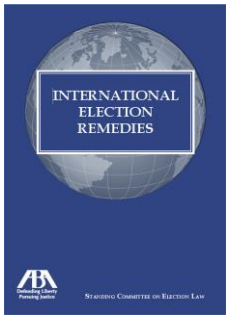
Measuring Effective Remedies for Fraud and Administrative Malpractice

Katherine Ellena and Chad Vickery

International Foundation for Electoral Systems

Chapter excerpted from *International Election Remedies*

Edited by John Hardin Young, and published in 2016 by the American Bar Association's Standing Committee on Election Law. Please contact Elizabeth Yang (Elizabeth.Yang@americanbar.org) or Katherine Ellena (kellena@ifes.org) regarding copies of this publication.



Measuring Effective Remedies for Fraud and Administrative Malpractice

Katherine Ellena and Chad Vickery[1]

I. Introduction

Ubi jus, ibi remedium
(Where there is a right, there must be a remedy)[2]

The right to an effective remedy is well established in international law, and stems from the fundamental rights of political participation and universal suffrage detailed in Ben Griffith's chapter on "Voting Rights from an International Perspective." It is the violation of these rights – intentional or otherwise – that necessitates a remedy to restore them. Less clear is what constitutes an "effective" remedy, especially given the wide range of electoral irregularities and violations that can arise throughout an electoral process. Inevitably there are irregularities in every election that do not necessarily threaten an election outcome or a fundamental right, but still require a resolution or remedy to preserve or strengthen the integrity of the process. Further research is needed on just how the efficacy of different remedies might be better measured – and ultimately their application better refined. This chapter will review case law and literature to explore the elements of an effective remedy, consider existing research on measuring effective remedies, and set out an agenda for further research.

II. The right to an effective remedy

The provision of a meaningful remedy has been long established in law as a fundamental right. In 1703's *Ashby v. White*, the Chief Justice of the King's Bench of England stated: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it . . . want of right and want of remedy are reciprocal."[3] More contemporary sources of international law clearly reinforce the right to an effective remedy. Among other documents, the foundational Universal Declaration of Human Rights (UDHR) notes the importance of the "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[4] The International Covenant on Civil and Political Rights (ICCPR) further obliges states to ensure: that effective remedies are provided for human rights violations; that complainants have their claims determined by competent judicial, administrative or legislative authorities (or any other competent authority); and that the competent authorities enforce such remedies.[5] As Griffith outlines, other international and regional treaties reaffirm these rights.[6] Without meaningful and enforceable remedies, any legal or adjudicative process

[1] The authors also wish to acknowledge the valuable review and editorial commentary provided by David Ennis and Erica Shein, and research support by Emily Lippolis.

[2] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768).

[3] 92 Eng. Rep. 126 (K.D. 1703).

[4] G.A. Res. 217A (XX), Universal Declaration of Human Rights (Dec. 10, 1948).

[5] G.A. Res. 2200A (XXI) art. 2(3), International Covenant on Civil and Political Rights [hereinafter ICCPR] (Mar. 23, 1976) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[6] For example, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Rights of Persons with Disabilities (CRPD), the European Convention for Protection of Human Rights & Fundamental Freedoms, the

may become meaningless in the protection of rights, as decisions will effectively have no force to change or deter certain kinds of behavior that threaten the rights of others, or to right a wrong that has already occurred.

The purpose of legal remedies in the elections context is to protect the integrity of the process and to ensure that electoral rights (to vote and stand for office) are respected. No election is perfect, but sometimes irregularities can escalate until they violate fundamental rights, and/or threaten the credibility and legitimacy of the election or the election results. Ideally, appropriate preventative measures should be established prior to an election to mitigate this threat, but equally important are effective and timely remedial measures to address allegations of fraud or malpractice when they do occur.

There are many different ways to design an effective and efficient system for addressing electoral complaints and providing effective remedies, and these have been outlined elsewhere in the literature.[7] It is important that any system adhere to international standards that stem from the fundamental right to participate in government found in the UDHR and the ICCPR.[8] Signatories to the ICCPR are committed to ensuring that any person whose right to vote and be elected has been violated will have an effective remedy.[9] For a complaints adjudication process to be effective, the judge or adjudicator must be able to grant the complaining party a meaningful remedy that, in addition to righting the wrong at hand, helps to deter future malpractice and fraud.[10] , Additionally, there should be predetermined rules in place governing the application of this remedy.[11]

The role of the judiciary to ensure that the legal provisions protecting fundamental rights are interpreted in such a way as to make them effective has been acknowledged by the European Court of Human Rights (ECtHR). In *Namat Alieyev v. Azerbaijan*, the ECtHR held that the "object and purpose" of the European Convention for the Protection of Human Rights and Fundamental Freedoms "requires its provisions to be interpreted and applied in such a way as to make their stipulations *not theoretical or illusory but practical and effective* [emphasis added]."[12]

American Convention on Human Rights, The African Charter on Human and Peoples' Rights, The Arab Charter on Human Rights, and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

[7] *See, e.g.,* GUIDELINES FOR UNDERSTANDING, ADJUDICATING, AND RESOLVING DISPUTES IN ELECTIONS [GUARDE] [hereinafter GUIDELINES FOR UNDERSTANDING] (Chad Vickery ed., 2011), http://www.ifes.org/Content/Publications/Books/2011/Guidelines-to-Understanding-Adjudicating-and-Resolving-Disputes-in-Elections.aspx.; JESÚS OROZCO-HENRIQUEZ, ELECTORAL JUSTICE: THE INTERNATIONAL IDEA HANDBOOK (2010). . Models include administrative and judicial bodies operating under special procedures; shared jurisdiction between ordinary courts and election commissions; permanent electoral courts; legislative bodies; international and ad hoc bodies.

[8] ICCPR, *supra* note 5, at art. 25.

[9] *Id.* at art. 2(3).

[10] GUIDELINES FOR UNDERSTANDING, *supra* note 7, http://www.ifes.org/Content/Publications/Books/2011/Guidelines-to-Understanding-Adjudicating-and-Resolving-Disputes-in-Elections.aspx. According to GUARDE, effective systems will provide: a transparent right of redress; clearly defined election standards and procedures; an impartial and informed arbiter; appropriately expedited decisions; established burdens of proof and standards of evidence; meaningful and effective remedies; and effective education and training for stakeholders

[11] *Id.*

[12] Namat Aliyev v. Azerbaijan, App. No. 18705/06, Eur. Ct. H.R. ¶ 72 (2010). . (*See*, United Communist Party of Turk. and Ors v. Turk., No. 19392/92, 1998-I Eur. Ct. H.R. § 33 (1998), http://www.associationline.org/guidebook/action/read/chapter/10/section/jurisprudence/decision/290; Chassagnou and Others v. Fr., Nos. 25088/94, 28331/95, & 28443/95, 1999-III Eur. Ct. H.R. § 100 (1999); and Lykourezos v. Greece, No. 33554/03, 2006-VIII Eur. Ct. H.R. § 56 (2006).

It can be difficult to determine whether a system provides adequate remedies in response to electoral irregularities, in part because of the politically charged atmosphere inherent to electoral conflict.[13] There are two elements to consider: the effectiveness of the election dispute resolution system; and the actual remedies the system applies. International human rights law clearly recognizes *substantive* rights to remedies and *procedural* rights of access to remedies. These elements are inextricably linked, but it is helpful to look at them in isolation, as the effectiveness of the system (i.e., an EDR process that establishes guarantees for a timely decision, a legal justification, a final decision that is no longer subject to appeal, and mandates for sanctions and penalties) will contribute to ensuring the availability of effective remedies.

Election observers have increasingly emphasized the importance of effective remedies for electoral complaints or disputes, and frequently identify the failure to provide such remedies as a key weakness in the electoral process. In the OSCE Observer Report for the 2010 Kyrgyz parliamentary elections, observers noted that "[t]he failure to provide timely and written decisions on complaints deprived plaintiffs of their right to receive effective legal redress."[14] In an electoral process where timeliness is critical, when a court or tribunal fails to resolve disputes in an expedited manner, it can indicate that both the dispute resolution process and the remedy it produces are ineffectual.

For the 2011 Presidential and Legislative Elections in the Democratic Republic of the Congo, observers with the Carter Center found that "the underdeveloped [EDR] system does not seem to sufficiently protect citizens' fundamental right to adjudicative remedy for alleged violations of their rights."[15] The Carter Center also observed that "there are few legal remedies within the DRC available for breaches of electoral law," illustrating the problems associated with EDR legal and regulatory regimes that do not clearly set out available remedies.[16] Ultimately, the legal framework may provide for a remedy, but if the systems and institutions that can provide that remedy are incapable of making timely and well-reasoned decisions, or if the mechanisms used to enforce the remedies are weak or non-existent, then the system does not meet international standards.

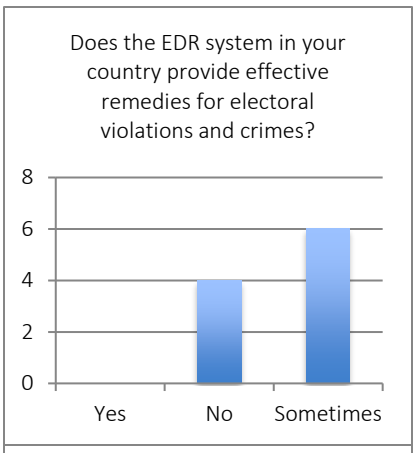
---

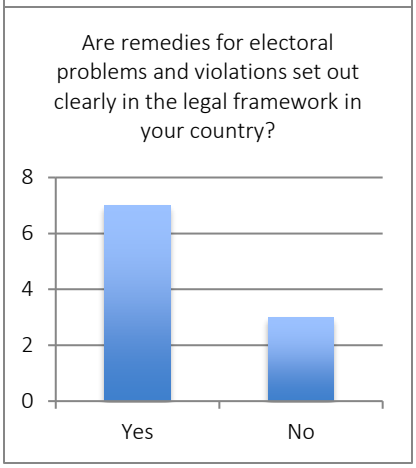
[13] GUIDELINES FOR UNDERSTANDING, 69 *supra* note 7, http://www.ifes.org/Content/Publications/Books/2011/Guidelines-to-Understanding-Adjudicating-and-Resolving-Disputes-in-Elections.aspx.

[14] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE [hereinafter OSCE], KYRGYZSTAN, PARLIAMENTARY ELECTIONS, 10 OCTOBER 2010: FINAL REPORT (2010), http://www.osce.org/odihr/74649.

[15] CARTER CENTER, FINAL REPORT: PRESIDENTIAL AND LEGISLATIVE ELECTIONS IN THE DEMOCRATIC REPUBLIC OF THE CONGO (2011), http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-112811-elections-final-rpt.pdf

[16] *Id.*





The law in most countries, regardless of the level of democratic development, establishes a right to seek a remedy for violations of electoral rights, but the legal and regulatory framework articulating that right may be weak or incomplete, and the effectiveness of the actual process may require closer scrutiny. In an effort to collect further data on the provision of effective remedies for electoral problems and violations, the authors conducted a brief survey of electoral experts in ten countries around the world to learn more about the election dispute resolution (EDR) system in country and its practical application.[17] Respondents provided insights on EDR systems in Myanmar, Pakistan, Indonesia, Kyrgyzstan, Ukraine, Georgia, Guatemala, Kenya, Burkina Faso, and Cote d'Ivoire. Six out of ten countries were assessed by election experts as sometimes providing effective remedies for electoral violations and crimes, while the rest were not considered to provide effective remedies.

Despite this serious weakness, seven respondents indicated that the system in their country did have remedies for electoral problems or violations clearly set out in the regulatory framework. Only the respondents from Myanmar, Guatemala, and Ukraine said that this is not the case. For Ukraine, the expert noted: "administrative fines for many election-related violations are too small to be considered effective, proportionate and dissuasive sanctions. . . .For certain violations of the election laws, such as distribution of goods and services to voters in relation to election campaigning, no sanctions are provided at all."[18] For Myanmar, the expert observed "for election violations committed during the campaign period or on Election Day, there is no provision in the law regulating this process and no timely remedy."[19] Even in those countries where remedies were provided in the law, challenges were obvious in applying the remedies. In Pakistan for example, while remedies are set out in the law, the application of these remedies is considered poor, due to "a weak implementation mechanism"[20] and a failure of tribunals to take timely action.

While international law clearly defines the right to a meaningful remedy as essential to the protection of fundamental political rights, in practice, the provision of effective remedies to electoral irregularities or violations remains a widespread challenge. It is important to note that this is not simply an academic challenge. Election stakeholders worldwide are becoming increasingly litigious, but many countries with evolving EDR systems (particularly those in developing democracies) cannot keep pace with the demand; the total number of complaints received generally far exceeds the number that are actually heard and resolved. Many cases may

[17] Internal IFES field office survey, February, 2016. Countries surveyed represent aid recipient countries at different levels of development, with locally identified electoral expertise, and capacity to respond to the questions in the survey.
[18] *Id.*
[19] *Id.*
[20] *Id.*

be dismissed for technical reasons without being substantive consideration, while the number of frivolous and vexatious cases is also rising. Increasingly, poor EDR systems exacerbate problematic elections, triggering constitutional crises, fueling politically-motivated violence, and/or precluding the successful transfer of power.

As highlighted by initial IFES field research, the right to a remedy can reside in the legal framework; however, access to an effective remedy remains elusive in many countries around the world. But, what is meant by an "effective remedy?" As stated above, the right to an effective remedy is well established in international law, and stems from the fundamental rights of political participation and universal suffrage. When remedies are not "effective," this weakens the fundamental rights of political participation and universal suffrage. Yet, to date, the definition of "effectiveness" is not clear to election practitioners. Nor is it clear how to properly measure if an EDR system is effective in providing resolutions or remedies that protect these rights and that preserve the integrity of the process. With this in mind, there is an acute need for evidence-based approaches to understanding, measuring and applying effective remedies.

III. What is being remedied?

No election is perfect. Democracy is messy and human-centered, and elections in particular require enormous organizational efforts by Election Management Bodies (EMBs). This is illustrated by the Indian context, where elections involve operating 800,000 polling stations in multiple phases over a period of weeks, and have been called "the largest democratic undertaking in human history."[21] In Indonesia, elections require the support of more than 4 million polling staff spread over thousands of islands in the archipelago. This organizational complexity is compounded by the fact that successful elections also rely on the behavior of groups and individuals that may be well beyond the control of the EMB. Such challenges can make it difficult, or in some cases impossible, to ensure a level playing field for electoral contestants. In addition, as political campaigns become more sophisticated, narratives of widespread fraud may be used to undermine or stabilize the process as a whole.

Hence, effective remedies are needed to respond to mistakes and violations, ranging from administrative malpractice to criminal acts, by different actors.[22] These types of mistakes or violations vary depending on the phase of the electoral process and the relevant actor. As outlined in subsequent chapters of this volume, a range of different remedies, both criminal and administrative, exist for different parts of the electoral process, and for different types of complaints within that process. Some remedies may be provided for in the law, while others can arise out of judicial discretion, or from the authority vested in the EMB to address irregularities in the process. The provisions of these different types of remedies, and their effectiveness in redressing the issue at hand, are important for protecting the integrity of the electoral process as a whole.

One approach to analyzing challenges to the integrity of the election process, used by the International Foundation for Electoral Systems (IFES), distinguishes between violations related to

---

[21] Fred Dews, *Democracies Should Celebrate Indian Elections, the Largest Democratic Undertaking in Human History*, BROOKINGS (Dec. 13, 2013, 5:11 PM), http://www.brookings.edu/blogs/brookings-now/posts/2013/12/democracies-should-celebrate-indian-elections.

[22] Chad Vickery & Erica Shein, *Assessing Electoral Fraud in New Democracies: Refining the Vocabulary*, *in* IFES WHITE PAPER 9 (2012), http://www.ifes.org/sites/default/files/assessing_electoral_fraud_series_vickery_shein.pdf.

systemic manipulation, malpractice, and fraud. The IFES Electoral Integrity Assessment Methodology defines systemic manipulation as "the use of domestic legal provisions and/or electoral rules and procedures that run counter to widely accepted democratic principles and international standards, and that purposefully distort the will of voters."[23] Malpractice is "a breach by a professional of his or her relevant duty of care, resulting from carelessness or neglect."[24] Finally, fraud is considered to be "deliberate wrong-doing by election officials or other electoral stakeholders, which distorts the individual or collective will of the voters."[25]

It is important to note that there is some overlap between the concepts of fraud and malpractice: criminal malpractice (i.e., malpractice by an official that is so egregious that it rises to the level of fraud despite the lack of intent). Determining whether a particular act constitutes gross negligence or fraud can be difficult in practice, but proof of intent is not always a prerequisite for criminal liability. Criminal malpractice or gross negligence can be subject to criminal sanction even without the element of intent.

One key benefit of integrity distinctions is that they can help identify appropriate remedies depending on the type of vulnerability identified – particularly with respect to the distinction between fraud and malpractice.[26] The remedy for a procedural mistake will be different than for a procedural fraud. As discussed further in Cameron Quinn and David Ennis' chapter on Election Day violations, consideration should also be given to whether a practical resolution, particularly one to an immediate Election Day problem, might protect the integrity of the process as effectively, or more effectively, than a formal legal remedy. While the two terms overlap to some extent, a *remedy* focuses on recovering a right or obtaining a redress for a wrong, while a *resolution* focuses on solving a problem to allow a process to proceed properly. As Quinn and Ennis note (in chapter 6 of this volume), "a court or tribunal may not be able to find an effective remedy to an Election Day problem, but a person impacted by that problem may find a timely, practical resolution by a polling official to be entirely satisfactory."[27]

Figure 2: Distinctions between applicable remedies for fraud and malpractice

	Electoral Fraud	**Electoral Malpractice[28]**
Possible Actors	Election officials, other public officials, voters, political parties, candidates, media	Election officials (including full-time and temporary election staff performing official duties related to any stage of the electoral process, as well as other actors with electoral responsibilities (for example, security personnel, media, political party officials)
Action	Actor knowingly interferes with the electoral process	Actor is negligent or careless in carrying out his or her election-related responsibilities
Intent	The act or omission is committed	The interference results from carelessness or neglect *(gross negligence may rise to the level of*

[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* We use the term "malpractice" rather than breaking it down further to cover misfeasance, malfeasance, and nonfeasance because: (1) the term "malpractice" has widespread use in academic literature and is used by practitioners; and (2) we want to make sure that we are capturing the concept of each actor having a duty of care, particularly those with a professional responsibility like an election administrator.
[27] chapter 6 of this volume
[28] *Id.*

	intentionally	*criminal malpractice, regardless of whether intent is proven)*
Result	Distorts the will of the people. This may manifest as interference with individual votes, or in overall vote counts that impact results.	May lead to irregularities in the electoral process, some of which may prevent the election outcome from reflecting the will of the people
Illustrative Remedies	Job loss or suspension Blacklist (not to be hired again) Fine Criminal prosecution	Corrective resolution (e.g., clarification on correct procedure) Additional training Warning Job dismissal, suspension, or demotion Blacklist (not to be hired again) Fine *For criminal malpractice, criminal prosecution*

In some cases, a practical resolution to a problem or irregularity will actually be more effective in ensuring the integrity of the process and protecting fundamental rights than a formal legal remedy. A resolution can be implemented immediately and fix a problem directly, and may prevent any violations of fundamental rights if implemented early enough in the process. In *Grosaru v. Romania*, the ECtHR held:

> for a remedy to be effective it need not always be a judicial remedy or a single remedy. The Court has accepted the possibility of an aggregate of remedies. Furthermore, the notion of effectiveness is construed as ensuring either the prevention of the alleged violation, or the provision of adequate redress, including compensation, for the victim of a violation.[29]

Grosaru v. Romania illustrates the fact that certain violations (and hence certain remedies) may overlap; an action can be both an electoral violation under electoral laws or regulations, as well as a crime under the country's penal code. For example, an incident of violence committed with the purpose of intimidating a person to vote a certain way may be both an offense of intimidation under electoral laws, and the crime of assault under the penal code. In such cases the act may be sanctioned (i.e., a remedy provided) under both the electoral laws and under the penal code. The level of evidence necessary for a criminal conviction can make a criminal prosecution more time-consuming, and convicting a person of a crime requires a higher evidentiary standard (generally "beyond a reasonable doubt"), than to sanction a person for an electoral offense. Conversely, there are factors that make criminal prosecution more effective: greater resources for investigation; greater penalties; the power of arrest; and wide powers of search and seizure to obtain evidence.

In short, what is being remedied must be determined if one is to measure the effectiveness of a particular remedy. If administrative mistakes have been made, administrative corrections of the mistakes and additional training to ensure the mistakes do not happen again are likely to be considered effective. However, if fraud has occurred, effectively correcting the fraudulent act and its impact on the election could be difficult. Numerous factors need be

[29] Grosaru v. Rom., App. No. 78039/01, 2010-II Eur. Ct. H.R. 1 (2010). *See also*, Kudła v. Pol., No. 30210/96, 2000-XI Eur. Ct. H.R. § 158 (2000).

considered: how does one determine the extent of the fraud? How does one correct the impact of the fraud once it is properly identified? Does the remedy disproportionally impact one candidate over another? How can one be sure that the remedy has captured the will of voters? And, how does one identify and prosecute the perpetrators to deter future fraudulent acts? These questions, and how one strives to answer them, begin with the question of what is being remedied – acts of fraud, negligence or systemic manipulation.

IV. Who is the remedy for?

The effectiveness of a remedy depends in part on the parties that it affects. Whose rights have been violated? Who can bring a complaint or appeal against the violation? Is there broader public interest in a particular remedy? Is it within the court's ability to redress the kind of harm at issue? Who is harmed when election laws are written to benefit one group over another or not followed?

One of the most important procedural tools used by adjudicators to determine who can seek relief from adjudication process is standing. Election irregularities include a wide range of issues like incorrect voter registration, candidate eligibility, ballot recounts, or fraud, all of which may involve (or impact) different actors, including election officials, candidates, political parties, voters, or other individuals. In principle, all actors who assert knowledge of an electoral irregularity should have legal standing to bring complaints, regardless of injury.[30] However, a broad legal standing can lead to burdensome caseloads and increase the number of frivolous claims, which can undermine the efficiency of EDR systems. Thus, a more restrictive approach to standing may be preferred for practical reasons.[31] Generally, electoral laws state that claims should be limited to individuals who are directly impacted by a violation.[32]

Standing rules that require a direct correlation to injury or impact may ease the identification and application of an effective remedy. In the United States, standing is limited to only those who have suffered or will suffer an injury in fact, whose injury was or will be caused by the actions or inactions of the defendant, and whose injury can be reasonably redressed by the court. The U.S. Supreme Court has further narrowed standing doctrine in cases like *Federal Election Commission v. Akins*, which created the "zone of interest" test.[33] This test limits statutory standing to only those intended by the legislature to be protected by the law at issue.[34]

Although the standing requirement in the United States is relatively narrow, adjudicators deciding election cases have approached this requirement liberally when it comes to determining the legal concept of "injury in fact." In *Akins*, the plaintiffs were a group of registered voters who had asked the defendant, the FEC, to determine that an organization called the American Israel

---

[30] GUIDELINES FOR UNDERSTANDING, *supra* note 7, at 21.

[31] A case can be made that exceptions to ordinary rules on standing are justified with regard to certain types of grievances. *See* CARTER CENTER, ELECTORAL RESOLUTION EXPERTS' MEETING 2, 10 (2009), http://www.cartercenter.org/resources/pdfs/peace/democracy/des/electoral-dispute-resolution-meeting.pdf.

[32] Avery Davis-Roberts, *International Obligations for Electoral Dispute Resolution* 10-11 (Carter Center, Discussion Paper for Experts' Meeting, Feb. 24-25, 2009), http://www.cartercenter.org/resources/pdfs/peace/democracy/des/edr-approach-paper.pdf

[33] Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).

[34] *Id.*

Public Affairs Committee ("AIPAC") was a political committee as per the terms of the Federal Election Campaign Act (FECA).[35] Political committees are required under the FECA to disclose financial contributions and expenditures over a certain threshold. Congress specifically provided in FECA that "any person who believes a violation of this act has occurred, may file a complaint with the commission"[36] and "any party aggrieved by an order of the Commission dismissing a complaint filed by such party may file a petition in the district court."[37] The Court ultimately held that while the grievance was a "generalized grievance," the harm (failure of the voters to obtain information on donations to and expenditure by AIPAC) was considered to be an "injury in fact" and fell within the zone of interests protected by the statute.[38]

Here, defining those complainants that have a genuine injury which is traceable to the alleged harm makes the provision of an effective remedy more comprehensive, and leads to the conclusion that the integrity of the election process is the concern of all citizens. For this reason, some countries have maintained a broad definition of standing to ensure that a wider range of potential plaintiffs have access to justice, and in cases where there is a clear need to represent a wider sector of society, broader legal standing may be critical.[39] In Iraq, any voter or organization (other than referendum and election observers) "who has a complaint or dispute related to the electoral and referendum process" has the right to file a complaint.[40] In Afghanistan, any person or organization that "has a legitimate interest in the electoral process" has the right to file a complaint.[41] As these examples illustrate, in an effective EDR system there is a range of standing options available. The U.S. has a fairly restrictive interpretation of standing but adjudicators have tried to expand this interpretation when it comes to election cases; whereas, other countries, such as Afghanistan, have a very broad application of standing, which has led to an overwhelming number of complaints, and therefore could be further refined. In short, the legal framework must find the right balance in terms of who can file a complaint to ensure that the legal system has the capacity to properly investigate and adjudicate legitimate claims in a timely and effective manner.

In its *Code of Good Practice in Electoral Matters*, the Venice Commission states that

> [i]f the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.[42]

---

[35] *Id.*
[36] Federal Election Campaign Act (FECA), 52 U.S.C §437g(1)(a)
[37] *Id.* §437g(8)(a)
[38] Federal Election Campaign Act (FECA), 52 U.S.C. §30109; *Akins*, 524 U.S. 11, at 22-24.
[39] GUIDELINES FOR UNDERSTANDING, *supra* note 7, at 21.
[40] Electoral Complaints and Disputes Reg. No. 2 § 3(1) of 2008 (Iraq); *See also*, Independent High Electoral Comm'm Law No. 11 art. 4 § 8 of 2007 (Iraq).
[41] Electoral Law art. 5 of 2014 (Afg.).
[42] Eur. Comm'n for Democracy though Law (Venice Comm'n), *Code of Good Practice in Electoral Matters*, 52d Sess., Opinion No. 190/2002 (2003), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e.

Once a state has determined what can be adjudicated and by whom, legal drafters and reformers must consider the broad range of policy options available to them in defining the remedies that apply to specific types of fraud and malpractice. With this in mind, legal drafters have minimal guidance as to how they should determine which remedy to tie to a specific violation or wrongdoing. Legal drafters have to use intuition and comparative examples when drafting the legal code that applies to remedies. There is little to no information available that provides the drafter the tools they need to determine if a specific remedy will be "effective" in producing the outcome for which the remedy is intended. With that in mind, the following section focuses on a proposed framework that can measure the effectiveness of specific remedies in specific situations and give legal drafters the tools they need design an effective EDR regime.

V. What are the core elements of effectiveness?

There are arguably several core elements comprising the concept of "effectiveness." As outlined above, these elements concern both the effectiveness of the election dispute resolution system itself, and the actual remedies the system produces. This paper identifies six core elements of effectiveness. Namely, an effective remedy: (1) ensures that the letter and spirit of the law is realized in practice (including to restore electoral rights or otherwise undo the harm caused by a violation); (2) is provided in a timely manner; (3) is proportional to the violation or irregularity in question; (4) is enforceable; (5) leads to deterrence or a change in behavior in question; and (6) reinforces the perception of fairness and credibility of the process.

1. A remedy must be effective in practice as well as in law

As illustrated by our field research, even when the right to a remedy resides in the legal framework, access to an effective remedy may remain elusive. Courts and other bodies responsible for adjudicating electoral disputes must give effect to these legal remedies by practically applying them in a manner that will redress the issue at hand. Ultimately, a right has no meaning without a remedy to protect it. As legal theorist Tracy Thomas has noted, "[r]ights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees."[43] In *Petkov v. Bulgaria*, the ECtHR ruled that a remedy must be "effective in practice as well as in law in the sense either of preventing the alleged violation or remedying the impugned state of affairs, or of providing adequate redress for any violation that has already occurred."[44] Similarly, in *Namat Aliyev v. Azerbaijan*, the ECtHR held that "the object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective."[45]

The Inter-American Court of Human Rights has also examined the different components of an effective remedy in *Miyagawa v. Peru*, where the applicant alleged that the National Elections Board arbitrarily and illegally deprived her of her right to stand for an election as an independent candidate, and further that this violation led to the denial of the right to vote for

[43] Tracy Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process* [hereinafter *Ubi Jus*], 41 SAN DIEGO L. REV. 6 (2004).
[44] Petkov v. Bulgaria, Nos. 77568/01, 178/02, & 505/02, 5 Eur. Ct. H.R. ¶ 74 (2009).
[45] Namat Aliyev v. Azerbaijan, App. No. 18705/06, 2010 Eur. Ct. H.R. ¶ 72 (2010).

hundreds of thousands of Peruvian citizens.[46] In its ruling, the Court addressed both the merits of the case as well as the judicial authority to restore the enjoyment of rights at issue, holding that the obligation of the state is not limited to the mere existence of courts and tribunals, but must provide a "real possibility to file a remedy."[47] While it is important for remedies to be clearly set out in the legal framework, the application of these remedies must also be guaranteed: "winning the case is not the same as winning the remedy."[48]

In the 2015 parliamentary elections in Turkey, the Rights and Liberties Party lodged a complaint alleging that several media outlets had incorrectly reported that the party had withdrawn from the election, and the party requested that the Supreme Board of Elections (SBE) remedy the matter by corrective announcement.[49] The SBE informed OSCE observers that it would not adopt a decision on the complaint and had no means to remedy the matter.[50] In another instance, a complaint lodged by the People's Liberation Party concerning continued use of a campaign song by another party was left without consideration on the substance, on the grounds that the remedy requested by the complainant, to de-register the party, was not appropriate. OSCE observers noted that while remedies existed in the law, ultimately the SBE did not provide an effective remedy for contestants in practice.[51]

The principle that a remedy must be effective in practice (*de facto*) as well as in law (*de jure*) has been emphasized in other areas of law concerning the protection of rights, including those related to asylum. In 2010, the United Nations High Commissioner for Refugees (UNHCR) conducted research in 11 Member States on approaches to asylum procedures.[52] The final report from this research concluded that "[t]he notion of effectiveness implies that a person should be able to access the remedy in not only legal terms, but also in practice. The research indicated that, in practice, various and numerous [procedural] impediments face prospective appellants in some Member States…[and] a number of these impediments may combine to render the right of appeal ineffective in practice.[53]

As illustrated by this research, many procedural factors can render a remedy ineffective in practice, even if the remedy is provided for in the legal framework. Therefore, the notion of

---

[46] Miyagawa v. Peru, Case 11.28, Rep. No. 119/99, Inter-Am. Comm. H.R. doc. 3 rev. ¶ 1262 (Oct. 6, 1999), http://www1.umn.edu/humanrts/cases/119-99.html.

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

[48] *Ubi Jus*, *supra* note 33.

[49] OSCE, EARLY PARLIAMENTARY ELECTIONS, 1 NOV. 2015: FINAL REPORT (2015), http://www.osce.org/odihr/elections/turkey/219201.

[50] *Id.*

[51] *ID.*

[52] Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Italy, Netherlands, Slovenia, Spain and the United Kingdom.

[53] John Barnes, *The right to an effective remedy: The Scope of Article 39 of the Procedure Directives (2005/85/EC) and the effect of the proposals for amendment of the Directive (2009 COM 554/4),* INT'L ASS'N OF REFUGEE JUDGES 2 (2010) https://www.iarlj.org/general/images/stories/lisbon_sep_2010/john_barnes_-_lisbonconferencepaperonart39pdversion3_jb.pdf. Potential impediments identified included inadequate information provided to applicants on how to appeal, and to which appeal body; extremely short time-limits within which to appeal; a requirement to lodge the appeal in person, which is impossible for some applicants to fulfill in practice; difficulties in accessing the case file in a timely manner; and limited physical access to the court or tribunal due to distance and lack of financial resources to travel.

effectiveness must encompass these procedural elements. Hence, the first element to consider when measuring effectiveness is to simply determine if the legal system has the ability to give effect to the legal remedies available by applying them in practice in a manner that will redress the issue at hand. In the elections context, a key part of this process is the expedited provision of a remedy, discussed in more detail in the next section.

2. A remedy must timely

It is crucial to resolve disputes or violations in a timely manner while they can still be redressed in a meaningful way. This is particularly true in the electoral context, where rights are tied to the electoral calendar, and results dictate the transfer of power. If the public considers the settlement of disputes too slow, trust in the EMB and judicial institutions (and ultimately in the results of an election) may be lost. Crucially, slow administration of justice may impact public confidence in the peaceful settlement of disputes. As IFES has previously noted, "[b]ecause the legitimacy of the entire government may rest on the validity of election results, complaint proceedings must be expeditious."[54] Most relevant for the purposes of this volume, undue delay can render remedies ineffective.

The importance of a timely remedy or resolution to a dispute is widely recognized in international conventions and treaties, even though the language used to describe the requirement for timeliness may vary. In general, the time-sensitivity of elections requires dispute resolution proceedings to take place "within a reasonable time" or "without undue delay."[55] In Nigeria, despite the requirement of Section 148 of the Electoral Act of 2006 that requires an election petition or appeal to have an "accelerated hearing" that has "precedence over all other cases or matters before the Tribunal or Court,"[56] the Nigerian court system took nearly two years to resolve a dispute regarding the 2007 gubernatorial election, with a rerun finally ordered in 2009 after the declared winner had spent two years in office.[57] According to observers, the delays concerning the 2007 electoral complaints created a deep legitimacy and credibility crisis in the Ekiti State.[58] Fast-forward to the 2015 Nigerian elections, where observers from the OSCE noted that "the lack of time limits for filing and adjudicating of pre-election suits, in combination with loopholes allowing lawyers to delay cases unnecessarily, left the majority of cases pending before the courts for after the elections, thus compromising the right to a timely remedy."[59]

During the 2013 electoral cycle in Pakistan, the complaints process was "marked by substantial delays at all levels."[60] At the time of this writing, more than two years after the 2013 election, petitions continue to be decided, despite the election tribunals being required by law to dispose of them of within 120 days of receipt. This has caused prominent politicians to be removed from office after many months or years, and widespread protests continue to plague

---

[54] GUIDELINES FOR UNDERSTANDING, *supra* note 7 at 42.

[55] ICCPR, *supra* note 5 at art. 14 § 1(c); European Convention for Protection of Human Rights & Fundamental Freedoms, art. 6, § 1 and the American Convention on Human Rights, art. 8.

[56] Electoral Act (2010) § 142 (Nigeria).

[57] This provision of the electoral law recalls section 294(1) of the Nigerian Constitution, that "every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses." CONSTITUTION OF NIGERIA (1999), § 294(1).

[58] GUIDELINES FOR UNDERSTANDING, *supra* note 7.

[59] OSCE, FEDERAL REPUBLIC OF NIGERIA, GENERAL ELECTIONS 28 MARCH 2015 AND 11 APRIL 2015: FINAL REPORT (2015), http://www.eueom.eu/files/pressreleases/english/eu-eom-nigeria-2015-final-report_en.pdf.

[60] IFES, ELECTION TRIBUNAL MONITORING PROJECT FINAL REPORT (2009); DRI, ELECTION DISPUTE RESOLUTION: AN ANALYSIS OF PAKISTAN'S MECHANISMS PRIOR TO THE 2013 PARLIAMENTARY ELECTIONS (2013).

Pakistan's political environment, despite the 2013 elections generally being considered credible. In Sri Lanka in 2015, the European Union Election Observation Mission (EUEOM) noted that while "legislation provides for complaints and appeals processes that are generally in line with the international principle of judicial review," nevertheless, "election-related complaints go through regular administrative procedures, with no specific election-related deadlines, which may undermine their timely and effective remedy."[61]

In a paper titled "The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings," Martin Kuijer observed that "[e]very year hundreds of applicants complain before the European Court of Human Rights (hereinafter the "Court") that judicial proceedings before their domestic courts have taken too much time and thereby violate Article 6 of the ECHR, which states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[62] When the paper was published in 2013, Kuijer noted that twenty-five per cent of the total number of ECtHR judgments still relate to length of proceedings cases. In *Ummuhan v. Kaplan*, the ECtHR noted that more than 2700 applications stemming from the same issue in Turkey had been pending before the Court, and ruled that Turkey was required to put in place, within a year, an effective remedy affording adequate and sufficient redress in cases where judicial proceedings exceeded a reasonable time.[63]

Whether a remedy is effective in practice can be difficult to measure in the time-bound elections context. For example, it can be difficult to restore the right to vote to an individual post-hoc in an otherwise credible election. When examining the right to an effective remedy under Article 13 of the EDHR, and the right to a fair trial "within a reasonable time" under Article 6, the ECtHR has noted that expedited proceedings are paramount, but where a delay has already occurred a remedy should still be provided. In *McFarlane v Ireland* the Court held that Article 13 allows a State to choose between a remedy that can expedite pending proceedings, or a remedy post factum for a delay that has already occurred. While the former is preferred, "a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist."[64] The Court has also noted that the right to a timely and fair hearing is separate to whether a remedy is available in the law. In *Kudla v Poland* the Court observed that whether the applicant benefitted from a civil rights or criminal trial within a reasonable time is a separate legal issue than "whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground."[65]

The need for the prompt resolution of electoral issues must be balanced with the requirement for due process. Given the high stakes involved in elections, courts and adjudicatory bodies must balance the expeditious disposal of cases and the fairness of the adjudication

---

[61] OSCE, DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, PARLIAMENTARY ELECTIONS 17 AUGUST 2015: FINAL REPORT (2015), http://www.eueom.eu/files/pressreleases/english/EUEOM_SriLanka_FinalReport_20151017.pdf.

[62] Martin Kuijer, *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, 13:4 HUMAN RIGHTS L. REV. 777 (2013), http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/KUIJER_Fair_Trial_Lengthy_Proc_CoE_2013.pdf.

[63] *Id.* at 784.

[64] McFarlane v. Ir., App. No. 31333/06, Eur. Ct. H.R. ¶ 108 (2010).

[65] Kudla v Poland, App. No. 30210/96, Eur. Ct. H.R. (2000), http://law2.syr.edu/media/documents/2009/3/Kudla_v_Poland.pdf.

process. In *Namat Alieyev v. Azerbaijan*, the ECtHR held that time restraints "may not serve to undermine the effectiveness of the appeal procedure, and it must be ensured that a genuine effort is made to address the substance of arguable individual complaints concerning electoral irregularities."[66] Due process is critical to the perception of fairness of the process and institution, which is discussed further below.

Lastly, it is important to consider the effectiveness of a resolution versus a remedy. Given the importance of due process requirements for a fair hearing, and the fact that these requirements by their nature require a certain amount of time (e.g., notifying parties or preparing a defense), it may be that applying a practical resolution to a violation or irregularity may ultimately protect the integrity of the electoral process more effectively than a formal legal remedy which requires more time to determine and apply. However, the more informal resolution of irregularities should also be provided for in the regulatory framework and not simply applied on an *ad hoc* basis depending on the particular election official or decision maker. To measure the effectiveness of remedies in terms of timeliness, several factors should be examined, including the legal framework, the deadlines set therein, the actual time taken to resolve complaints, and the impact any delay has on the election or office in question.

3. A remedy should be proportional to the violation

As indicated at the beginning of this chapter, violations or irregularities often have relatively minor consequences and do not amount to violation of any fundamental human right. However, as discussed further by Quinn and Ennis later in this volume, this fact does not mean that election contestants should be permitted to flout the law with impunity.[67] Rather, remedies for these violations should be proportionate to the harm caused. For example, in many cases, an injunction or directive from an election management body may be a sufficient to remedy a violation of a rule against campaigning on Election Day.

The availability of a range of remedies is necessary to ensure proportionality of the sanctioning system. As outlined by Magnus Ohman and Megan Ritchie in a separate chapter on campaign finance in this volume, a fraud violation such as vote buying or bribing election officials should carry a heavier penalty, such as not being able to run for office for a certain period, including for the purposes of deterrence.[68] Conversely, a malpractice violation, such as inadvertently failing to submit campaign finance disclosure forms by the established deadlines, should attract a lighter penalty, such as a warning or a fine, unless it is found that the intention was to hide controversial transactions. As Ohman and Ritchie note, fines are particularly conducive to proportionality, since they can easily be varied from a small amount that is more symbolic in nature to a more substantial amount that can curb the activities of political actors.[69]

The Philippines complaint adjudication system provides an example of the broad spectrum of electoral offense sanctions. In 2004, IFES reported that the penalties implemented by the Philippines electoral authorities were harsh and not proportional to the committed offense. These harsh sanctions could discourage people from bringing a claim, as a prospective claimant might not want to condemn a poll worker to jail time (the sanction provided in the law)

---

[66] Namat Aliyev, *supra* note 35 at ¶ 90.
[67] Chapter 6 of this volume
[68] Chapter 10 of this volume
[69] Id.

for an offense such as failing to post the list of voters in the correct location.[70] IFES recommended that the legislative authority delink criminal and electoral law and establish sanctions more appropriate for the offenses in question, such as fines, loss of media access, campaign restrictions, and public apologies, recommendations that were ultimately put into effect by the legislature. [71]

Whether a remedy is proportional to a violation depends on a variety of different factors. For example, in the U.S., certain factors will increase recommended sentences for election fraud under the sentencing guidelines, including whether a defendant occupies a leadership or supervisory role in an election fraud scheme or abuses a position of public or private trust; if individual voters are viewed as vulnerable victims; if there is obstruction; or if the election fraud involved corrupting a public official.[72] As outlined by this example, to measure the proportionality of remedies, one must consider the violation, the impact it has had on the entire process, what will correct the mistake or wrongdoing, and what deterrence is required to ensure others do not repeat the illegal act or careless mistake.

4. A remedy must be enforceable

The right to a remedy cannot be effective if the remedy is not implemented, but enforcement requires the cooperation of diverse authorities responsible for the implementation of administrative or judicial decisions.[73] The enforcement component of a remedy is the critical element that distinguishes it from simply an idea or decision, and actualizes the right in a tangible manner. In the 1838 case *Kendall v. United States*, the U.S. Supreme Court observed that "[t]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well- organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."[74]

A lack of proper enforcement can undermine the right to an effective remedy and must be addressed if the electoral dispute resolution process – and the electoral process as a whole – is to be respected by the electorate and if electoral and judicial institutions are to be seen as legitimate. In *Petkov v. Bulgaria* the ECtHR stressed that the "rule of law — one of the fundamental principles of a democratic society — entails a duty on the part of the State and public authorities to comply with judicial orders or decisions against them."[75] In this case, three applicants alleged that their rights to run for office in the 2001 parliamentary elections had been unfairly abrogated.[76] The applicants' coalition withdrew their names from the candidates' list due to their links with the former State security agencies.[77] The Supreme Administrative Court ruled in the applicants' coalition's favor and declared the striking of the applicants off the lists of

---

[70] Peter Erben, Beverly Hagerdon Thakur, Craig Jenness, & Ian Smith, *CEPPS Philippines Election Observation Program Strengthening the Electoral Process IFES Final Report*, IFES (2004), http://pdf.usaid.gov/pdf_docs/pdacw958.pdf.

[71] *Id.*

[72] CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES, U.S. DEPT. OF JUST. (7th ed. 2007) http://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf

[73] GUIDELINES FOR UNDERSTANDING, *supra* note 7 at 64.

[74] Kendall v. United States ex rel. Stokes, 37 U.S. 524, 624 (1838).

[75] Petkov, *supra* note 34 at ¶ 62. ("The applicants complained of the electoral authorities' refusal to comply with the final judgment of the Supreme Administrative Court declaring their striking off the lists of candidates null and void, and of their resulting inability to stand in the parliamentary elections on 17 June 2001.").

[76] *Id.* at ¶¶ 55-82.

[77] *Id*. at ¶ 60.

candidates null and void. However, the electoral authorities failed to effectuate this final and binding decision, and therefore, the applicants brought the case before the European Court of Human Rights. The ECtHR acknowledged the failure on the part of electoral authorities, and added that even if the authorities disapprove the findings of the court, they cannot refuse to comply with the judgment in a democratic society abiding by the rule of law.

Due to a lack of financial resources or to a lack of will, the enforcement of sanctions and penalties is not always effective in developing democracies. In our survey of IFES electoral experts in the field, the weak enforcement of sanctions was frequently cited as a problem, with only respondents from Georgia and Guatemala saying that remedies are used or enforced within a proper amount of time to make them effective.[78] In Burkina Faso, Indonesia, Kenya, Myanmar, and Ukraine, remedies are not used or enforced at all.[79] On the whole, experts highlight the significant need for more enforcement, with only respondents in Georgia and Kyrgyzstan saying that the availability and enforcement of these remedies deter other violators, while in Guatemala and Pakistan these remedies work sometimes.[80] In other countries surveyed, sanctions do not serve to deter other potential violators, mainly due to a lack of enforcement. With respect to the abuse of state resources, the IFES expert in Ukraine noted that "the sanctions are not enforced, in particular, when it comes to high level officials" while in Kenya, there is a "perception that enforcement is more of a political tool than a legal one."[81]

The enforcement of remedies and sanctions is important not only to give substance to rights, but also to deter future instances of malpractice and fraud. The effectiveness of certain sanctions as a deterrent depends in part on enforcement. If the courts, EMB, or other state bodies are unable, or unwilling, to enforce a sanction or implement a remedy, the deterrent effect decreases. To measure this element of effectiveness, we must first ask whether the remedy was clearly defined and if the proper body pursued it in practice (e.g., if a fine was levied, was it paid by the perpetrator and was the fine collected by the proper branch of government?). Once this determination is made, if the remedy was put in place over a period of time (e.g., a jail sentence, or a restriction on candidacy) these cases must be monitored over time to ensure that the actual sentence or restriction remained in place for the time period determined by the body adjudicating the case.

5. A remedy should be effective in deterrence

An effective remedy implies the availability of sanctions and penalties, such as issuing a warning to the offender (including political parties), imposing a fine or criminal penalty, decertifying a candidate, disqualifying a political party, suspending the right to campaign, invalidating a ballot, or ordering a recount or a re-run election.[82] These sanctions and penalties should be established in a manner that will deter candidates and others from violating electoral law.

---

[78] Internal IFES field office survey, supra note 17

[79] Id.

[80] Id.

[81] Id.

[82] Electoral Law, *supra* note 31 at art 54 § 1; Electoral Reform Law §§ 22-25 of 2004 (Liber.) (penalizing fraudulent registration and bribery), http://www.necliberia.org/content/legaldocs/laws/elereformlaw.pdf; The New Elections Law, § 10.25, 10.26 of 1986 (Liber.), http://www.necliberia.org/content/legaldocs/laws/1986electionlaws.pdf.

To effectively deter, the availability and application of sanctions must be known. The right of redress cannot be fully effective if the electorate and the candidates are not aware of existing sanctions for violations. Without clear procedures and publication of resolutions or remedies, the deterrence value decreases. Beyond these clarity and transparency measures, penalties or sanctions must be sufficiently strict to deter each different kind of violation, without being disproportionate or heavy-handed.

In an article titled "The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations," Todd Lochner and Bruce E. Calin note that "[b]ecause election law implicates important constitutional rights, the use of criminal sanctions can only be imposed in the most egregious cases. Thus, the enforcement of violations usually involves the question of how great a fine to impose…[which has] different effects on wealthier and less affluent candidates."[83] International IDEA sets out a revealing case study in the *Electoral Justice Handbook* on the effectiveness of financial sanctions in deterrence, which may differ depending on the context:

> Provision for gender quotas was included in electoral law in France in the French 'Parity Law' of 2000. Under this provision, political parties that did not nominate a stated percentage of women would be fined by a reduction in the funding that their party received from the state. Some parties in France itself were not keen to comply, and regarded the fine as small: they did not nominate enough women, and they were fined. The same legislation applied in the overseas departments of France, including New Caledonia. The parties in New Caledonia, which is poorer than France, regarded exactly the same level of fines as high and as a deterrent, and ensured that they complied with the legislation. The election in New Caledonia produced a legislative body composed almost equally of women and men . . . [w]hat is proportionate and effective in one place is not necessarily so in another.[84]

In our survey of IFES field offices, electoral experts acknowledged the challenges regarding deterrent effect of remedies in the law. In Ukraine, "administrative fines for many election-related violations are too small to be considered effective, proportionate and dissuasive sanctions . . . [and] for certain violations of the election laws…no sanctions are provided at all." In Myanmar, "because there is no provision regarding the sanctioning of civil servants – this creates no deterrence." As Magnus Ohman and Megan Ritchie outline in a separate chapter in this volume on campaign finance, sanctions will be more effective in deterrence if all parties engaged in a violation are penalized.[85] For example, a sanction may be imposed on a political party for receiving illegal campaign contributions, but if those making these illegal contributions are not also punished, the deterrence impact may appear weaker.

In the U.S. Department of Justice manual on 'Federal Prosecution of Election Offenses," the authors include a newspaper editorial from Eastern Kentucky University to illustrate why prosecuting election crimes is important to send a message to the populace that electoral actors will be held to account: "the people…were effectively robbed of their voting rights by Newsome and others dolling out cash to buy a public office…federal authorities have pledged to continue

---

[83] Todd Lochner Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions For Campaign Finance Violations,* 52 ADMIN. L. REV. 629 (2000), https://www.wcl.american.edu/journal/alr/52/52-2lochner.pdf.

[84] OROZCO-HENRIQUEZ, supra note 7 at 50 ¶ 123.

[85] Chapter 10 of this volume.

the fight they have started to restore to the people the right to govern themselves without dealing with a stacked deck."[86] Measuring remedies' efficacy in deterring further violations will require sustained studies over time to see if the acts that have been identified and adjudicated decrease, or whether the actions have no deterrence effect. If a decline is identified, further contextual research would be needed to isolate the change to the remedies used, and to ensure that other factors do not contribute to the drop in actions (such as a change in the electoral system).

6. A remedy should reinforce the perception of fairness and the credibility of the process

Finally, effective remedies are essential for undergirding the credibility of the election dispute process, as well as the wider electoral process. Research focused on the effectiveness of institutions administering a particular system suggests that people largely react to the fairness by which authorities make decisions and exercise authority, and that these reactions "shape both their willingness to accept decisions and their everyday rule-following behavior."[87] Additionally, "these effects have been found to occur when substantial issues, such as personal freedom, are involved."[88] In terms of the perception of fairness and credibility of the overall process, citizens must believe the will of the voter is ultimately reflected in the election result, and that losing candidates have a right to redress via an effective dispute resolution process that considers all legitimate complaints.

This right to redress encompasses a right to due process, whether a complaint or irregularity is dealt with administratively or through the court system. Where there are serious irregularities, the adjudication body should schedule a hearing and enable the claimants to be fully informed of the status of their complaints.[89] The ECtHR has also affirmed that the right to a fair trial and access to a remedy is not limited to the courts, but applies to administrative proceedings. In *Öztürk v. Germany* the ECtHR held that

> it would be contrary to the object and purpose of Article 6…which guarantees to 'everyone charged with a criminal offence' the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty . . . [c]onferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.[90]

Studies of the 2000 U.S. Supreme Court decision in *Bush v. Gore* suggest that in gaining acceptance of a controversial decision, the Court benefitted from the widespread public view of

---

[86] DONSANTO, *supra* note 56 at 240.

[87] TOM R. TYLER, WHY PEOPLE OBEY THE LAW, PRINCETON UNIVERSITY PRESS (2006)

[88] *Id* at 284. Findings consistently suggest that the legitimacy of authorities and institutions is linked to the fairness of the procedures by which they exercise their authority. These findings link legitimacy to the degree to which institutions are "just" institutions. Hence, the pursuit of public support requires institutions and authorities to adhere to lay principles of justice. The effort to create and maintain legitimacy, in other words, causes institutions to focus on those who are being led, and their conceptions of procedural justice.

[89] GUIDELINES FOR UNDERSTANDING, supra note 7.

[90] Öztürk v. Germany, App. No. 8544/79, Eur. Ct. H.R. (1984).

the Court as a legitimate political institution.[91] Conversely, Carter Center observers of the 2011 presidential elections in the Democratic Republic of the Congo (DRC) were told that many citizens avoided the court system since they believed judges were not impartial in their work and could be swayed by political interests instead of justice. The Carter Center suggested that "[c]itizens' awareness of the DRC's inadequate dispute resolution mechanisms is believed to have contributed some to the many street protests and violence that have permeated this election; many voters are frustrated and feel they have no other alternative but to protest in order to have their voice heard."[92] Ultimately, observers considered that the underdeveloped system did not sufficiently protect citizens' fundamental right to adjudicative remedy for alleged violations of their rights.[93]

In "Why People Obey the Law," psychologist Tom Tyler examines the linkage between the perceived legitimacy of institutions and systems, and the compliance with rules and decisions issues by those institutions:

> Findings consistently suggest that the legitimacy of authorities and institutions is linked to the fairness of the procedures by which they exercise their authority. These findings link legitimacy to the degree to which institutions are "just" institutions. Hence, the pursuit of public support requires institutions and authorities to adhere to lay principles of justice. The effort to create and maintain legitimacy, in other words, causes institutions to focus on those who are being led, and their conceptions of procedural justice. It is only when the perspectives of everyday members are enshrined in institutions and in the actions of authorities that widespread legitimacy will exist.[94]

Ultimately, Tyler suggests that beyond simply "winning" a case or claim, people care about the justice of outcomes (what Tyler terms "distributive justice") and of the procedures by which they are arrived ("procedural justice").[95] Additionally, he finds that these elements influence both the perceived legitimacy of the institution providing the remedy, and the remedy itself (independent of whether the remedy is favorable to the person in question).

VI. How can effectiveness be measured?

As emphasized at the start of this chapter, there is an acute need for evidence-based approaches to measuring and applying effective remedies. Increasingly, weak EDR systems exacerbate problematic elections, and in some instances, cause stakeholders to bypass the formal EDR system in ways that can trigger legitimacy crises, protests, and violence. Further research is needed on just how the effectiveness of remedies might be better measured – and ultimately their application better refined to mitigate these political pressures.

---

[91] James L. Gibson, Gregory A. Caldiera & Lester Kenyatta Spence, Measuring Attitudes toward the United States Supreme Court, 47 AM. J. POL. SCI. 354, 354 (2003).

[92] CARTER CENTER, FINAL REPORT: PRESIDENTIAL AND LEGISLATIVE ELECTIONS IN THE DEMOCRATIC REPUBLIC OF THE CONGO (2011), http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-112811-elections-final-rpt.pdf

[93] *Id.*

[94] WHY PEOPLE OBEY THE LAW, *supra* note 87.

[95] *Id.* at 5.

The process of measuring different types of remedies for different categories is complex. For example, measuring the decline in complaints of fraud may help us to draw conclusions about effective deterrence, but this may not provide insights into other elements of effectiveness (for example, redressing rights). Proper analysis of effective remedies requires an examination of the core elements of effectiveness outlined in this paper, to ensure that a remedy: (1) ensures that the letter and spirit of the law is realized in practice (including to restore electoral rights or otherwise undo the harm caused by a violation); (2) is provided in a timely manner; (3) is proportional to the violation or irregularity in question; (4) is enforceable; (5) leads to deterrence or a change in behavior in question; and (6) reinforces the perception of fairness and credibility of the process.

In any comprehensive analysis of remedies' effectiveness, these elements will need to be balanced. For example, we have an intuitive sense of when a legal remedy may be too heavy-handed, but it may be considered effective in the sense that it deters the conduct in question. In Sri Lanka, a heavy and non-proportional sentence of three years of jail time may be imposed on any individual for publicly disclosing a political party campaign finance asset statement (which seems disproportional), but no violation of this rule has ever been reported (therefore, it may be effective as a deterrent).

Furthermore, to measure the effectiveness of remedies, data on remedies that have been applied and enforced must be available. Election observers have highlighted the importance of case management systems to provide transparency and visibility of both the EDR system and the remedies it provides. During the 2013 Pakistan general elections, OSCE observers noted that "[t]he lack of a central record-keeping system and routine publication of decisions ma[de] it difficult to assess the extent to which there was consistent opportunity for effective remedy."[96] An effective case management system allows for consistent information on the adjudication of complaints, the reasoning behind decisions, the application of the remedy, and the enforcement of that remedy.

The process of evaluation of the effectiveness of remedies should draw on mixed (or multiple) methods, given the multiple variables involved and components of effectiveness. A key benefit of this type of approach is that we can combine multiple perspectives, both qualitative and quantitative evidence, and overcome data limitations inherent to collecting information on the application of EDR remedies in developing democracies. Specificity regarding the desired outcomes (e.g., deterrence or organizational legitimacy) will be essential both to the analysis and to achieving system improvement. 'Evidence-based practice' implies that (1) one outcome is desired over others; (2) the outcome is measurable; and (3) the outcome is defined according to practical realities rather than immeasurable moral or value-oriented standards.[97] We outline below an agenda for further research based on the elements of effectiveness introduced in this chapter as well as the implicit requirements for developing an evidence base for good practice.

1. Does the remedy reflect the spirit and the letter of the law?

   In general, answering this question will require comparative legal analysis of both formal

[96] OSCE, ISLAMIC REPUBLIC OF PAKISTAN, GENERAL ELECTIONS 11 MAY 2013: FINAL REPORT (2013) http://www.eueom.eu/files/dmfile/eu-eom-pakistan-2013-final-report_en.pdf.

[97] U.S. DEPT. JUST., IMPLEMENTING EVIDENCE-BASED PRACTICE IN COMMUNITY CORRECTIONS: THE PRINCIPLES OF EFFECTIVE INTERVENTION, https://s3.amazonaws.com/static.nicic.gov/Library/019342.pdf.

case law as well as data from EMB case management systems that captures administrative decisions made and resolutions or remedies extended.

2. Is the remedy timely?

One way of assessing the timeliness of remedies is by looking at what is set out in the legal framework regarding timelines (legal deadlines, the electoral calendar, constitutional requirements, and international principles), and the level of adherence to those timelines. This examination could review the actual or average time it takes to resolve certain types of election complaints, as well as the number of appeals directly related to a lack of timely remedy. As outlined by Martin Kuijer in "Effective Remedies as a Fundamental Right," the experience of the ECtHR has been that repetitive appeals to the ECtHR "generally reveal a failure to implement effective domestic remedies…if States fail to provide effective remedies, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise . . . have to be addressed in the first place within the national legal system."[98] Surveys could also be used to assess whether complainants consider their claim was dealt with in a timely manner.

3. Was the remedy proportional to the violation or irregularity?

Measuring the proportionality of a remedy will require reference to other models, such as those used in the criminal justice sphere. For example, a significant amount of literature and scientific research exists on evidence-based practice regarding probation policies. That is, "supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole or post-release supervision."[99]

Significant research also exists on sentencing for white collar crime, which differs from other criminal offenses in the relationship between offender and victim: "[u]nlike the victims of violent crime, victims of white-collar crime rarely suffer from direct physical harm or the apprehension of such injury. . . .These features of white-collar crime are important to legal theory because they call attention to the complicated relationship of these offenses to the harm principle."[100] This body of research may be particularly applicable to the elections context, as the impact that white-collar crimes such as tax evasion or fraud may have could be similar to certain types of electoral fraud in "undermining the trust and integrity essential for the effective functioning of the economy and polity."[101]

4. Is the remedy enforceable?

This question requires a review of whether the state can and does enforce remedies. Enforceability could be assessed via comparative analysis of factors such as: access to the

---

[98] Martin Kuijer, Escuela Judicial Española & European Judicial Training Network, *Effective Remedies as a Fundamental Right* 2 (2014) http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Outline_Lecture_Effective_Remedies_KUIJER_Martin.pdf.

[99] Hon. J. Richard Couzens, Placer County Superior Court (Ret.), "Evidence-Based Practices-Reducing Recidivism to Increase Public Safety: A Cooperative Effort by Courts and Probation" June, 2011, at 5.

[100] Samuel W. Buell, *Fraud in Government & Punishment and Public Attitudes, in* "WHITE COLLAR" CRIMES 853 & 859 (2014), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6035&context=faculty_scholarship.

[101] *Id.*

court system by potential plaintiffs, clarity in the law, whether the law has been enforced previously, and whether the delegated agency has the capacity to implement the law.

5. Does the remedy lead to deterrence or the change in behavior intended?

   To measure deterrence properly, analysis will require longitudinal study (i.e. measurement over time). While there is virtually no literature on how deterrence can be measured in the elections context, research is ongoing in the criminal justice sector on evidence-based assessment tools to support sentencing decisions. As noted by the Supreme Court of Indiana in *Malenchik v. State of Indiana*, "[h]aving been determined to be statistically valid, reliable, and effective in forecasting recidivism . . . [assessment tools] may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant."[102]

   Law enforcement personnel have long recognized that arrest and prosecution of individuals, even on a massive scale, is often ineffective in ending political corruption, organized crime, or the operation of illicit businesses. Primarily needed are specific changes and reforms, visible managerial action, the enforcement of current laws, and, when necessary, severe and publicized punishments for convicted white-collar criminals.[103]

6. Does the remedy lead to the perception that the process was fair, the process was credible, and that the ultimate decision ensured that the election reflected the will of the voters?

   Given that this research question relies on perceptions, this analysis will be best achieved by appropriately targeted public opinion survey mechanisms. Various media monitoring tools and sentiment analysis may also provide additional insights to supplement survey results.

[102] Malenchik v. State, 928 N.E.2d 564 (Ind. 2010), http://www.courts.ca.gov/documents/malenchik-decision.pdf.
[103] LORRAINE GREEN MAZEROLLE & JAN ROEHL, CIVIL REMEDIES AND CRIME PREVENTION: AN INTRODUCTION (2009), http://www.popcenter.org/library/crimeprevention/volume_09/0b_editor_introduction.pdf.