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OBSERVATIONS FROM A COMPARATIVE PERSPECTIVE¹

Leena Rikkila Tamang (Regional Director for Asia and the Pacific, International
IDEA)

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ABSTRACT

This working paper responds to the paper by Maley and Orr (Working Paper 64) and examines how electoral management bodies operate in different contexts including transitional contexts and the complications that arise in these contexts.

The discussion paper by Maley and Orr offers an excellent overview and typology; offering ideas on how rule-making should be done and explaining the interest of different stakeholders.

While there is much information and comparative research on the powers of the electoral management bodies (EMBs) - which rule making powers have been delegated in any given context - there is much less research about *how this process comes about*: big bang or incremental, and particularly if incremental what the process was like; why some reform efforts did not materialise; what are the informal powers that election management bodies have. Maley and Orr's discussion paper serves as an inspiration for us at IDEA too to investigate this and do some more work.

This is particularly so when it comes to established democracies and there are more recent experiences and examples from transitional contexts, where the legal frameworks were developed as part of a peace process and or moving from an authoritarian or semi-authoritarian regime toward democratisation.

I have basically three observations to make on delegated rule making:

1. The first one relates to the history and tradition of rule-making in each country, and also to political history;
2. My second point is about the model of electoral management bodies, whether independent, mixed or governmental model and the implications to rule-making, and also to levels of societal trust in a given society;
3. New emerging areas; such as cybersecurity in elections, which I believe do require not only delegated legislation but, in many instances, new legislation, and inter-agency collaboration - the cybersecurity and the role of EMBS in regulating and mitigating those risks offer some interesting comparative examples.

Before going to those points, just a few words about hierarchies of rule-making and the role of global and regional conventions and political agreements.

Maley and Orr (2019:7-10) describe the hierarchy of electoral rules as follows: the constitution; electoral act; subordinate acts; orders, instruments, determinations and notices; procedures; and conventions and codes. These serve as:

- Reference points for actors involved in the design and reform of national electoral process and institutions
- Integral part of agreed and promoted norms that govern human society.

While the formal role or influence of EMBs in the constitution-building processes may be limited and sporadic, they are likely to participate in or influence (through expert inputs and advocacy) the creation/reform of electoral acts. However, their discretionary powers to make

electoral rules truly manifests only in the development of electoral bylaws. The depth and scope of this effort, and ultimately powers of EMBs differ from context to context.

Maley and Orr (2019:12) point to how different law-making traditions may work for or against the discretionary power of EMBs (whether laws are more-or-less prescriptive; the principle or rule-based). In this respect, it may sound fair (and safe) to recommend that, unless there is a controversy or unaddressed grievance over this matter (past, present or anticipated), the rule-making powers of electoral commissions should follow the mainstream habits (the guiding principle being “If it ain’t broke, don’t fix it”). However, there is a saying: “Being comfortable isn’t the way to learn to expand your abilities.” It can be dangerous too. Therefore, one needs to look for impending warning signs to ensure that old processes can stand trials of new realities.

In reality, there are many instances in which the rule-making powers of an EMB – whether seen as deficient or extensive - create controversies that threaten to undermine the credibility of electoral processes and results they yield. This is particularly the case in transitional contexts.

To start with, one may point to countries where democratic transition processes are triggered by peace agreements. In those countries, democratic institutions – including electoral management bodies - will likely not have the continuity and will require build-up. It is sometimes the case that provisional electoral commission with strong international presence and executive powers will be established. Such a body will also likely have extraordinary discretionary power to legislate elections. This was the case of Bosnia and Herzegovina (Alihodzic, Matatu and Raffoul 2019:6-12), Afghanistan, and Timor Leste, for example. While strong discretionary powers of transitional/provisional electoral management bodies may be necessary to ensure expediency and trust (that is often connected with the presence of third parties), they are also controversial because international representatives have no accountability to national stakeholders. It is rather an accountability to their governments and organizations.

Elections a long time ago also teach us an important lesson. Namely, many of these countries have been locked in transitional arrangements in which the absence of systematic electoral reforms created an atmosphere of the permanent state of transition (such is Lesotho, Burkina Faso). In some countries, such as Haiti, even the electoral management body remained provisional.

In Zambia, electoral reform was initiated two times 2003 and 2011, but failed. An EMB was involved, but it has no legal mandate to initiate such reforms, nor the power to draft legislation.

Implications of models of Electoral Management

While there are many variations of detail, there are three broad types or models of electoral management - the Independent, Governmental and Mixed Models. The Australian Electoral Commission is an independent body, whereas for example in Finland elections are managed by a department within the Ministry for Justice (governmental model).

In some countries, an EMB has legal powers to regulate the electoral framework either by enacting new laws or by making rules and regulations that complement existing primary legislation. Such an arrangement is efficient and allows for the speedy amendment of the legal

framework. For example, Uruguay's EMB can make decisions and dictate actions that cannot be reviewed by any other branch of government. Thus it has legislative powers (making laws that govern elections), judicial powers (reviewing and interpreting laws with binding effect) and implementation powers for the laws and norms it has enacted (see ACE case study).

In countries such as the Gambia, Thailand and Yemen, the EMBs have the power to make regulations to facilitate their mandate, including the conduct of elections. In Namibia, the EMB has the power to issue proclamations that by law must be gazetted, and that cover issues such as political parties' code of conduct, some procedural issues on voter registration and parties' disclosure of foreign donations. The Indonesian EMB has specific regulatory powers in some critical areas, including voter registration, candidate registration, the conduct of election campaigns and voting processes.

Many EMBs have the power to formulate administrative policies and directions on operational issues such as their relationships with their own staff (on matters such as gender equality, affirmative action, performance management and staff development) and with external stakeholders. External stakeholders include government ministries, in particular finance ministries, the legislature, political parties, CSOs and the media.

Unlike regulations, which by law must be issued publicly, an EMB may have no legal obligation to publish its administrative directives and policies, although it is always good practice for it to do so. Where EMB policies have to be formally approved by the EMB, they can be made publicly available through the minutes of EMB meetings. It is important that an EMB consult its stakeholders when formulating new policies or reviewing old ones in order to foster stakeholder awareness and buy-in.

The recent IDEA guide on Cybersecurity in Elections provides many useful remarks. In fact, it also includes case studies on several OECD countries that conveniently reveal rule-making discretion of EMBs.²

EMBAs are commonly responsible for protecting the integrity of their own systems and for upholding the trust and credibility of their institution. Hacking attacks against electoral stakeholders, such as political parties and candidates, and undue influence over the political debate are more commonly a grey area over which other state agencies have jurisdiction; alternatively, there may be no regulation and/or clear mandate for countermeasures... (pp13)

While adversaries are free to choose any attack vector, defense strategies are much more fragmented. Depending on the country context, some cyberthreats fall under the mandate of various levels of election administration, other threats are the responsibility of other state agencies, some are countered mostly through private sector or political party action and industry self-regulation and some - especially where technical progress is fast or freedom of speech may be at stake - are not regulated at all. The ensuing network of jurisdictions, competences and responsibilities is what makes a whole of government approach and interagency collaboration on cybersecurity in elections essential... (pp 25)

Interagency collaboration should be transparent and clearly defined. In order to safeguard the actual and perceived independence of the EMB, interagency collaboration should be publicly

² <https://www.idea.int/publications/catalogue/cybersecurity-in-elections>

explained. It should clearly define where the involvement of non-traditional agencies, such as the security services, begins and ends. This may require legal regulation stipulating the scope and boundaries of collaboration (pp41)

Interestingly, the case study Netherlands (pp 74) points to the fact that:

- The Electoral Commission is responsible for preparing candidate lists, aggregating votes at the national level, declaring the national result and advising the government. In the past, it has also made software available to municipalities.
- The Ministry of the Interior holds political responsibility for the implementation of the Electoral Law and creates related policies, rules and regulations. In cases of electoral disruptions, parliament can hold the minister to account.

In Norway (pp76) the security of the electronic computer system was challenged in 2017, first on social media and then in the mainstream media. Ten days before election day new regulations were issued that stipulated that all municipalities must manually count the preliminary vote. This requirement will be re-evaluated for upcoming elections. While the election administration system is well tested and secure, the new regulations were issued to avoid any speculation or uncertainty about the election results as security and trust are vital to the conduct of elections.

The UK case study (pp 86) specifies: Elections in the United Kingdom are run locally by independent returning officers based in each local authority, and in Northern Ireland by the chief electoral officer. They are overseen by an independent regulator, the UK Electoral Commission, which is responsible for party registration, regulation of political party financing, research, developing standards, and supporting elections and referendums in the UK. While the government is responsible for electoral policy and changes to the law, the commission feeds into this through reports and wider policy work.

In Conclusion...

There are some tradeoffs between more and less rule-making powers. From the risk management perspective the questions are:

1. What are the real risks associated with the present arrangements? How serious are they? The Maley and Orr paper mentions some issues, but it may speak of the AEC (in)convenience rather than risks.
2. Would the eventual shift yield new, even bigger risks or inconveniences, not only for the AEC but for electoral actors or other state agencies?
3. What other alternatives exist for dealing with the present challenges?