the electoral implementation in the implementation of electoral arrangements, including manipulation of polling, counting and tabulation.

Using international observation reports as the data source, she develops an Index of Electoral Malpractice. The dataset used draws upon the reports of large scale observation missions conducted by international organisation, although conceptual issues and issues of data availability mean that the study does not include data from Asia. However, the study does show that the location of a country in Latin America, Eastern Europe, the former Soviet Union, or sub-Saharan Africa – the four regions studied ‘rarely played a significant role in determining the degree to which elections are manipulated’.¹ One can hypothesise that just as experience and good practice in democracy building and democracy support can be usefully shared worldwide, so can experience and practice be shared across the globe by the ‘bad guys’, and that although their countries do not appear in the study, the ‘bad guys’ of Asia and the Pacific are no different from their counterparts elsewhere in their capabilities for electoral manipulation.

Although wider interest in electoral integrity has until recently been limited, the electoral support community has paid considerable attention to electoral justice and electoral dispute resolution mechanisms in recent years, for example International IDEA (2010). Contests such as the Mexican presidential election of 2006 have shown the value of robust and effective electoral dispute resolution bodies. However, Birch’s study demonstrates that ‘vote manipulation is the least common form of electoral malpractice, and... canny leaders are far more likely to manipulate electoral rules or voters in preference to the mechanics of the vote’², and shows that the two variables most strongly associated with electoral

¹ Birch (2011), p161

² Birch (2011), p143

malpractice are the level of corruption and the lack of media freedom³.

In developing her framework, Birch has addressed electoral malpractice at a country level. I shall seek in this paper to start to consider how it might be used at a more micro level, and in particular to assess its relevance and implications for those engaged with electoral justice. It is, for example, unlikely that malpractice by the manipulation of institutions through legislative drafting can be identified from analysis of the reporting of a specific election or set of elections. Nor can a remedy for it be sought through the mechanism of a complaint disputing a specific election. If such a remedy lies through a judicial process at all (rather than through a political process), it does so through challenges to the constitutionality of electoral legislation in general or specific provisions of it.

This means that the design and operation of electoral justice bodies is potentially a vital part of the electoral integrity story, but only a part of that story. To probe that part further, this paper seeks to frame questions for more detailed research which may lead to practical advice for the design and implementation of electoral justice systems. For example: Is the profile of electoral malpractice different in different countries, or in different parts of the same country? What determines the use of the electoral justice system in practice, and what impact does this have on actual and perceived electoral integrity? How effective is the electoral justice system in dealing with complaints about different areas of electoral malpractice?

Data and coding

Research of such questions is however not easy, because suitable sources of data relating to electoral malpractice and electoral dispute resolution of a sufficient level of detail are rarely easily available. Electoral dispute resolution procedures vary widely between countries. While there is an increasing tendency for electoral justice systems to be judicial in nature (International IDEA 2010), the point at which the courts become involved varies from country to country. The reporting of cases, either at a stage where they are heard by an electoral body through an administrative procedure or at a stage where they are heard by a court through a judicial procedure, does not readily permit analysis across countries. Yet such analysis would be extremely valuable both in seeking to ensure that the design and operation of electoral justice procedures

³ Birch (2011), pp 159-161

contributes as effectively as possible to maintaining and improving electoral integrity, and in identifying the issues of integrity that cannot be addressed by electoral justice mechanisms.

Is the pattern of electoral malpractice always a national level issue?

The instinctive answer to this question is negative, at least in relation to large countries: to quote Pippa Norris, 'Florida is not Minnesota'. However, in viewing democratic systems in developing countries, much analysis – not least by those involved in the planning and implementation of democracy assistance programmes – does not look below the country level. To investigate the effect of such a simplification, useful data is available for Papua New Guinea (PNG).

The reports of domestic electoral observers at the 2007 general election for PNG) are collected in the PNG Election Study (May et al (2011). There are a total of 19 of these reports which relate specifically to an individual provincial or open electorate. Seeking to apply the Birch methodology, these reports have been coded according to the apparent occurrence and severity of 11 forms of electoral malpractice: allegations related to the independence of the electoral authority, electoral registration, polling station siting and arrangements, conduct of polling, conduct of counting and tabulation, restriction of access by party agents, biased media coverage, campaign resource and finance issues, vote buying, intimidation or obstruction of voters, and intimidation or obstruction of candidates. A general 'other' category was also included. The coding of each report assessed the severity of the forms of observed malpractice on a five point scale from zero (absent) to 4 (widespread and serious), enabling a mean for each to be calculated.

Table 1 shows the analysis of the PNG domestic observer reports. Two issues are salient, with a mean malpractice score of over 50%: vote buying (voter choice) and electoral registration (electoral administration). Lowering this threshold to 30%, these are joined by campaign resourcing and financing (voter choice), conduct of polling (electoral administration) and electoral administration independence (electoral administration).

There has long been a recognition of the distinctiveness of the political patterns of the communities and societies of the PNG Highlands (see for example Ketan 2004). Strong anecdotal evidence exists that the conduct of elections is particularly problematic in the Highlands of PNG. The analysis accordingly splits the 19 reports between the 9 reports from Highlands electorates and 10 reports from coastal and islands electorates. While the total

number of reports is small, a clear trend emerges. In the coastal and island electorates, there are no issues which score over 50%: vote buying and electoral registration breach 30%, but not by much.

The Highlands reports tell a very different story. Three issues relating to electoral administration show a mean malpractice score of over 50%: conduct of polling (which reaches 80%), electoral registration (75%), and independence of electoral administration (53%): a fourth, polling arrangements, reaches 45%. On voter choice issues, vote buying has a score of 69%: intimidation of voters and campaign finance issues also score between 30% and 50%. Unclassified 'other' malpractice also shows a score of over 50%.

It can be noted that alongside these 'dogs that bark', there are some areas of electoral malpractice which do not feature in the reports to any great extent, even in the Highlands. These include nomination of candidates, the process of counting and tabulation, media coverage, and party agent access.

In assessing electoral practice in PNG, two worlds thus emerge. In the Highlands, the well established stories of polling which ignores the register completely (for example calling voters from two lines, one for men and one for women, and going down the register marking off entries of each sex sequentially) are matched by the report analysis. In the coastal and island areas, things have been much quieter, although the malpractice there appears to follow the same pattern as in the Highlands. It will be interesting to conduct the parallel analysis when the 2012 PNG Election Study is published. It may specifically be worth watching whether Highlands practices spill over elsewhere.

Do people use electoral justice systems to seek redress for malpractice?

In the last twenty years, Mexico has developed a strong and independent electoral justice body, the Tribunal Electoral del Poder Judicial de la Federación (TEPJF), which has been responsible since 1996 for hearing electoral dispute cases, and was considerably strengthened in 2007. Although TEPJF's published summary data of cases resolved (TEPJF 2012) does not include the detail necessary to analyse patterns of electoral malpractice using the Birch methodology, it is nonetheless useful to compare the volume of cases heard year by year. Table 2 contains figures for cases resolved by regional courts (which deal with cases relating to the 'constituency' seats of national elections and all state and local elections) and the Superior Court (which deals with cases relating to

the 'proportional' seats of national elections, in addition to presidential elections). The figures in Table 2 relate to the years 1996-1997, 2002-2003 and 2008-2009, and thus show disputes related to mid-term Congressional elections and synchronous local elections. (While the figures for the corresponding elections in Presidential election years are also available, I have not included them; the close and controversial nature of the 2006 Presidential election may be thought to have had a specific sui generis impact on the dispute resolution process which would distort any analysis.)

The data appears to show a strong and increasing tendency for Mexicans to use the electoral dispute resolution process at all levels (the one apparent exception, the high number of cases heard by regional courts in 1996-1997, appears to be related to the fact that this was the first time that it was possible for citizens to make a formal complaint about their own electoral registration or non-registration).

However, this is not a universal pattern. More than 2500 cases were filed after the 1983 municipal elections in France: among the most common allegations were ballot box stuffing, falsification of election returns, and misuse of voters' cards (Maligner 1986). More recent French municipal elections have been less controversial. The same trend can be seen the Republic of Korea, where Table 3 shows that very few cases are now taken to court. This number has also declined over a fifteen to twenty year period.⁴

Indonesia, however, shows another example of continuing electoral litigiousness. Following the process of transition and constitutional amendment of 1999-2004, legislation was passed introducing direct popular elections (*Pilkada*) on a ticket basis for the head and deputy head of the executive at both provincial (*propinsi*) and district (*kota/kabupaten*) level⁵. This legislation was amended in 2008 to allow independent tickets, in addition to party nominated tickets, to compete. These elections first took place in 2005 and have often proved highly competitive and controversial.

The legislation establishing *Pilkada* identifies the Constitutional Court (*Mahkamah Konstitusi* or *MK*) as the body responsible for hearing electoral disputes. The statements of case and judgments of the MK are public documents accessible on the web (Mahkamah

⁴ Cho Dong-jin, Attorney to the Election Commission of the Republic of Korea, personal discussion with the author, May 2012

⁵ see Buehler, Michael, *Decentralisation and Local Democracy in Indonesia*, in Aspinall, Edward and Mietzner, Marcus, *Problems of Democratisation in Indonesia*, ISEAS Singapore (2010), pp270-272

Konstitusi Republik Indonesia (2012)). Between 2008 and 2011, approximately 500 *Pilkada* elections took place: arising from these, a total of no less than 376 cases were submitted to the MK.

And what happens when people do use the electoral justice system?

An initial analysis of 157 of the 376 MK cases was prepared and presented at a CDI/IPD sponsored workshop in Sanur, Bali in December 2011. This analysis considered the statement of claim submitted by the complainant plaintiff, identifying allegations relating to the 11 forms of electoral malpractice considered in the PNG analysis: allegations related to the independence of the electoral authority, electoral registration, polling station siting and arrangements, conduct of polling, conduct of counting and tabulation, restriction of access by party agents, biased media coverage, campaign resource and finance issues, vote buying, intimidation or obstruction of voters, and intimidation or obstruction of candidates. A general 'other' category was also included. The cases were then classified by the verdict reached - ruled inadmissible, rejected, partially upheld or upheld - and the grounds assessed on which those cases fully or partially upheld were decided.

The remaining cases have been analysed subsequently. These totalled 219, of which one was delayed and still proceeding, six had been dismissed for want of prosecution by the complainant, and eight were interlocutory proceedings prior to the substantive hearing. This leaves a total of 204 cases which were heard and decided by the MK.

In linking the Indonesian data to the Birch typology, manipulation of voter choice can underlie complaints relating to party agent access, media coverage, misuse of public resources, campaign finance, vote buying, and intimidation of voters or candidates. Manipulation of electoral administration shows up in complaints of lack of independence of the electoral administration and in issues relating to electoral registration, candidate nomination, polling arrangements, conduct of polling, and conduct of counting and tabulation.

In undertaking the coding, a variation was required from the methodology used for the PNG observation reports - because nobody submitting a complaint ever alleges that the malpractice was other than extremely serious. As a result, the cases could be coded only by the presence or absence of allegations of each individual form of malpractice in the statement of claim.

Following the Sanur workshop, the coding frame was revised to include separate recording of allegations relating to the nomination of candidates and allegations relating to the improper use of public funds and resources by incumbents during election campaigns. In the first set of data, these had been recorded as 'Other'.

In addition, the second set of 204 cases were coded according to the lead judge for the proceedings – in most cases the Chief Justice, Mahfud MD, in the remainder his colleague Achmad Sodiki – and according to whether or not the result complained of was marginal (difference between two leading candidate tickets being less than 5%).

The data classifying malpractice is thus drawn from a total of 361 cases. However, the separate recording introduced in the second batch of coding means that the total number of cases considered in relation to allegations regarding candidate nomination or misuse of resources by incumbents is only 204 – as is the total number of cases considered in the 'other' category.

Findings

Table 4 breaks down the verdicts reached by Indonesia's MK. The striking feature of this analysis, in the context of an overall large number of cases, is the extent to which complainants are unsuccessful: 19% of complaints are declared inadmissible by the court – that is, that there is no case to answer – and a further 70% are rejected. Just 2% are upheld in full. There appears to be an assumption – maybe even a norm – adopted by losing candidates that it is worth having a go in front of the court.

Table 5A shows the forms of electoral malpractice alleged by the complainants in the cases heard by the MK. It is of course possible for more than one form of malpractice to be alleged in the same complaint.

The most common allegation made in the complaints is of vote buying, followed by lack of independence of the election administration and issues relating to counting and tabulation: all of these were cited in over 50% of complaints. In addition, the proportion of complaints citing misuse of public resources by incumbents, electoral registration, conduct of polling, polling station arrangements, candidate nomination and voter intimidation all exceeded 30%. The forms of malpractice which are not often cited may also be noted: party agent access, biased media coverage, political finance, intimidation of candidates.

Table 5B analyses the same data but categorises the complaints only by whether or not there is an allegation of malpractice through manipulation of electoral administration, and whether or not there is an allegation of malpractice through manipulation of voter choice. Almost all complaints – 96% - allege the former: fewer – although still 86% - allege the latter. Tabulated against the judgments, it appears that complaints which allege voter choice are particularly likely (92%) to be rejected. Several explanations for this may be considered. One could conceive of complainants who throw in allegations of all descriptions with few grounds, but are nonetheless prepared to have a go in court anyway: a very different reason could be that the court is less able or competent in detecting manipulation of voter choice, possibly because the burden of proof is intrinsically more difficult to satisfy from the kind of evidence that can be gathered and presented.

In contrast, Table 6 shows the forms of electoral malpractice cited by the MK in its judgments. In the cases where complaints were upheld, the most common grounds related to election administration: lack of independence (38% of cases) and conduct of polling (also 38% of cases). In addition, 35% of cases where complaints were partially upheld involved findings of misuse of public resources by incumbents. Although the numbers are small, the pattern which appears is very different from the pattern shown in the complaints themselves: vote buying is found in only one of the upheld complaints, and issues relating to counting and tabulation not at all.

This finding is susceptible to different explanations, which are not necessarily mutually exclusive. It may for example be that vote buying is difficult to demonstrate to a sufficient standard of proof: it may also be part of the mythology of elections rather than an actual widespread malpractice. It is perhaps less likely that interference with the counting and tabulation process cannot be proved to judicial satisfaction. It may also be that there are systematic differences between perceived malpractice (which is what complaints presumably reflect) and actual malpractice.

Table 7 shows the verdicts in the second batch of 204 cases tabulated by lead judge: 25 of these cases (12%) led to a positive finding in which the complainant's case was upheld or partially upheld. Every one of these cases was heard by a panel headed by the Chief Justice. Hypothesising that the expected number of positive verdicts within a given relatively small total number of cases will follow a binomial distribution with $p(\text{positive finding})=0.12$, the observed total of zero positive findings reached by the 25 panels headed by Justice Achmad Sodiki is significant at

the 5% level. This does not however necessarily imply that the two justices have different approaches to deciding cases: it could also be that cases that appear more likely in the beginning to lead to a positive finding are allocated to panels led by the Chief Justice.

Table 8 shows the verdicts in the second batch of 204 cases tabulated by marginality, defined as a margin of 5% or less between the two leading candidates. This information was not available for 15 cases, leaving 189 cases to be analysed.

Of the 35 cases where the original result was marginal, 5 (15%) led to positive verdicts, compared with an overall rate of 13%; 3 (9%) were ruled inadmissible, compared with an overall rate of 20%. Hypothesising that the expected number of positive findings and the expected number of inadmissible cases will both follow binomial distributions with $p(\text{positive finding}) = 0.13$ and $p(\text{inadmissibility}) = 0.2$ respectively, the observed totals in cases in marginal contests are not significant.

In addition to the analyses performed here, this dataset is sufficient for further work assessing whether the patterns of malpractice in Indonesia are common across the country, or whether a division between, say, Sumatra, Java, Kalimantan, Sulawesi and Outer Islands would reveal differing patterns across the country.

Conclusions

This initial venture into the detail of electoral integrity and electoral justice does little more than scratch the surface – although it does demonstrate that, as long as the challenges of data availability and analysis can be overcome, the work on electoral integrity which underlies the creation of the Index of Electoral Malpractice approach is likely to be useful in pursuing the links between broad findings of principle and practical steps that can be taken by democracy builders. In particular, the following observations may be ventured.

The PNG analysis demonstrates that is not only in established large and diverse countries that patterns of electoral malpractice vary substantially from one part of the country to another, which means that electoral integrity and legitimacy may differ both in perception and in reality from one area to another. However obvious this may seem, it is not always a live consideration in discussions of electoral institutions and support – but it would be desirable for it to become so.

Electoral litigiousness varies widely between countries. It is not immediately obvious why Mexicans and Indonesians pursue

disputes about elections, while the Koreans tend no longer to do so, and may never have done so to the same extent; nor whether this has implications for either the actuality or the perception of electoral integrity or for the consolidation and legitimacy of democracy more generally. Is the large scale use of the electoral justice system a sign of its health as an institution of democracy, or sign of weakness of the credibility of elections?

Setting the findings from Indonesia and PNG alongside each other, there are both commonalities and striking differences in the pattern of electoral malpractice. The top two issues of electoral malpractice identified by the domestic observers in PNG are vote buying and electoral administration independence: in the complaints submitted to the MK in Indonesia, the same two issues emerge. However, the verdicts of the MK do not show the same pattern: the top two issues which contribute to positive verdicts for the complainant are lack of independence and conduct of polling.

This gives rise to the suggestion that a story arises about the shortcomings of an election which is received both by observers and by participants: thus both the observation reports and the electoral complaints submitted tend to identify perceived irregularities rather than the irregularities. (Since the legitimacy and credibility of elections may well depend on perceptions as the mediation of reality, this is still important.) If systematic differences do exist between perception and reality, as may be the case in Indonesia, why should this be so? Alternatively, are electoral dispute resolution systems in general better at detecting malpractice affecting electoral administration than malpractice affecting voter choice, and if so, what can be done to address the latter?

There is clearly scope, albeit with considerably more research than has been possible in preparing this paper, to suggest some answers to these questions. Alongside addressing the issues of electoral integrity that cannot ever be resolved through the form and operation of the electoral justice system, these answers would provide valuable input, and potentially tools, for those seeking to ensure that the transparent resolution of electoral disputes contributes effectively to combatting electoral malpractice and protecting electoral integrity.

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