Beyond the Gavel



Harnessing Alternative Election Dispute Resolution for Electoral Justice

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Taona E MWANYISA

Abstract

In this article our Managing Partner examines the rise of electoral disputes in Africa and their impact on democracy. It discusses the nature of these conflicts, their effects on voter behaviour, and the role of Alternative Election Dispute Resolution (AEDR) mechanisms. The paper highlights AEDR's advantages, such as flexibility and cost-effectiveness, while also acknowledging its limitations, including mediators' lack of specialized knowledge and limited enforcement powers. The article concludes by outlining strategies to improve AEDR mechanisms, emphasizing early establishment, public education, specialized training, and data collection, ultimately underscoring AEDR's importance in maintaining democratic integrity in Africa

Navigating the Minefield: Electoral Disputes in Democracy

Over the past decade, the African continent has witnessed a concerning rise in election disputes, significantly undermining the integrity of electoral processes. Recent elections in Nigeria, Sierra Leone, Zimbabwe, Kenya, and more recently in Mozambique and Tunisia, have faced widespread criticism. These cases highlight a troubling pattern across Africa, where electoral disputes range from allegations of fraud and lack of transparency to outright manipulation. In extreme instances, such as in Gabon and Niger, electoral discontent has even led to military coups, starkly illustrating the fragility of democratic institutions in the region. While electoral disputes are an inherent aspect of democratic processes due to the competitive nature of elections, their increasing frequency and severity in Africa pose a significant challenge to the continent's democratic progress.

Electoral conflicts are an inevitable byproduct of the intense competition for power in democratic systems. Candidates invest substantial resources and emotions into their campaigns, with incumbents fighting to retain their positions and challengers striving to unseat them. This charged atmosphere creates fertile ground for disagreements. When disputes arise, they often strike at the heart of democratic principles, such as the peaceful transfer of power and public trust in institutions, raising the stakes to extraordinary levels with potentially far-reaching consequences for the political landscape. These conflicts are not confined to a single moment but can erupt throughout the entire election cycle. From pre-registration and campaigning to voting day and post-election phases, disputes can emerge at any stage. Common flashpoints include disruptions during campaign periods, controversies over boundary delimitation, and irregularities in voter registration. Additionally, disputes often arise over candidate nominations, disagreements about voting procedures, and challenges to the acceptance of final results. The pervasive nature of these disputes underscores the complexity of maintaining electoral integrity and the need for robust dispute resolution mechanisms throughout the democratic process.

Electoral disputes can significantly impact voter turnout and participation, with effects varying based on the context and severity of the disputes. In countries with high levels of corruption, perceptions of electoral irregularities often lead to decreased voter turnout as citizens lose faith in the democratic process. Studies have shown that people with more negative assessments of corruption are less likely to vote, especially in highly corrupt environments[1]. This suppression effect stems from the belief that one's vote may not matter in a system perceived as corrupt. Conversely, in countries with relatively low corruption, increased perceptions of electoral disputes can sometimes mobilize voters, motivating them to participate in order to "kick the rascals out".[2]

The impact of electoral disputes on voter behavior is not uniform and can lead to contrasting outcomes. In some cases, particularly in poorer countries, experiences with electoral clientelism (such as vote buying) have been associated with higher turnout. However, in extreme situations, electoral disputes can escalate to violence, resulting in direct suppression of participation through intimidation, coercion, and physical attacks that prevent citizens from accessing polling places or participating freely. Over time, repeated electoral disputes and conflicts can erode public confidence in the integrity of elections, potentially leading to voter apathy and decreased participation in future elections. To address these challenges, a multi-pronged approach is employed, leveraging both formal and informal dispute resolution mechanisms.

Beyond the Courtroom: The Role of Alternative Election Dispute Resolution (AEDR) in Resolving Election Conflicts

Formal election dispute resolution processes, while crucial, can sometimes be overwhelmed by the sheer volume of disputes, potentially leaving some unresolved and justice delayed. AEDR steps in to fill this gap. It offers parties involved in an election dispute flexible, non-adjudicative methods to reach an

[1] Tambe, E. B., & Monyake, M. (2023). The impact of corruption and clientelism on voter turnout in Africa. Crime, Law and Social Change, 80, 329-352. https://doi.org/10.1007/s10611-023-10092-z Accessed 22/10/24
[2] Ibid Accessed 22/10/24

agreement outside of the courts. This includes negotiation, mediation, fact-finding, and arbitration[3]. These approaches aim to find solutions that satisfy both sides, often faster and more cost-effectively than traditional litigation. The existence and the use of alternatives seem to suggest that the formal processes do not work and hence the alternative. It's important to note that AEDR doesn't replace formal processes, rather, it complements them. By providing an alternative avenue for dispute resolution, AEDR helps to streamline the system, ensuring swifter justice and reducing the burden on formal courts[4].

One key advantage of AEDR in electoral disputes is its flexibility and speed, offering quicker resolutions compared to the often-glacial pace of formal court systems. This, coupled with its cost-effectiveness and accessibility, makes AEDR an attractive alternative. Accessibility refers to the ease with which aggrieved parties can file complaints. Factors like legal standing, complexity of the system, language barriers, gender disparities, and physical location of forums all impact accessibility. For example, establishing local "election conflict management communities" in countries like South Africa, Zambia, and Malawi has proven effective in resolving local disputes and preventing politically motivated violence. This success stems from their accessibility and ability to address issues within the community, fostering trust and understanding.

Formal court systems often fail to deliver justice in electoral disputes. This failure can stem from several factors, including prohibitive costs, complex procedures, and limited access to legal resources. One key advantage of AEDR is its affordability. Unlike traditional litigation, which can incur exorbitant expenses due to court fees, lawyer fees, and evidence collection, AEDR typically follows a faster and more cost-effective process. This makes it accessible to a wider range of individuals and parties. Furthermore, navigating the complexities of formal legal systems often requires significant financial resources. Parties with greater economic means can afford legal expertise, secure evidence, and mobilize witnesses, ultimately increasing their chances of success. However, AEDR can level the playing field by providing a simpler and more affordable way to resolve disputes.

Beyond accessibility, AEDR boasts significant flexibility, offering distinct advantages over traditional court systems. Firstly, unlike rigid court schedules, AEDR allows for mutually convenient proceedings, accelerating conflict resolution and easing the burden on the formal system. This flexibility extends to tailored remedies, including agreements unenforceable by courts, such as adjustments to campaign routes or venue usage. Secondly, AEDR fosters collaborative solutions instead of adversarial win-loss outcomes. This can preserve relationships and improve communication between parties, potentially leading to more sustainable resolutions. Finally, the flexibility of AEDR allows for addressing both legal and non-legal concerns, crafting solutions that conventional court systems may not offer. This can lead to more comprehensive and satisfying outcomes for all parties involved.

Limitations and Challenges of AEDR Mechanisms.

While AEDR offers numerous advantages, some limitations hamper its effectiveness. ADR may not be suitable for every dispute, for example, if the dispute involves a matter of public interest, it may be more appropriate to have a court judgment to set a precedent. Cases of a criminal nature, such as violence and theft, will require the involvement of law enforcement agents and formal criminal court systems. Mediators may lack specialized knowledge of electoral laws and intricacies, potentially hindering their ability to handle complex disputes effectively. Imagine a mediator trying to navigate a dispute over gerrymandering without a deep understanding of electoral districting laws. This lack of expertise can lead to misunderstandings, unfair outcomes, and a loss of trust in the AEDR process.

The tight window before elections often leaves inadequate time for thorough preparation and robust dispute resolution processes. With limited time, mediators may not be able to fully investigate the facts, gather evidence, and hear from all parties involved. This can lead to rushed decisions and a higher chance of errors. Lack of mediator's specialized training in electoral dispute resolution may render AEDRs

[3] International Foundation for Electoral Systems. (n.d.). Alternative Dispute Resolution in Elections: Practitioner brief. https://www.ifes.org/document/alternative-dispute-resolution-elections-practitioner-brief
[4] Ibid

ineffective. Perhaps the greatest challenge of AEDRs is its limited enforcement powers. Some agreements made at AeDR may not be as easy to enforce as a court order. The lack of authority to enforce agreements reached through AEDR can undermine its efficacy in resolving contentious disputes. This is coupled with proactive limitations, AEDR mechanisms may have limited power to proactively address potential disputes or intervene in situations escalating towards violence.

Another potential drawback of AEDR mechanisms is their vulnerability to external influence, potentially compromising their effectiveness. This influence could stem from various actors, undermining the neutrality and impartiality crucial for fair dispute resolution. Furthermore, a lack of data on AEDR cases and outcomes can hinder assessments of their effectiveness. During the Support to the Electoral Dispute Resolution Oversight and Capacity Building Zambia SEDROBZ project, we encountered limited information on the activities and caseloads of conflict management committees. This could indicate insufficient training on record-keeping or a broader lack of support for these important mechanisms. Without comprehensive data, it's challenging to measure the impact of AEDR and identify areas for improvement. Addressing these concerns around influence and data collection is crucial to bolstering the credibility and effectiveness of AEDR in facilitating fair and peaceful elections.

Optimizing Alternative Electoral Dispute Resolution Mechanisms

To maximize the potential of Alternative Electoral Dispute Resolution (AEDR) mechanisms and ensure their successful implementation, several key challenges must be addressed through crucial interventions. Establishing AEDR mechanisms well in advance of elections and equipping them with clear operational guidelines and accessibility protocols is essential. This proactive approach ensures transparency and readiness to handle disputes promptly and effectively. Simultaneously, electoral actors and Electoral Management Bodies (EMBs) must conduct public education campaigns about the existence, mandate, and role of AEDR mechanisms, empowering voters and stakeholders to utilize these avenues for dispute resolution and thereby increasing their legitimacy and effectiveness.

Central to the success of AEDR mechanisms is the presence of specialized mediators. Targeted training in electoral law and dispute resolution skills for mediators and presiding officers is crucial, equipping them with the necessary knowledge and expertise to handle complex cases fairly and efficiently. Furthermore, fostering collaboration between AEDR and judicial systems is vital, with judges being made aware of AEDR mechanisms and their potential to alleviate court caseloads by effectively resolving certain electoral disputes.

Equally important is the implementation of robust data collection and evaluation systems to track AEDR caseloads, outcomes, and impact. This data provides valuable insights for continuous improvement and ensures accountability within the mechanisms. This is the approach employed by the SEDROBZ project[5].

AEDR mechanisms undoubtedly play a vital role in resolving electoral disputes at the local level, offering quicker, more accessible, and cost-effective resolutions compared to formal court systems. Their importance in ensuring fair and peaceful elections cannot be overstated. To maximize their effectiveness and sustain this valuable tool, investing resources in their development and ongoing support is paramount. By prioritizing these investments, we can empower AEDR mechanisms to play an even more critical role in safeguarding the integrity and fairness of electoral processes at the local level, ultimately contributing to the strengthening of democratic institutions and practices.

[5] SEDROBZ, "EDR Tracker," https://www.sedrobz.org/edr-tracker/index. Accessed [22/ 10/2024]