
**A Critical Analysis of the Powers, Functions and Responsibilities of Electoral
Management Board (E.M.B)**

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ABSTRACT

An EMB is an organization or body that has the sole purpose of, and is legally responsible for, managing some or all of the elements that are essential for the conduct of elections and direct democracy instruments, such as referendums, citizens' initiatives and recall votes - if those are part of the legal framework. There is often no clear distinction in electoral law or practice between the powers and functions of an EMB. In some electoral laws, all EMB activities sanctioned by law are referred to as powers. It could be argued that a legally described power gives the EMB the authority to do something, and a legally described function is an activity that the EMB is expected to perform. It is preferable for an EMB's legal framework to include a voter education and information function, as this is indispensable for democratic consolidation, especially in emerging democracies. It is important for the legal framework to empower an EMB to conduct voter education and information campaigns in its official mandate in order to help consolidate democracy, since otherwise the government will be reluctant to fund such efforts. EMBs have an intrinsic responsibility to ensure that their activities and operations benefit all citizens.

KEYWORDS: Powers, Functions, Responsibilities, Electoral Management Board, Democracy, Equity.

Introduction

There is often no clear distinction in electoral law or practice between the powers and functions of an EMB. In some electoral laws, all EMB activities sanctioned by law are referred to as powers. In many countries, powers and functions are listed in both the constitution and legislation so that EMBs have both constitutional and statutory powers and functions. In many electoral laws, such as those of Australia, Indonesia and South Africa, 'powers and functions' are referred to jointly; in others, such as Bosnia and Herzegovina, the law merely lists activities that the EMB 'shall' perform Dundas (2012). It could be argued that a legally described power gives the EMB the *authority* to do something, and a legally described function is an activity that the EMB is *expected* to perform. Responsibilities, such as gender equity, often comes from separate national and international laws that cover the work of all government-funded bodies, or are adopted as an extension of democratic principles.

According to Council of Europe (2010), many factors influence EMBs' powers and functions. The results of the negotiation processes among political forces, within the country or beyond, that paved the way for the EMB's establishment are generally a strong influence, particularly in countries recently emerging into democracy. Other specific political, administrative and geographical influences can include the structure of the state (e.g. unitary

or federal, presidential or parliamentary), demographics, the electoral system (e.g. single or multi-member electoral districts) and the existence of other electoral service providers. The historical interaction of these factors within each country has created a wide variety of models for EMB powers, functions and responsibilities.

Powers and Functions of EMB

Noted by EISA (2003), the majority of EMBs have the powers to make rules, regulations and determinations that are binding on all players in the electoral process—voters, political parties and candidates, the media and observers—provided they are consistent with both the constitution and the electoral laws. These powers may be limited by law to specific aspects of the electoral process, or the law may give the EMB a general regulation-making power. Some EMBs have executive, legislative and judicial powers. They also have executive powers to call and conduct elections, to certify or nullify election results, and to resolve electoral disputes. In other parts of the world, EMBs have some power to investigate and enforce laws related to the conduct of elections.

The Liberian, Mexican and Portuguese EMBs can impose fines. In Thailand, the EMB can indict those who break election laws. In Cambodia and South Africa, the EMBs have the power to investigate and resolve disputes of an administrative nature or disputes that do not necessarily fall within the courts' jurisdiction. The majority of EMBs have powers that are primarily of an executive nature, related to implementing electoral activities (Benoni 2004). In some countries, the EMB's powers extend to determining election dates, within parameters set by laws that are often fixed to a time period defined by the end of an elected body's term of office. However, many EMBs have no influence over when an election is called. For example, in countries such as Mexico and the United States, which have presidential constitutions that stipulate the separation of legislative and executive powers, elections are held on a fixed date.

Extent of Powers, Functions and Responsibilities of EMB

In many countries, EMBs have powers and functions across a wide range of activities throughout the electoral cycle. The core functions in the conduct of an election according to Alvarez, Lonna, & Thad (2012), are:

- *Determining who is eligible to vote*: the right of adult citizens to participate in elections is one of the cornerstones of democracy, and ensuring that only eligible people vote helps confer legitimacy on the election process.
- *Receiving and validating the nominations of electoral participants* (for elections, political parties and/or candidates): the right to stand for election is a fundamental political right, and ensuring that all contestants have followed the law helps confer legitimacy on the election.
- *Conducting polling*: the ability to safely cast a vote is at the core of an election.
- *Counting the votes* cast so that the election result reflects the will of the voters.
- *Tabulating the votes* in accordance with the electoral system so that the winners can be identified.
- *Running a credible organization* so that the legitimacy of the election is not compromised by the actions of those conducting the election.

Direct Democracy Instruments

The conduct of electoral direct democracy instruments—referendums, citizens’ initiatives and recall votes—raises issues that are for the most part similar to those raised by the conduct of elections. Additional issues may include verifying that the processes for calling direct democracy votes have been correctly followed—a contentious issue, for example, in Venezuela’s presidential recall vote in 2004— and regulating campaigning and voter education and information. In the US state of Oregon, the EMB is required to distribute to every household a collection of the position statements submitted by citizens on each issue submitted to referendum. (Benoni 2004). It is usual for EMBs to be responsible for organizing both elections and direct democracy instruments. However, the UK Electoral Commission, which does not perform the role of EMB for elections (for which a Governmental Model electoral management structure is used), is tasked with the role of EMB for referendums.

Functional Divisions between Electoral Institutions

According to Birch (2011), it is common for some of the potential non-core functions of an EMB to be assigned in the electoral legal framework to another institution. It is becoming more common for some non-core functions to be contracted out by an EMB or supported by other institutions or civil society organizations (CSOs), but this is a management rather than a legal framework issue. Functions that are often assigned in the legal framework to an institution separate from the EMB(s) include boundary delimitation, voter registration, the registration and funding of political parties, electoral dispute resolution, the certification and announcement of election results, and voter education and information. If electoral functions are assigned to more than one institution, the legal and policy framework needs to be very clear on each institution’s functional responsibilities, and on the hierarchy of authority and coordination mechanisms between the institutions.

Voter Registration

In some countries, the electoral legal framework requires voter registration to be linked to a national identification or civil registration system that is controlled by an authority other than the EMB. If there is any dispute (for example, if someone is alleged to be registered who is not qualified to vote, or has allegedly been wrongly omitted from the electoral register), the EMB has to determine voter eligibility, not the civil registration authority. Catt, Andrew, Michael, Alan, & Peter (2014).

However as opined by Clark (2014), when the electoral register is compiled, the basic concern is that the data contained in it must be accurate and credible. Voter registration conducted by an EMB under the Independent Model may give electoral registers greater credibility with the public than those derived from or compiled by a government department, even though using existing civil registration or ID system data may be more cost effective. Whatever an institution prepares the electoral register data, an EMB must verify that the electoral registers used at polling stations are accurate. One of the most important aspects of an effective voter registration process is ensuring that all eligible voters, women and men, are enfranchised and have access to information and infrastructures for voter registration purposes. Planning and administering a voter registration process that gives women equal access to information and infrastructure is critical for ensuring their right to universal and equal suffrage. This objective can be pursued by strategies such as an active voter registration process in which an EMB is tasked to reach out to potential voters and help them register door to door or using other procedures canvassing large groups of the population. It may also

include conducting a broad-based voter information campaign in connection with the planned voter registration process, to explain basic legal and democratic principles underpinning the voter registration process to members in rural and traditionally marginalized communities or groups, or in settings where women may face gender-based barriers that limit their participation in social and political processes (Clark 2015).

Registration and Funding of Political Parties

According to Elklit & Andrew (2001), the registration of political parties, when required, may also fall outside the functions assigned to EMBs by the electoral legal framework. In other countries such as India, Mexico, South Africa and Thailand, the EMB administers political party registration, serves as the guardian of political party symbols and independent candidates' logo, and holds copies of party constitutions and selection rules. Party registration may take place either throughout the electoral cycle or occur in the months prior to each election. It is uncommon for an EMB to assume responsibility for parties' procedures for selecting candidates, but the increasing pressure for internal party democratization has caused some election analysts to support this role for EMBs. Many EMBs in the USA are involved in running primary elections for party candidates for elected office. The EMB in the Australian state of Queensland have the power to conduct inquiries and audits of pre-selection or primaries of candidates for state and local elections. The Indian EMB insists that registered parties hold periodic internal elections.

Election Campaigns

Political party and candidate campaign codes of conduct may be included in the legal framework. These codes are more effective if they are voluntarily agreed upon by the parties, but benefit from the EMB or electoral dispute resolution bodies being legally empowered to impose sanctions for breaches. According to Fall, Hounkpe, & Jinadu, (2012), some EMBs also seek to regulate the conduct of the party in power to ensure that it does not use public resources in the election campaign. The quality of non-partisanship and the ability to create a level playing field for all political participants are pillars on which an EMB can build good-practice electoral management. A lack of electoral equity—for example, an electoral environment that favours the governing party—can undermine transparency and the credibility of elections and EMBs. While some of the factors and practices that contribute to electoral equity may lie outside the strict ambit of an EMB's powers and functions, EMBs can work to ensure that the legal framework is fully utilized to promote equality and equity.

The use of public resources for election campaigns is a challenge to EMBs in all countries. This area is rarely covered in electoral legislation. The Indian EMB has issued a code of conduct to govern the electoral use of public resources by government ministers to ensure that no cause is given for any complaint that the ruling party has used its official position during the election campaign. Elements of election campaigns that are not directly related to political party activities are also under the jurisdiction of some EMBs. For example, Hamberg, & Aaron (2013), electoral law in Bosnia and Herzegovina and in Russia regulates the publication of political opinion polling. In countries such as Albania, Peru and Singapore, the EMBs are empowered to enforce bans on the publication of opinion polls during specified periods before voting day.

Voter Education and Information

Voter information and broader democracy or civic education is a role that is increasingly being added to EMB functions. Some EMB legal frameworks have clearly provided for EMB

conduct of voter information and education campaigns as in Bhutan, Cambodia, Kenya, Latvia, Lithuania, Singapore, South Africa, Thailand and Tonga, while others, including Sweden, have not. Some EMBs have a wider remit to promote democratic values (Costa Rica), the democratic process (Lesotho), the purpose of elections (Ghana) and active citizenship (Costa Rica). Education efforts are often targeted at groups that are less likely to vote or face hurdles in participation. The Nepalese EMB has created an education centre based on the Australian EMB's education centres. The Costa Rican EMB's Institute for Training and Education in Democracy has a mandate to conduct relevant academic research, support the wider education system and incorporate new technologies in its work. However, it would be harmful for the EMB or any other body to be given exclusive voter education and information rights or powers to restrict who may educate and inform voters. Voter education and information is too important, and its implementation too complex, to be left to an EMB alone. Political parties, civil society, corporations and government agencies such as education systems may all have an important complementary role to play to help ensure that voters have all the information they need to make informed choices.

According to Hartlyn, Jennifer, & Thomas (2008), EMBs have an intrinsic responsibility to ensure that their activities and operations benefit all citizens. This responsibility naturally entails targeting voter information campaigns to groups that may have traditionally experienced specific and disproportionate difficulties in accessing information and knowledge about their basic democratic rights and freedoms, such as the right to vote and the right to be elected. Women in many societies have traditionally been subjected to such forms of exclusion. Voter information campaigns are a particularly important tool to help eliminate barriers to women's political participation and representation.

Validation of Election Results

Noted in James (2013a), it is common for electoral legal frameworks to make EMBs responsible for certifying and announcing election results, and to prescribe a time period within which the results must be announced. This is the case, for example, in Armenia, Cambodia, Honduras, Poland and South Africa. In Niger these functions are given to the Constitutional Court, and in Cameroon and France to the Constitutional Council. In Denmark, the legislature is responsible for validating the results of national elections. The chief justice of Zambia is the returning officer for the presidential election and is thus responsible for announcing its results. Following a recommendation of the National Technical Committee on Elections, the draft revised constitution released for discussion in April 2012 makes the chair of the Election Commission the returning officer for the presidential election.

Electoral Observation

James (2013b) opined that, while independent election observation, by its nature, is conducted outside EMB control, electoral legal frameworks often assign EMBs observation-related functions. It is good practice for an EMB to accredit observers, guarantee their rights of observation, provide them with comprehensive background briefing materials and define observers' responsibilities, often in a legally enforceable code of conduct. Independent observation, especially in emerging democracies, can be a critical component of building public confidence in electoral processes.

Independent observation, by both citizen and international observers, by its nature must be free of control and interference by EMBs or any other authority, except those controls necessary to ensure observers' authenticity, impartiality and safety, and to prevent the

disruption of electoral processes. Just as electoral laws take into account a country's international treaty obligations, an EMB's observer-related powers and functions must recognize international obligations and good practices—such as the UN-endorsed Global Declaration of Principles and Code of Conduct for International Electoral Observation. Attempts to place impediments in the way of observation—such as charging a high fee for the registration of each observer—or to over-regulate observation may be contrary to international principles. EMBs often insist that observers are accredited before being admitted to polling places, and have created agreed upon codes of conduct in some places, such as Cambodia and Liberia.

International Activities

It is important that the legal framework for elections provides a mandate for the EMB to participate in international electoral activities. No EMB or country is an island unto itself, and many EMBs are called on from time to time to assist other EMBs, either as observers or technical advisers, or to host study missions from other EMBs. According to James, (2014), although many EMB legal frameworks do not provide for participation in international electoral assistance missions, many EMBs do undertake these tasks on both small and large scales. EMBs that regularly participate in international technical cooperation include those of Australia, Canada, France, Ghana, India, Mexico and South Africa; such cooperation is both bilateral and multilateral. Many other EMBs regularly participate in international observation missions, or in professional contact and exchange activities facilitated by regional networks of election officials. The mandate of the Bangladeshi EMB provides for EMB 'support to the United Nations and its member states in organizing elections by fielding of election monitors and observers and organising training for electoral personnel'. The law in Bhutan tasks the EMB with providing assistance to foreign countries and organizations in matters relating to elections in situations approved by the Ministry of Foreign Affairs.

Electoral Dispute Resolution

When the electoral dispute relates to the election result, other bodies are often involved. Complaints about the results come first to the EMB in many countries, including Afghanistan, Australia, Bosnia and Herzegovina, Costa Rica, Timor-Leste, Lesotho, South Africa and Thailand. Such complaints go to the regular courts in Bangladesh, Botswana, Guyana, Ireland and Sierra Leone, and to the Constitutional Court in Burkina Faso, Germany and Indonesia. The EMB has the final say in disputes over the election result for legislative and other elections in some places including Bolivia, Costa Rica, Sweden and Uruguay, while the final say goes to the regular court in Bosnia and Herzegovina, Botswana, Timor-Leste, Ireland, Lesotho and Russia; to the Constitutional Court in Cambodia and Mozambique; and to a specialized electoral court in Mexico and South Africa. Clark, (2014).

EMB Responsibilities as a Public Organization

As a state-funded organization, the EMB will be expected to behave with integrity and to follow the country's public sector standards, which may include measures of transparency and accountability. Such measures often include standard public sector accountability measures, such as annual reporting on activities to an external body such as the relevant minister (as in Botswana) or directly to the legislature (e.g. in Australia, Canada, Liberia and South Africa). EMBs have overarching obligations to adopt good practices so that their levels of integrity promote free, fair and credible elections, their efficiency ensures that public funds are not wasted, and their service standards meet with public approval. If the best practice in electoral organization could be identified, it would be the goal that EMBs would strive to achieve. It is perhaps more realistic to aim to achieve targeted elements of good practice, which can be applied regardless of the differences between electoral systems, while still delivering free, fair and credible elections.

Noted in Catt, Andrew, Michael, Alan, & Peter (2014), an EMB's responsibilities may also include more normative elements of how it is expected to behave, which may be further elaborated in its code of conduct. Detailed codes of conduct for EMB members and more senior staff may also include transparent and accountable actions based on law, professional behaviour in all actions and accuracy in all work. It may be more appropriate to have a simpler code for lower-level or temporary staff with limited responsibilities. For example, for polling station officials, a simple statement committing them to obey all relevant laws, regulations and directions, and maintain impartiality and ballot secrecy, may be sufficient. A code of conduct embodying the above principles is essential for all EMBs, regardless of their model or composition. Members and staff of all EMBs are expected to uphold the integrity of electoral processes and to refrain from acting in a manner that imposes conflict with their role as impartial electoral referees.

Avoidance of Conflicts of Interest

EMB's make decisions involving the fast and effective spending of large budgets. High-value individual supply agreements—for items such as ballot boxes, ballot papers and computer equipment—can be of huge benefit to the winning supplier. Connections between EMB members or staff and suppliers, other election participants or stakeholders who can benefit from EMB decisions can lead to perceived conflicts of interest which jeopardize an EMB's public credibility, or real conflicts of interest which damage its integrity. General public service legislation may cover these issues in relation to public servants serving in EMBs (Birch, 2011).

Conflict of interest provisions could be included in legislation or EMB regulations, and can be part of an enforceable code of conduct for EMB members and staff. They usually specify that EMB members and staff who have an interest or potential interest in a matter that comes before the EMB for consideration and decision should notify the EMB in a timely manner and refrain from participating in the consideration of that matter. To be effective, realistic enforceable sanctions for breaches of conflict of interest provisions are necessary, such as dismissal from the EMB or other disciplinary action. Examples of such provisions (in relation to an EMB member) are contained in the Australian electoral legal framework. The same is true of EMB staff and members' contacts with or links to political parties and candidates. Such contacts or links should be disclosed in a timely manner, and affected EMB members and staff should refrain from participating in any decision that might benefit the relevant parties or candidates.

EMB Responsibilities to Promote Democracy and Equity

According to Dundas, (2012), electoral legislation in some countries defines not only EMB powers and functions, but also their responsibilities and obligations. Other international and national laws apply to the EMB as a public body, such as human rights and laws seeking to ensure equal treatment for women, ethnic minorities, people with disabilities and internally displaced persons. As upholders of democratic values, EMBs have behavioural and access responsibilities to the community they serve, even where these are not defined in the electoral legal framework. Some of these responsibilities relate to issues such as transparency, gender balance, sensitivity to customs and traditions, treatment of ethnicity, providing electoral access to marginalized groups and creating conditions that are conducive to fair electoral competition. The South African EMB has created a Governance and Ethics Committee that will develop a policy of social responsibility.

Gender Balance

EMB's have a responsibility to ensure that they reflect the society's gender composition in their internal and external activities. Elements of this responsibility may be defined in electoral and gender equity laws, and some may be adopted voluntarily by an EMB. In much of the world gender equity relates to women, as they generally constitute less than half of participants in elections despite making up half of the population. Across much of Asia, gender balance also considers the third gender.

Ethnicity

Ethnicity and diversity have become important factors in the organization of multiparty democratic elections, especially in many emerging democratic societies, such as Bosnia and Herzegovina (James, 2015b). As with gender balance, ethnic balance relates to enforcing any candidate quotas, the composition of the EMB members and staff, as well as internal policies and the delivery of voter information and education.

Broad-based Access

James, (2015a) ascertained that voters' special access needs may include mobile registration and voting facilities for those in hospitals, confined to the home or in prison; external voting; the provision of voter registration and voting facilities for internally displaced persons, and in locations outside the country for significant refugee populations; providing facilities for voting by post or before election day; ensuring that registration, polling stations and equipment are accessible to voters with disabilities; providing electoral information materials suitable for those with visual or aural disabilities, and providing registration or voting assistance to them where needed; and providing voting equipment such as ballot paper templates for the visually impaired.

Conclusion

1. An EMB's powers and functions may not be separately identified in its legal framework. Apart from the essential elements of an EMB, these powers and functions can cover a greater or lesser variety of tasks, depending on factors such as the structure of the state, the electoral system, and the number and type of organizations that provide electoral services.
2. Most EMBs have 'executive' powers and functions that relate to the conduct of elections; some have adjudicative and a very few have legislative powers. Most EMBs' activities are reviewable by judicial or other bodies.
3. There may be advantages and disadvantages, which need to be carefully assessed, of assigning some electoral activities—such as boundary delimitation, compiling data for electoral registers, registering and funding political parties, monitoring political campaigns, voter education and information, and validation of election results—to specialist bodies other than an EMB.
4. EMBs have behavioural and access responsibilities to the communities they serve, which may extend beyond the minimum requirements of the electoral legal framework. These include promoting gender balance within the EMB itself and political life more broadly, dealing fairly with issues of ethnicity, promoting equality and equity in electoral contests, providing equality of access to electoral services for all and especially for marginalized members of society, and recognizing customary practices where these are in harmony with electoral management principles.

Recommendations

1. The electoral legal framework and EMB policies can help guard against inappropriate behaviour by EMBs by requiring members and staff to avoid conflicts of interest.
2. An enforceable code of conduct, which all EMB members and staff are required to sign, must be diligently adhered, as it helps the EMB maintain electoral integrity, ethics, impartiality, service and professional standards.
3. Voter registration conducted by an EMB under the Independent Model may give electoral registers greater credibility with the public than those derived from or compiled by a government department. However the electoral register is compiled, the basic concern is that the data contained in it must be accurate and credible.

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