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Guidelines for Reviewing a Legal Framework for Elections

Second Edition

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1.

Introduction

The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) published the first edition of its *Guidelines for Reviewing a Legal Framework for Elections in 2001.*[1] Since then, there have been a number of developments in international standards for democratic elections. The European Commission for Democracy through Law (Venice Commission) of the Council of Europe adopted and published a "Code of Good Practice in Electoral Manners" in May 2003.[2] Also, the case law of the European Court

1 The first edition of these guidelines was prepared in collaboration with the International Institute for Democracy and Electoral Assistance (International IDEA). *Guidelines for Reviewing a Legal Framework for Elections (*Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2001) <http://www.osce.org/odihr/elections/13960>.

2 "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report", European Commission for Democracy through Law (Venice Commission), October 2002, <http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx>. (Venice Commission)

of Human Rights (ECtHR) has become more developed in areas addressing human rights issues arising within the context of election processes.[3] Finally, there have also been developments in election administration, particularly due to the emergence of electronic voting systems, and a number of good practices have been identified in the course of ODIHR's election observation activities. This second edition of the *Guidelines for Reviewing a Legal Framework for Elections* takes into account all of these developments.

These guidelines are of particular relevance to OSCE participating States. In 2002, in Porto, the OSCE Ministerial Council recognized ODIHR's expertise in assisting participating States in implementing election-related commitments and called upon participating States to strengthen their responses to ODIHR recommendations following its observation of elections.[4] Even earlier, the OSCE Istanbul Document of 1999 recognized the assistance ODIHR can provide to participating States in developing and implementing electoral legislation.[5] The Istanbul Document also noted "the role of ODIHR in assisting countries to develop electoral legislation in keeping with OSCE principles and commitments" and committed participating States to "follow up promptly ODIHR's election assessments and recommendations".[6] In 2006, in Brussels, the Ministerial Council also recognized "ODIHR's expertise in assisting participating States through its election related activities, including reviewing election legislation […]".[7] In line with these pronouncements, the guidelines are intended to assist the assessment and the development of electoral legislation within the OSCE region.

The guidelines established in the first edition remain valid, and the structure of this second edition is similar to the 2001 publication. There is a new section on new voting technologies and expanded discussions in the areas of districting and equal suffrage, electoral thresholds, data protection, election administration, national minorities, gender, voting by internally displaced persons (IDPs), the protection of electoral rights, and postal, early and proxy voting.

These guidelines are intended to set forth the components of a legal framework governing elections and to detail the standards relevant to each of the necessary components for democratic elections. They are intended to contribute to uniformity, reliability, consistency and accuracy in the review and preparation of electoral legislation. Thus, these guidelines can provide guidance to both reviewers of electoral legislation and to national authorities when they draft or amend election-related documents.

3 Forty-seven OSCE participating States are members of the Council of Europe and are subject to the European Convention on Human Rights and decisions of the European Court of Human Rights.

4 OSCE Ministerial Council, Decision No. 7/02, "Election Commitments", Porto, 7 December 2002, <http://www.osce.org/mc/40521>. (Ministerial Council, Porto)

5 Istanbul Document, "Charter for European Security: III Our Common Response", 19 November 1999, paragraph 25, <http://www.osce.org/node/39569>.

6 *Ibid.*, paragraph 26.

7 OSCE Ministerial Council, Decision No. 19/06, "Strengthening the Effectiveness of the OSCE", Brussels, 5 December 2006, <http://www.osce.org/mc/25065>.

The chapters are structured thematically to facilitate the review, assessment and development of a legal framework for elections. The first four chapters of this publication provide a general background to the issue, after which each subsequent chapter identifies the subject matter of the particular component of the legal framework being addressed.



OSCE

2.

Sources of Standards

These guidelines are drawn from recognized international and regional documents, such as the Universal Declaration of Human Rights (UDHR),[8] the International Covenant on Civil and Political Rights (ICCPR),[9] the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Paris for a New Europe – Conference for Security and Co-operation in Europe (CSCE) Summit (1990) and the

8 All OSCE participating States are members of the United Nations (UN). The provisions of the UDHR, as well as other UN General Assembly resolutions and documents pertaining to democracy, democratic elections and human rights, are therefore particularly relevant. Although the UDHR is a General Assembly resolution, it is considered binding because it is viewed by most to be a part of customary international law.

9 All OSCE participating States are parties to the ICCPR and subject to its provisions. Additionally, General Comments adopted by the UN Human Rights Committee are relevant, as it is the body established by the ICCPR to oversee implementation of the ICCPR and has authority under the First Optional Protocol to decide an individual complaint against a state for violation of the ICCPR.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.[10] The OSCE participating States agreed in the Helsinki Final Act that "in the field of human rights and fundamental freedoms, [they] will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound."[11] Further, OSCE participating States have agreed to consider acceding to such agreements if they have not yet done so.[12] The relevant excerpts of these sources are included in the Appendix.

In addition, the reference points presented in these guidelines take into account case law of supervisory bodies, such as the ECtHR and the United Nations Human Rights Committee, that have applied the relevant international and regional documents to specific actual situations in cases they have considered.

Paragraph 25 of the OSCE 1999 Charter for European Security states, "We recognize the assistance the ODIHR can provide to participating States in developing and implementing electoral legislation. […] We agree to follow up promptly the ODIHR's election assessment and recommendations." Thus, recommendations concerning election legislation in ODIHR election observation mission final reports should also be considered when reviewing election legislation in the OSCE region. Additionally, ODIHR and the Venice Commission of the Council of Europe have prepared a number of joint assessments of the election legislation of OSCE participating States that are also members of the Council of Europe. These joint opinions should also be considered, since they assess specific textual language and contain recommendations for improving election legislation to meet international standards.[13]

Both ODIHR and the Venice Commission have been active not only in preparing assessments of election legislation, but also in developing guidelines for election legislation to help states that are members of both the OSCE and the Council of Europe to satisfy their respective commitments. In this regard, ODIHR published Existing Commitments for Democratic Elections in OSCE Participating States in 2003. Together with

10 Other international documents relevant to civil and political rights applicable during elections include the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Political Rights of Women; the Convention on the Rights of Persons with Disabilities; and the International Convention on the Protection of the Rights of All Migrant Workers and Members or Their Families.

11 Final Act of the Conference on Security and Co-operation in Europe, "Declaration on Principles Guiding Relations between Participating States", Helsinki, 1 August 1975, principle X (paragraphs 1-3), principle VII (paragraph 8), <http://www.osce.org/node/39501> (Helsinki Final Act); Concluding Document of the Madrid Meeting, "Questions relating to Security in Europe", Madrid, 6 September 1983, paragraph 19.

12 Concluding Document of the Vienna Meeting, "Questions relating to Security in Europe", Vienna, 15 January 1989, paragraphs 13.2 and 15, <http://www.osce.org/mc/16262>; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, paragraphs 5.21 and 13, <http://www.osce.org/odihr/elections/14304>; Concluding Document of Helsinki, "The Challenges of Change", Helsinki, 10 July 1992, chapter VII (paragraph 32) <http://www.osce.org/node/39530>.

13 These joint opinions and all election observation mission final reports can be accessed on the OSCE/ODIHR website, <http://www.osce.org/odihr/elections>.

the Venice Commission's Code of Good Practice in Electoral Matters, these texts are also sources of good practice and reference points for the standards presented in these guidelines. Additionally, any requirement imposed as a state becomes a party to a particular international or regional treaty or convention also establishes corresponding obligations for that state.



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3.

Considerations for the Reviewer

These guidelines apply to the review of electoral legislation. There are, however, additional considerations when reviewing electoral legislation, particularly if the country for which the legislation is being assessed is not the reviewer's own.

The reviewer must be mindful of his or her role, which is examining the legal framework for the purpose of determining whether it complies with international standards and good practice. The review is not intended to be judgmental, but to constructively suggest corrections, improvements and good practices that could be incorporated into the legislation. The tone of the assessment should be respectful, even if criticisms and recommendations are direct and serious.

A meaningful assessment requires more than an examination of the text. The assessment is of little value, no matter how thorough the review is, if comments, recommen-

dations and advice are not provided in an appropriate and constructive manner. It is important to explain why a particular recommendation is being made. Some recommendations are made in order to promote conformity with a particular international standard or good practice; others, such as recommendations to address possible contradictions or gaps in the legislation under review, are intended to make the legislation more coherent and effective. The reviewer needs to emphasize that the implementation of recommendations will enhance the credibility of and public confidence in the elections. This can be particularly pertinent, for example, when recommending measures to enhance transparency.

The reviewer should review all relevant sources of legal provisions regulating or otherwise affecting electoral processes. Issues not addressed in the primary electoral law may in some cases be covered by other elements of the legal framework. The reviewer should, therefore, review all relevant legal provisions that impact electoral processes, including the country's constitution and other legislation. Where appropriate, the reviewer should consider instructions and regulations issued by the central election-administration authority. When preparing an assessment, the reviewer should verify which international instruments the country is signatory to in order to reference them as relevant.

While fundamental issues must be addressed by the primary legislation, the reviewer should recognize that primary legislation cannot regulate every detail. It may be appropriate to stipulate some of the finer details of voting procedures in regulations adopted by government bodies, including the central authority for administering elections.[14] The reviewer must know which issues should be covered specifically by election laws, and which may be determined by administrative regulations.[15] The examination of reports by election observers is particularly important in this regard. These might reveal instances where the central election-administration authority lacks the legal competence or simply fails to issue appropriate written instructions for critical electoral processes not addressed in the legislation. If the election administration is not able to address an issue, then the law must.

Finally, it is critically important that accurate translations are available for all electoral legislation that is under review. In the event that only unofficial translations of the texts are available, the reviewer must be aware that there might be errors in translation. Where a recommendation, comment or criticism arises from text that might have been erroneously translated, the reviewer should note this possibility in the assessment.

14 See Chapter 7 on "Election-Administration Bodies".

15 See Chapter 4, section 4.5 on "Electoral Legislation vs. Instructions of the Central Election-Administration Body".



4.

The Structure of the Legal Framework

National authorities will establish the structure of electoral legislation according to the legal traditions of their country, so this structure will vary from case to case. Nevertheless, the choice of an electoral legislation structure has consequences, and the reviewer of the legislation should be aware of and offer advice on the structure, where appropriate. The following principles should be considered.

4.1. The Use and Merit of the Written Law

Although a government has the flexibility in determining the structure of the legal framework, the primary instrument in the field of elections must be a written law, as opposed

to custom or a collection of administrative policies. As the instrument of choice, written law provides the benefits of equity, certainty, visibility and transparency, and makes the matter subject to judicial interpretation and review, as well as open to recourse by citizens.

Written electoral law should be clear and as precise as possible. In some cases, such as candidate eligibility and mandate allocation, the failure to be clear and precise might result in a violation of the European Convention on Human Rights. As the ECtHR has stated, key electoral law provisions, such as those related to candidacy and mandate allocation, "must be circumscribed, with sufficient precision, by the provisions of domestic law" in order "to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant [state] authority".[16]

4.2. Constitutional Provisions

The inclusion of the basic principles of the electoral system in the constitution creates a safeguard against frequent changes, as the requirements for amending most constitutions are usually more rigorous than those for other laws. Thus, it is a recommended practice to include the fundamental guarantees for suffrage rights in a country's constitution. These would include provisions regulating the very basics of the electoral system, such as the right to elect and be elected, the institutions subject to democratic elections and the terms of office of elected candidates.

At the same time, as the introduction of amendments to a constitution can be subject to complex and time-consuming procedures, often involving difficult political negotiations, it is not recommended that constitutional provisions go beyond describing the very foundation of the electoral system and guaranteeing fundamental rights. In order to allow for a measure of flexibility, provisions on the administration of the elections and other procedural matters should be left for legislation enacted by the parliament and administrative rules issued by authorized election-administration bodies.[17]

4.3. General vs. Specific Electoral Legislation

National electoral legislation can be divided into two categories:

- General electoral legislation, relevant to any election, that establishes a legal framework governing all elections, including elections to the executive and legislative branches, at the national and local levels; or
- Specific electoral legislation, relevant to a specific body of government or to referenda, that establishes special legal provisions.

16 European Court of Human Rights, *Grosaru v. Romania,* no. 78039/01, §§ 47 and 52, 2 June 2010.

17 See Chapter 5, section 5.5 on "Electoral Thresholds". On a number of occasions, election observers have noted that legal provisions requiring the achievement of turnout thresholds in order for elections to be valid have led to endless cycles of failed elections or resulted in electoral malfeasance. When such legal provisions have been part of the primary electoral law only, it has been easier to amend them. However, a number of OSCE participating States have included such legal requirements in their constitutions, making them more difficult to amend or repeal.

Different countries have handled the division between general and specific electoral legislation in different ways. A country might adopt a separate law on the basic principles of elections that defines provisions applicable to all elections. In addition, that country might then adopt separate laws that contain provisions specific to the particular elections to each state body. In contrast, another country may include the entire electoral legislation in one law, with separate chapters establishing provisions for various specific elections.

Although both of the above approaches have been applied by different states, one electoral law regulating all elections is recommended, as this approach safeguards consistency in electoral administration and practices, and the unified implementation of the law in connection with all elections. This also simplifies the drafting process in cases where amendments to legislation are needed. However, in some cases, particularly in federal systems or where there is a high degree of de-centralization, such an approach might not be possible.

Regardless of which of the above approaches is adopted by a country, certain principles should be respected:

- Electoral legislation should be written in clear and unambiguous language. Interpretation of electoral legislation should not be a matter of subjective opinion;
- Relationships between national and local authorities, as well as between election-administration bodies and other governmental bodies, should be clearly stated and defined. The areas of authority of election-administration bodies must be clearly stated and defined to prevent conflicts or overlap with the powers of other government bodies;
- Electoral legislation should be enacted sufficiently in advance of elections to enable voters and all participants in the process – including election-administration bodies, candidates, parties and the media – to become informed of the rules. Electoral legislation enacted at the "last minute" has the potential to undermine trust in the process and diminish the opportunity for political participants and voters to become familiar with the rules of the electoral process in a timely manner;
- Electoral legislation should be enacted in accordance with the applicable legal provisions governing the promulgation of laws in the country in question. Electoral legislation that is not enacted in accordance with the applicable legal provisions risks annulment by the courts; and
- Electoral legislation should be published and readily available to the public.

4.4. Electoral Legislation vs. Other Legislation

An electoral law neither can nor should contain all regulations relevant to the electoral process. The electoral process will require the involvement of institutions and implementation of procedures that are based on other parts of the national legal system.

National legislation governing the media, the registration of political parties, party and campaign finance, citizenship, voter registration and criminal provisions related to electoral violations are of particular importance. These laws are part of the legal framework for elections and, in many instances, are as important as the electoral legislation to ensuring the conditions for democratic elections.

4.5. Electoral Legislation vs. Instructions of the Election Administration

In a democratic system, the legal framework for elections is adopted by a national parliament. There are limits, however, to the number of procedural regulations that can be included in a law. Most electoral laws, thus, allow for the election administration to issue instructions to further clarify issues related to the electoral process.[18] In these instances, the law should require that such instructions be directly based on provisions in the electoral legislation.

The role of the election administration in issuing detailed instructions should be clearly understood. Its role is not to act as a substitute legislator, but to provide clarification as needed, by way of supplementing the electoral laws. Effective electoral legislation should create a balance that allows the election administration the necessary flexibility to respond to obvious needs without undermining the principle of legislative control over the electoral legislation.

Certain principles should be respected when the authority to issue instructions is given to the election administration. These principles include:

- Substantive fundamental rights, such as the secrecy of the vote, may not be abrogated or diminished by any instruction;
- Electoral legislation should clearly state and define the scope and extent of the election administration's authority to issue instructions;
- The law should clearly state that instructions may not be contrary to or inconsistent with the electoral legislation;
- Electoral legislation should provide for a process by which political participants and voters can lodge complaints and appeals arising from the adoption and implementation of these instructions. This process should also allow for complaints and appeals arising from the violation of electoral legislation by the election-administration body;
- Electoral legislation should clearly define the hierarchy of legal norms governing elections. It should be clearly stated that constitutional and legislative provisions take precedence over any instructions; and

18 See Chapter 7 on "Election-Administration Bodies".

- The election administration's authority to issue instructions in emergency situations or on election day, as well as the process involved, should be clearly stated and defined in the electoral legislation.

The above principles respect the right of the parliament to adopt the legal framework for elections, while also recognizing the need to make it possible for the election administration to issue supplementary instructions involving electoral processes.


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5.

The Electoral System

5.1. The Choice of an Electoral System

Generally, a country's choice of an electoral system, if it meets the standards for democratic elections, should be respected.[19] As the OSCE Ministerial Council noted in the Porto Ministerial Declaration of 2002, "democratic elections can be conducted under a variety of electoral systems."[20] While the description of specific electoral systems goes beyond the objectives of these guidelines, any given electoral system could offer both advantages and disadvantages. In addition, while the details in which two electoral systems vary might initially appear insignificant, they may profoundly affect seat allocation.

19 In this context, an electoral system is the method or formula that defines how votes cast for parties or candidates are converted into seats in the elected institution.

20 Ministerial Council, Decision No. 7/02, Porto, *op. cit.*, note 4.

All details of a country's choice of electoral system need to be examined, as any single component of that system might conflict with international standards. As an example, an electoral system based on proportional representation and lists of candidates is, generally, an acceptable electoral system. However, if there is no mechanism for the participation of independent candidates, this becomes problematic, since OSCE commitments call on participating States to respect the rights of citizens to seek office regardless of political affiliation or lack thereof. [21]

Also relevant is whether a country is deeply divided along political, religious or ethnic lines, and whether minorities are properly represented in the political system. It is possible that the choice of an electoral system in a particular country has been a contributing factor behind these divisions or a lack of representation for some, or that the problem could be remedied by introducing alterations to the system. The reviewer of electoral legislation should make specific recommendations when a particular problem can be alleviated by alterations to the system being used.

5.2. Institutions Elected

Paragraph 7.2 of the OSCE 1990 Copenhagen Document defines a standard for institutions established through democratic elections. It stipulates that participating States will "permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote". The ECtHR has decided, in cases involving member states of the Council of Europe, that Article 3 of Protocol 1 of the European Convention on Human Rights may require elections beyond one chamber of the national legislature.[22] Thus, OSCE states that are also members of the Council of Europe may be required to hold elections for other institutions. Article 25 of the International Covenant on Civil and Political Rights has also been interpreted broadly to apply to many levels of government.[23]

Drafters of electoral legislation should ensure that appropriate legislation is in place for all institutions that are subject to democratic elections. Similarly, when reviewing a country's legislation, the reviewer should be aware that a country that is seeking admission to a particular international or regional organization or is a signatory to a particular international or regional instrument might be required to hold democratic elections to other institutions.

21 Helsinki Final Act, op. cit., note 11, paragraph 7.5. General Comment No. 25 of the UN Human Rights Committee also provides in paragraphs 15 and 17: "Persons who are otherwise eligible to stand for election should not be excluded … by reason of political affiliation", and "The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties." UN Human Rights Committee, "General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service", 12 July 1996, paragraph 5, <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument>. (UN Human Rights Committee, General Comment No. 25)

22 The ECtHR has stated: "The word 'legislature' does not necessarily mean only the national parliament, however; it has to be interpreted in the light of the constitutional structure of the State in question." See *Mathieu-Mohin and Clerfayt v. Belgium,* no. 9267/81, § 53, 2 March 1987.

23 UN Human Rights Committee, General Comment No. 25, *op. cit.*, note 21.

5.3. The Frequency of Elections

Paragraph 7.1 of the OSCE 1990 Copenhagen Document sets the standard governing the frequency of elections, requiring that democratic elections be held at reasonable intervals as established by law. This requires that elections be held pursuant to an existing legal framework and scheduled within the time parameters established by that framework.

5.4. The Organization of Electoral Constituencies (Districts)

The legal framework should address how electoral constituencies (districts) are organized. The legal framework regulating the drawing of boundaries for constituencies should state the frequency; criteria; degree of public participation; respective roles of the legislative, judicial, and executive branches of government; and who has the ultimate authority to choose the final plan for these boundaries. The law should also specify under what circumstances the population size of a constituency might deviate from the established criteria. Ideally, the law would also contain a list of all constituencies described in terms of the existing administrative division of the country and, with regard to urban areas, include sufficient identifying data to make it clear in which constituency a particular residence, based on its street address, is located.

Electoral constituencies should be drawn in a manner that preserves equality among voters.[24] Thus, the law should require that constituencies be drawn in such a way that each constituency has approximately the same population size. While the drawing of constituency boundaries could also be conducted on the basis of numbers of registered voters, it would be preferable to refer to population numbers, as elected officials represent the entire population. The manner in which constituencies are drawn should not circumvent the principle of equal suffrage, which is a cornerstone of democratic elections. However, this does not preclude consideration of convenience and accessibility for voters, including the existing delineation of administrative boundaries, which often depends on geography. It is implicit in the concept of a "constituency" that no voter in the constituency is separated from any other voter in the constituency by the geographic territory of another constituency. In addition, good practices would require that all constituencies satisfy the principle of connectivity.[25]

Ideally, the legal framework should ensure that people or institutions establishing the boundaries of constituencies are neutral, independent and impartial. The legal framework needs to also provide for maximum public input and participation in the process.

As a good practice, the boundaries of electoral constituencies should be examined and reviewed every ten years and, ideally, shortly after the completion of a periodic

24 See Chapter 6, section 6.2 on "Diminishing Equal Suffrage When Establishing Constituencies (Districts)".

25 A constituency would satisfy the implicit principle of connectivity if, from each point contained in the constituency, one can draw a (not necessarily straight) line to any other point contained in the constituency without crossing the boundaries of the constituency. For example, the existence of enclaves belonging to constituency A, which are fully surrounded by the territories of constituencies B and C and not connected to the other voters of constituency A, would mean that constituency A would not satisfy this principle.

population census. This allows for the boundaries of constituencies to be periodically adjusted as necessary to reflect population changes and shifts. However, frequent changes in the boundaries of constituencies should be avoided, and changes should be made only for demographic reasons, and not to favour a particular political party or candidate. Electoral manipulation through the drawing of constituencies becomes easier when the boundaries of constituencies are changed frequently. Further, the fundamental rationale for single member constituencies – making members of parliament (MPs) accountable to their electorate and creating a link between the MP and voters – is undermined when MPs know that they will acquire new voters with new constituencies before each election.

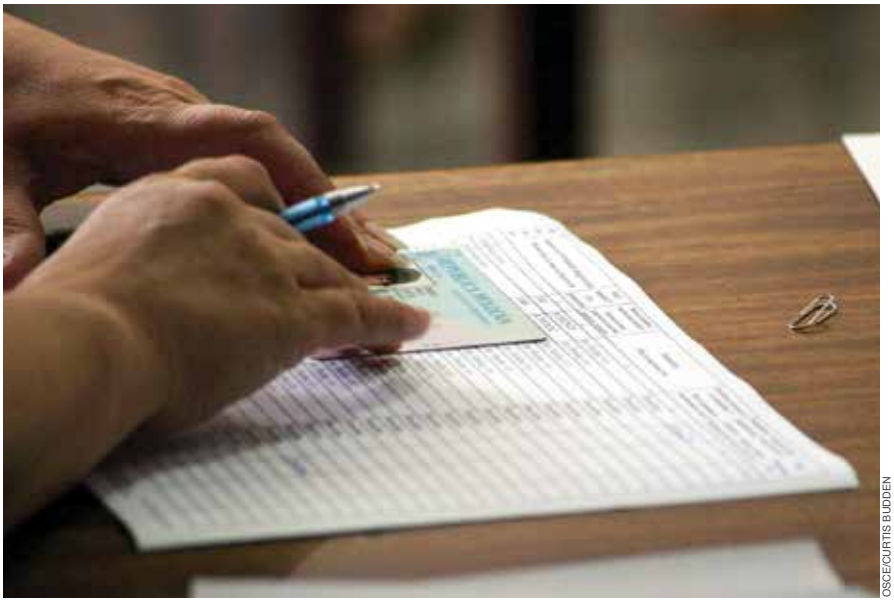
5.5. Electoral Thresholds

Electoral thresholds feature in many electoral systems. Two types of electoral thresholds are most often encountered, either separately or together – voter-turnout requirements and minimum thresholds determining eligibility for mandate allocation. While there are no explicit international standards with regard to thresholds, good practice has emerged.[26]

As elections are about participation, some countries have chosen to introduce a minimum voter turnout requirement for an election to be valid, usually 50 per cent of registered voters. In most cases, if the voter turnout requirement is not met, the law provides for the election to be repeated. As there are no guarantees that the repeat election will enjoy higher voter turnout, this opens the door for cycles of failed elections. It is therefore recommended that such thresholds be considered carefully or, at a minimum, that they be implemented in such a way as to preclude the repetition of failed elections. For instance, some states apply reduced turnout requirements to second rounds or repeat elections.

Sometimes, and most often in proportional representation systems, an election contestant is required to receive a minimum number of valid votes in order to become eligible for seat allocation. As these thresholds are most often defined in percentage terms, the electoral legislation should clearly state how the threshold is calculated (e.g., based on the total number of votes cast or only on valid votes cast, based on the number of registered voters, or any possible regional threshold requirements). Some countries have chosen the option of taking all votes cast as a basis, thus including invalid votes while calculating the threshold. Such a calculation raises the number of votes required for seat allocation. This could deny representation in the legislature to voters who cast valid ballots by taking into account the invalid votes cast by other voters. This may have political implications when one or more contenders have achieved vote totals close to the prescribed eligibility threshold. Such a requirement needs to be carefully considered.

26 See, for example, the "Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament", Venice Commission, Strasbourg, 15 December 2008, <http://www.venice.coe.int/webforms/documents/CDL-AD(2008)037.aspx>.



OSCE/CURTIS BUDDEN

6.

The Right to Elect and Be Elected

6.1. Universal and Equal Suffrage

The legal framework must guarantee universal and equal suffrage to each citizen who has reached the age of majority. Citizens may be required to reach a greater age to have the right to be elected, but the right must be guaranteed to each citizen who reaches the legally specified age.

6.2. Diminishing Equal Suffrage When Establishing Constituencies (Districts)

Careful consideration must be given to the impact the relative populations of constituencies have on voters' rights to equal suffrage. If the legal framework permits significant differences in the population sizes of constituencies, then it is possible that the equality of suffrage will be diminished.

Differences between the population sizes of constituencies can violate the principle of equal suffrage – commonly understood as "one person, one vote". For example, if there are 10,000 eligible voters in constituency A and 100,000 eligible voters in constituency B, but each constituency elects one member to parliament, then a vote cast by a voter in constituency A has ten times the weight of a vote cast by a voter in constituency B. The legal framework should ensure that such situations are avoided during the establishment of constituencies.[27]

Exceptional circumstances may allow, however, for relative differences in the population sizes of constituencies. These include geographic considerations related to transport and communication or the desire to facilitate the representation of indigenous populations or national minorities, particularly where a sizable minority population is dispersed across a country.

6.3. Non-Discrimination

The legal framework for elections must ensure that every person who has the right of suffrage is allowed to exercise this right free of discrimination and on the basis of equal treatment before the law.[28] Paragraphs 5.9 and 7.3 of the OSCE 1990 Copenhagen Document outline this principle, guaranteeing non-discrimination and equal protection of the law in the exercise of suffrage rights. Application of this principle requires that a person who has the right to vote be allowed to exercise his or her right to suffrage without distinction on the basis of "race", colour, gender, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Care must be taken in reviewing legal provisions regulating suffrage rights, to ensure that they cannot be applied to discriminate against a person in the exercise of these rights.

6.4. Scrutiny of Restrictions to the Right of Suffrage

The legal framework should clearly state under which circumstances a person's suffrage rights may be limited in any manner or to any degree, and such limitation must be consistent with the existing constitutional framework. Any limitation or restriction on the right to elect or be elected must be scrutinized and must be clearly justified on the basis of exceptional circumstances. The right of suffrage is a fundamental civil and political right, and any limitation of that right must be designed to achieve a legitimate aim and be demonstrated as strictly necessary in a democratic society.

Further, any restriction must be narrowly applied. Broad legal provisions that restrict the suffrage rights of general categories or groups of people without consideration of the particular circumstances of each case are at odds with the principle of proportion-

27 The Code of Good Practice in Electoral Matters of the Venice Commission of the Council of Europe, p. 2.2.15, suggests that "the maximum admissible departure from the distribution criterion […] should seldom exceed 10 per cent and never 15 per cent, except in really exceptional circumstances".

28 See Chapter 6, section 6.1 on the "Rights of Foreigners to Participate in Local Elections", which specifies that, under specific arrangements, citizens of other states may be eligible to vote.

ality. A general, automatic, indiscriminate restriction of the suffrage rights of all people convicted of a crime, regardless of the nature and degree of the crime, is an example of a restriction too broadly applied.

6.5. Participation of National Minorities in Elections

As previously noted, the legal framework must ensure the principle of non-discrimination in the exercise of suffrage rights. As members of national minorities enjoy the same rights and responsibilities as all other citizens, they should enjoy an equal right to participation in public affairs, including through effective representation in public offices. This includes the rights, free of discrimination, to vote, stand for election, participate in public affairs and form political parties. Reviewers of electoral legislation should carefully consider whether national-minority participation is adequately addressed given the specific context. This requires a review of election observation reports for information about national-minority participation in past elections. The reviewer should make recommendations, where appropriate, to improve the legal framework in order to enhance the participation of national minorities.

Representation of national minorities and their inclusion in public life may be strengthened not only through the design of the electoral system, but also through measures like printing ballots and other election materials in the language(s) of those groups. Members of national minorities have the right to disseminate, have access to and exchange information in their mother tongue. It is also the state's responsibility to ensure that national minorities have reasonable access to public media to express their views.

Further, in order to alleviate the effects of past discrimination and to enhance future participation, it is appropriate for the legal framework to include special electoral rules and voting arrangements for national minorities.[29] Special electoral rules or voting arrangements are not considered to violate the principle of equal suffrage when they are adopted as a temporary measure for a legitimate purpose of remedying the affects of past discrimination or for enhancing the participation of minorities in national political life. However, such measures must be of a temporary nature and transitional in character. The reviewer must have some knowledge of the legislative history of any special measure in order to assess whether the measure can be considered temporary within the context of its legislative history.

6.6. Participation of Women in Elections

Entitlement to equal rights, including to political participation, regardless of gender, has been recognized in international and regional human rights documents since the early 1950s. More recent documents call for states to take all appropriate measures to eliminate discrimination against women in political and public life in their countries and,

29 Examples of temporary special measures can be found in the forthcoming ODIHR *Handbook on Observing and Promoting the Participation of National Minorities in Electoral Processes.*

in particular, to ensure, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.[30] Nevertheless, women often face barriers to fair and effective representation due to generalized discrimination, including with respect to their participation in public life.

To combat this type of discrimination, states should consider electoral systems that facilitate full equality of men and women so that all can fully realize their guaranteed rights to electoral and public participation. This may require inclusion in the legal framework of special measures to increase the number of female candidates and office holders. It may be appropriate to require political parties and other nominating organizations to put forward a minimum number of candidates of each gender, with reasonable chances to be elected.

In such cases, measures to address discrimination against women are not considered themselves to be discriminatory. Remedial measures should, however, be considered as temporary and removed from the legal framework when the objectives of equality of opportunity and treatment have been achieved. There should also be a variety of sanctions available when political parties do not comply with legal measures aimed at ensuring gender equality. Sanctions may range from financial measures, such as the denial or reduction of public funding, to stronger measures, such as the removal of the party's electoral list from the ballot. In all cases, sanctions should be proportionate to the nature of the violation.

6.7. Ensuring the Rights of Internally Displaced Persons during Elections

Conflicts or natural disasters can result in the internal displacement of a sizable part of the population from its place of residence. Reviewers of electoral legislation must consider the protection of the suffrage rights of such internally displaced persons (IDPs).

All citizens of a country have the right to participate in elections, both as voters and candidates. This means that residence requirements for voting should be reasonable and must not be imposed in such a way as to exclude IDPs from participating in elections. A state must take all effective measures to ensure that all persons who are entitled to vote are able to exercise that right. Where relevant, the legal framework must specifically provide practical mechanisms that allow for the effective and meaningful suffrage rights of IDPs.

The legal framework should address areas where it is likely that IDPs will face difficulties. Issues here include access to the documentation necessary to register as voters or candidates; the effect of residency requirements for voters and candidates; alternative voting procedures to accommodate IDPs who cannot be present to vote at a regular polling station; and the provision of timely information concerning registration for voters and candidates and concerning election procedures.

30 See Charter for European Security, Istanbul Summit, 1999, *op cit,* note 5, paragraph 23-24; Document of the Moscow Meeting of the Conference on the Human Dimension of the OSCE (Moscow Document), 1991, paragraph 40-40.13; UN Convention on the Elimination of All Forms of Discrimination against Women, 1981, Articles 2 and 7.

6.8. Ensuring the Electoral Rights of Disabled Persons

All citizens have the right to participate in elections without unreasonable restrictions and through universal and equal suffrage. Thus, no restrictions on the right to vote or be a candidate should be imposed on the basis of physical or sensory disability, literacy or education, or intellectual disability or psychiatric illness, unless the latter amounts to a specific mental incapacity that justifies withdrawal of suffrage rights. The ECtHR found an automatic, blanket restriction on suffrage rights due to mental incapacity, regardless of the person's actual mental faculties, to be an unreasonable restriction on suffrage rights.[31]

How the legal framework addresses the suffrage rights of persons with disabilities, both in restrictions and affirmative measures to facilitate their participation, must be carefully considered. Any review of electoral legislation should provide recommendations for removing unreasonable restrictions and suggestions for including persons with disabilities in election processes if the legal framework inadequately protects their suffrage rights.

Discrimination, ignorance, poverty and neglect all contribute to the political and electoral disenfranchisement of people with disabilities. Some good practices to address this problem include assisting voters with disabilities to reach polling stations and cast their ballots in a dignified manner that preserves the secrecy of the ballot and prevents undue influence, and the utilization of special voting methods (such as absentee voting using a two-envelope system, or voting outside the polling station – sometimes referred to as "mobile voting"). In addition, the authorities responsible for civic education and voter information should consider the needs of special voters in designing and carrying out these activities.[32]

6.9. Rights of Foreigners to Participate in Local Elections

The right to suffrage is normally subject to a citizenship requirement, especially for national elections. However, international and European regional human rights documents counsel that foreigners lawfully resident in a country should be allowed to participate in local elections after an established period of residence.[33] Reviewers of electoral legislation should consider obligations a country may have to grant suffrage to eligible foreigners in line with the requirements of documents to which the country has formally acceded. Attention must also be paid to the country's constitution in assessing the suffrage rights of such foreigners. First, it should be ascertained what distinctions or qualifications are made in the constitution concerning suffrage rights, i.e., whether

31 See *Kiss v. Hungary*, no. 38832/06, 20 May 2010.

32 For further details see the "Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of Persons with Disabilities in Elections", Venice Commission of the Council of Europe, Strasbourg, 21 October 2010, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)036-e>.

33 See "Convention on the Participation of Foreigners in Public Life at Local Level", Council of Europe, Strasbourg, 5 February 1992, <http://conventions.coe.int/Treaty/EN/Treaties/Html/144.htm>; "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", UN General Assembly, United Nations, 18 December 1990, <http://www.un.org/documents/ga/res/45/a45r158.htm>.

there is a citizenship requirement and whether it applies to elections at all levels. Second, it should be ascertained whether the constitution incorporates, by reference, any international or regional document that grants suffrage rights to eligible foreigners, even though the country has not formally acceded to the document.

6.10. Rights of an Elected Candidate and the Forfeiture of Mandates

The legal framework should ensure that a mandate won by a candidate in an election should not be withheld or withdrawn by any state body, whether by an executive agency, election authority, legislative body, court or other body. There are limited exceptions to this rule, such as cases in which a member of parliament has been impeached according to a constitutional process.

Similarly, the legal framework should not permit a political party to have control over an elected candidate's mandate. Nor should membership in the political party be a condition for retention of a mandate. Elected candidates must have the freedom to form political associations at any time, including the freedom to leave one political party and join another without the threat of mandate forfeiture. This principle is applicable even where the electoral system uses a closed-list election system, in which voters are not allowed to express preferences among the candidates within a list.[34]

The reviewer of electoral legislation should comment on any provision that unreasonably requires the forfeiture of an elected candidate's mandate or permits control over the mandate by a political party and should recommend that any such provision be removed from the law, stressing the principle that an elected candidate is accountable to the electorate. This accountability is undermined if the legal framework contains unreasonable forfeiture provisions or requires a candidate who has changed political party affiliation to prematurely surrender his or her mandate.

34 See the "Report on Imperative Mandate and Similar Practices", Venice Commission of the Council of Europe, Strasbourg, 16 June 2009, <http://www.venice.coe.int/webforms/documents/CDL-AD(2009)027.aspx>.



OSCE/SHIV SHARMA

7.

Election-Administration Bodies

7.1. General Considerations

The administration of democratic elections requires that election-administration bodies perform their duties in a professional and impartial manner, independent from any political interests, and that their acts and decisions be subject to judicial review. These are critical issues, as the bodies that administer elections make and implement important decisions that may have an impact on the overall conduct of elections, and even their outcomes. A country's political circumstances are also an important consideration for reviewers of the legislation that regulates election-administration bodies.

The structure of the election administration as established by the legal framework should usually include a central election-administration body, with authority over sub-

ordinate election-administration bodies and responsibility for the overall conduct of elections. Federal states with a high degree of decentralization are sometimes justifiable exceptions to this principle. Whatever the case, the polling station should be the lowest level of the election administration structure.

It is common for a subordinate election-administration body to exist for each electoral constituency (district) in which candidates are to be elected. Whether intermediate election-administration bodies are needed will depend on the electoral system, as well as geographic and demographic factors unique to the country. In the context of a particular election, reviewers of electoral legislation should be wary of both an excessive number of election-administration bodies, as well as an insufficient number of levels in the election administration structure.

It is critical that the legal framework defines the relationship between the central election-administration body and those at lower levels, as well as the relationship between the election administration and executive government authorities at the national and local levels. The authority and responsibility of election-administration bodies at each level should be clearly defined in the legal framework. It is considered good practice that the central election-administration body be permanent to provide continuity in the performance of the election-administration bodies between electoral cycles.

The legislation should contain clear provisions on the way election-administration bodies should conduct their work. The law should state how and when election-administration bodies should meet, what type of notice the public should be given of these meetings, and how and within what timeframe the decisions of election-administration bodies should be made public. The law should define quorum requirements and also provide clear provisions for transparency so that the work of the election administration can be observed.

Where possible, professionals familiar with the country's electoral framework should be appointed to administer elections. Thus, a common provision found in many legal frameworks requires that members of election-administration bodies, at every level, have a background or training in law. Some legal frameworks also contain a similar requirement for the staff of election-administration bodies. Although such a provision is generally acceptable, it may be overly restrictive for lower level election-administration bodies, particularly at the polling station level. Furthermore, depending on the responsibilities of the election administration, it could be useful to include experts in administration and other technical areas, such as computers and software programming, in its staff. This would be particularly beneficial at the central level.

Provisions concerning the professional background of members of the election administration have to be evaluated within the context of the country in question. It is necessary to assess whether it is possible that the result of such a provision would be that the only people eligible to staff election-administration bodies would be biased in favor of a particular political interest or opinion. It is critically important to ascertain and consider the practical implications of such provisions governing the qualifications for elec-

tion administration members and staff. The legal framework should ensure a selection method that is open and transparent.

The legal framework should also specify on which grounds and according to what procedures a member of an election body or its staff can be removed. Except in cases where a person has completed the legally defined term in a position, grounds for removal should be limited to those necessary to protect the impartial and professional performance of the election administration. Members and staff of election-administration bodies should be protected against arbitrary or politically motivated removals, including removals by their own nominating bodies. The law should also specify the rights of each election-administration member, including rights to receive timely and adequate notice of meetings, to access all relevant documents and information, and to participate in all meetings.

The legal framework should clearly define the duties and responsibilities of election-administration bodies to ensure, in a transparent and accountable manner, the inclusiveness of the registration of candidates and, where relevant, of voters; coherent voting procedures that are made known to the public; the integrity of the ballot through appropriate measures preventing potential unlawful and fraudulent activities; and honest counting, tabulation and public reporting of both preliminary and final, official results.

7.2. The Formation of Election-Administration Bodies

A wide range of models for the formation of election-administration bodies has emerged in OSCE participating States over the course of the last century. In the absence of a specific international standard for the formation of election administrations, each country should find the most appropriate model that complies with local traditions and good practices that have been developed, and based on a few guiding principles, most notably the confidence of election stakeholders and transparency and accountability in the overall election process.

Although there is no specific international standard as a model for the formation of election-administration bodies, there are general international standards for filling public positions that should be considered when evaluating provisions for the formation of election administrations. Every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions, to have access to public service in his or her country.[35] The United Nations Human Rights Committee has interpreted the right to equal access to public service very broadly:

> The conduct of public affairs, referred to in paragraph 25(a), is a broad concept, which relates to the exercise of political power, in particular the exer-

35 See ICCPR, UN General Assembly, 16 December 1966, Article 25(c), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; UDHR, UN General Assembly, 10 December 1948, Article 21(2), <www.un.org/en/documents/udhr/>. The right to non-discriminatory access to public employment and civil service positions is basic and should be broadly applied.

cise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.[36]

A country's chosen model of election administration, even one in which temporary election workers are appointed for brief terms of service, should respect the principle that these positions should be filled on a non-discriminatory basis.

Countries that have a long tradition in the conduct of democratic elections frequently rely on election-administration bodies composed of civil servants from the central level of government or of officials elected by popular vote in elections. There are also examples of countries where elections are administered by judges. The performance of executive functions in elections by judges can, however, raise questions concerning the separation of powers, particularly in cases where judicial power is constitutionally limited to the adjudication of court disputes. Such arrangements have emerged over long periods of time and appear, according to reports by election observers, to have gained the confidence of the electorates in question. The confidence of the electorate and respect for the rule of law and constitutional principles are crucial for the establishment and reinforcement of democratic traditions.

More recently, emerging democracies without long traditions of democratic elections have developed an alternative form of election-administration bodies, based on the concept of a central body whose sole responsibility is the administration of elections. This form of election administration features election commissions whose legal authority is limited to administering elections. Such election administration models have been used by countries in democratic transition, frequently when there is lack of trust in state institutions as potential election administrators.

Different states have chosen different approaches to determining the makeup of their central election-administration bodies, including those based on multiparty representation, institutional quotas or a membership composed of civil servants. In the two latter instances, judges might be included in the membership of the commission. The membership of lower level election commissions generally replicates the principle followed in the establishment of the central commission. The legal framework should specify quorum and voting majorities for decision-making. It should also set out procedures for the selection and appointment of commission members, including for the positions of chairperson, deputy chairperson and secretary, under which no political interest has preponderance.[37]

The main value of setting up the central election-administration body based on multiparty representation is to strengthen confidence and transparency in the process by

36 The United Nations Human Rights Committee has adopted a General Comment interpreting the principles for democratic elections and public service set forth in Article 25 of the ICCPR. UN Human Rights Committee, General Comment No. 25, *op. cit.,* note 21.

37 The term "political interest" is chosen for its broader meaning, as opposed to the term "political party".

allowing major political interests to take part in the administration of the election.[38] These representatives may be members of a specific political party or civil servants, but could also have other backgrounds. The key assumption is that major political interests contesting the election should be able to identify professional and publicly respected individuals who, regardless of their political affiliations, will be able to implement the legal framework in a collegial and consensual manner, in accordance with both the spirit and the letter of the law. [39]

Central election-administration bodies established on the basis of institutional quotas would include representatives from major state institutions, generally from the legislative, judicial and executive branches. In a pluralistic political environment, political interests would generally be represented in the central election-administration body through nominations by the legislative branch. The institutional quota model is well suited to the introduction of staggered terms for central election-administration body members, to ensure continuity.

Central election-administration bodies composed of civil servants and/or judges often include both permanent and temporary components. The permanent component is formed of civil servants and/or judges, who either take leave from their permanent offices to join the central election-administration body for a few months to administer the entire process, including the registration of candidates, or may have multiple-year mandates. After the completion of registration, a few weeks before election day, the membership of the body is expanded with the temporary component. The members of this second, temporary group comprise appointees of those parties and coalitions that have been registered to participate in the election. The temporary members may or may not have full voting rights and decision-making authority during the remaining phases of the electoral process. Tasking representatives of the judiciary, even those on temporary leave, with the administration of elections should be carefully considered and balanced against the fundamental principles of judicial independence, judicial oversight through court review over the other branches of power, and constitutional questions concerning the performance of executive functions by members of the judicial branch.

Reviewers of electoral legislation need to identify the structure and rules for the functioning of election-administration bodies. They also need to assess whether legislation provides clear guidance for the determination of the membership of election-administration bodies, the rights and responsibilities of these bodies, and rules and timelines covering both the reaching of decisions and addressing of appeals, in order to provide useful recommendations where relevant for possible improvements. The views of major political actors could help to identify the practical consequences of a particular election-administration arrangement. The reports of election observers can be informative

38 There is always a risk of controversy with regard to naming the major political interests in a given country at a given time. This is one of the sensitive areas for establishing broad agreement. However, sensitivities may be limited if the election is conducted in an atmosphere of overall confidence in the process.

39 Observers have reported, at times, that this model has been abused by granting decision-making powers to one political interest.

in this respect. If the legal framework adopted follows a party-oriented formula, then it should address how and when changes in commission membership should occur when a political party dissolves, new parties emerge, or when the relative strength and representation of parties in elected institutions change.

7.3. The Status and Operation of Election-Administration Bodies

In order to enhance continuity and institutional consolidation, the central election-administration body generally works on a permanent basis. However, if the executive branch of power is tasked by law to provide strong administrative support to the electoral process, under the guidance of the central election-administration body, the latter may still function appropriately if continuity of membership is ensured. It is common for lower election-administration bodies, particularly at the polling station level, to be temporary bodies established before an election. The legal framework should require that election-administration bodies be established in a timely manner and be adequately funded.

Regardless of how they are formed and the degree of partisanship involved, election-administration bodies should operate in a professional, collegial and impartial manner, independent from interference by political interests and other branches of power. Once formed, an election-administration body must serve the interests of all citizens and electoral participants. No election-administration body should act in a partisan manner or exhibit partiality in the performance of its duties.

The legal framework should also provide mechanisms to allow aggrieved voters, observers, political parties or individual candidates to seek relief from a decision, action or failure to act by an election-administration body. The mechanism might involve an appeal to a higher election-administration body or, where the decision is made by the highest election-administration body, an appeal to a court of law. The important point is that the legal framework must provide for the opportunity to have a decision or act by an election-administration body reversed or corrected. The system of appeals should provide clear hierarchical procedures to exclude possible "forum shopping" between institutions and to facilitate uniformity and consistency in decisions on appeals.

7.4. Political Pluralism in Election Administration

Democracy is based on political pluralism and the rule of law, which must exist in national life and state institutions, including the election administration, in order to have genuine democratic elections. Reviewers of electoral legislation should examine the mechanisms in the legal framework to facilitate political pluralism and ensure the appointment of an election administration that is reflective of the political landscape in society. Recommendations to achieve this goal may range from providing the right to suggest nominees for election administration positions to the right to appoint a number of members. Various solutions can be sought to provide for political pluralism in election administration, and which of these are appropriate will depend on the country

context. However, the reviewer of electoral legislation should be able to discern immediately any legal provisions that create a monopoly on the appointment of election administration members. In these situations, the reviewer could comment and recommend amendment of the legal framework to include a degree of political pluralism in the administration of election processes.



OSCE/THOMAS RYMER

8.

Voter Registration and Registers

8.1. Transparency in the Voter-Registration Process

The right to vote is only of full value if the legal framework makes it easy for a person to register to vote, ensures accuracy in voter registers, includes sufficient safeguards against fraudulent voting, and guarantees honest counting of votes and tabulation of results. One of the standards for voter registration and maintenance of registers is complete transparency.

Transparency in the voter-registration process and the maintenance of voter registers should ensure that registration is easy for a person who has the right to vote, while also ensuring accuracy to prevent the potential for fraudulent voting. Reviewers of electoral legislation should be satisfied that the legal framework provides such transparency. The legal framework should clearly specify the method of establishing voter eligibility, including what documentation is required, so that the process is fully transparent, not subject to arbitrary decisions, and can be publicly monitored in an objective manner.

Transparency requires that voter registers be public documents readily available for inspection without undue cost to the requester, particularly if this is an eligible voter, political party or individual candidate. It is common for voter registers to be available at reasonable times and locations and for a sufficient period of time for voters to inspect and examine their personal data or those of their relatives, free of charge. The legal framework should clearly specify who may inspect voter registers, how the inspection should occur, and during what periods the registers should be available for public inspection.

The legal framework should clearly state the permitted uses of information obtained from inspection of the voter registers, including whether the information can be used for purposes other than requesting corrections or making challenges to the registration of a particular voter. In particular, the law should state whether the information may be used for the campaign activities of political parties and candidates, as well as establishing sanctions for the misuse of information obtained from voter registers. The law should also specify whether voter registers can be made available in an electronic format to political parties or other specified election stakeholders if so requested, as well as to public in general.

The legal framework should clearly specify who is permitted to request changes or entries to and deletions from the register, how such requests are made, and during what time period requests may be made. Requests involving changes, entries and deletions should not be limited to a time period just before a given election, except where necessary to finalize registers prior to an election. People should not be limited to making requests that relate only to themselves. Anyone should be permitted to make a request that affects another person, provided the other person is notified of the request and has permitted the request to be made on his or her behalf. Additionally, requests for changes should be available for public inspection. Changes, entries and deletions should be made only upon the presentation of specific documentation and in accordance with the procedure identified in the legal framework. Decisions on requests should be made expeditiously, within a time period specifically stated by the law. Adverse decisions must be subject to appeal and appeals must be determined expeditiously, within a time period specifically stated by the law.

A voter-registration system may be active or passive. Regardless of the choice of system, care needs to be taken to ensure the ease of registration, verification and maintenance of voter data, and to remove any obstacles that might prevent or discourage voters from registering or updating their records. The final responsibility for the accu-

racy of voter registers may lay with local authorities or a central state authority. A change should be made only by those responsible for maintenance of the voter register and only based upon documentation that justifies the change. However, the voter-registration system established by the law should, first, ensure that voter registers are maintained in an accurate and transparent manner that protects the rights of citizens of legal age to register and, second, prevent unlawful or fraudulent registration. Voter registers must be systematically updated and corrected in a transparent manner, well in advance of elections, to allow electoral participants and voters the opportunity to review it for accuracy.

8.2. Creation of Voter Registers for Election Day

It is necessary that voter registers be updated before the day of elections and are made available in polling stations to verify the eligibility of voters requesting a ballot. The legal framework should contain specific provisions to provide for updating the voter registers before election day, including specified deadlines for printing preliminary registers, public scrutiny, requests for changes and corrections, filing of legal challenges to decisions made by the election administration on requests for changes and corrections, and printing of the final registers for delivery to polling stations.

The law must clearly specify who is permitted to request updates of registration records and entries, the procedure for making such requests, and the time period during which requests can be made. Further, a voter who may be affected by such a request, either by being removed from the voter register or assigned to a different polling station, must be notified of the request and have the opportunity to submit documentation or information in support of or against the request. The legal framework should state specific procedures for such requests to avoid any possible disenfranchisement of eligible voters.

Documentary materials necessary to justify a change or correction in the voter register should be clearly stated in the law. If a change or correction is permitted based on a written statement where supporting documentation is not available, then the law should clearly state what form the statement must be in and whether the statement must be verified by a witness or government official. There should be no doubt as to whether a change or correction is justified based on the material or information presented to the election administration. The legal framework should provide that decisions on requests should be made expeditiously and by the stated deadline. All decisions must be subject to judicial appeal, and courts must decide on such appeals expeditiously, within a time period specifically stated by law.

Deadlines for updating of the voter registers must be clear and, after the expiration of such deadlines, the voter register should be closed to further changes. The law should prohibit changes or corrections of records after the legal deadline for changes and corrections. However, the law may permit, subject to specific conditions, changes or corrections after the deadline where required by an appropriate court order. The law should require, once voter registration is completed, announcement of the number of registered voters countrywide, by local government units and by polling stations. Pub-

licly announcing the voter-registration figures ahead of election day is helpful to the electoral contestants and enhances the overall transparency of the election process.

Updating of the voter registers may require the creation of special voter registers for special voting arrangements, such as voting abroad, early voting, voting by persons involved in the administration of elections on election day, mobile or homebound voting, and absentee voting by voters who are away from their place of residence on election day. The law should clearly specify the processes, deadlines and all modalities of how such special voter registers are created and how voters placed on special voter registers are removed from the regular voter register.

The law should specify when the final voter registers, after the expiration of all deadlines, must be printed and delivered to polling stations. The law must be clear as to the personal information of voters included on the registers delivered to polling stations, including special voter registers.

8.3. Protection of Personal Data and Information of Voters

In addition to requiring full transparency to protect the integrity of voter registers, the law should provide for the protection of personal data and information that have been collected during voter registration. The legal framework will require that a person disclose certain information to the authorities for purposes such as registration as a voter or as a candidate. The legal framework should prohibit the collection, use or dissemination of personal data or information in any manner for any purpose other than the exercise of suffrage rights. In particular, care should be given to provisions that relate to fingerprints, photographs and personal identification numbers, as well as to ethnicity or other factors that could lead to discrimination or place the voter at risk of personal harm. The reviewer of electoral legislation should also carefully assess provisions specifying what personal information and data concerning a voter will be listed publicly on registers.

The protection of personal information has its basis in the fundamental right to privacy recognized by international and regional human rights documents. The United Nations Human Rights Committee has noted that the right to privacy embodied in the ICCPR is affected by the collection and holding of personal information on computers, data banks and other devices.[40] The right to privacy has been clarified by international and regional documents to include the manner in which states collect and automatically process personal data. Additionally, there have been cases decided by the ECtHR in the area of personal data protection and the right of privacy.[41] The European Court has emphasized that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to privacy. Legal provisions governing voter registers must be reviewed carefully to ensure the law protects the right to privacy of

40 "General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)", UN Office of the High Commissioner for Human Rights, 4 August 1988, paragraph 10, <http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd>.

41 See for example, *S. and Marper v. The United Kingdom* [GC], nos. 30562/04 and 30555/04, 4 December 2008.

voters. Further, to the extent voter information is stored, altered, erased, retrieved or processed, such voter information is subject to special rules governing the automatic processing of personal data. These special rules are discussed in Chapter XV on “Use of New Voting Technologies”.



OSCE/LUBOMIR KOPAJ

9.

Political Parties and Candidates

9.1. Equal Treatment Before the Law

The legal framework should ensure that all political parties and candidates are able to compete in elections on the basis of equal treatment before the law. Paragraphs 7.5 and 7.6 of the OSCE 1990 Copenhagen Document set the standards in this regard.

Paragraph 7.5 of the Copenhagen Document requires that citizens be permitted "to seek political or public office, individually or as representatives of political parties or organizations, without discrimination".[42] Thus, candidates seeking office must be permitted to

42 See also General Comment No. 25 of the UN Human Rights Committee, which provides, in paragraphs 15 and 17: "Persons who are otherwise eligible to stand for election should not be excluded … by reason of political affiliation", and "The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties." UN Human Rights Committee, General Comment No. 25, *op. cit.*, note 21.

run as party candidates, independent candidates nominated by initiative groups or as self-nominated candidates. However, the legal framework should be drafted carefully to eliminate the possibility of self-nominated candidates appearing on the ballot with party affiliation or endorsement without the certification of that party. This is necessary to prevent voters from being misled about party affiliation when marking their ballots. Additionally, candidates cannot be discriminated against, regardless of party affiliation or lack thereof.

Paragraph 7.6 of the Copenhagen Document requires respect for the "right of individuals and groups to establish, in full freedom, their own political parties or other political organizations", and that the state "provides such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law". This requires the legal framework to establish conditions that will allow for all political parties and candidates to compete in elections on an equitable basis. In some countries, the establishment of equitable conditions for all election participants is referred to as providing a "level playing field". This sports analogy illustrates the principle that no political party or candidate should have an unfair advantage over any other, or be subject to a disadvantage.

The use or "abuse" of state resources has become a very problematic area in many states during elections and is contrary to the principle of equal treatment of candidates and political parties. Although there is a natural and unavoidable incumbency advantage, legislation must be careful to not perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e., materials, work contracts, transportation, employees and similar assets of the state) to their own advantage. Paragraph 5.4 of the OSCE 1990 Copenhagen Document provides, in this regard, that participating States will maintain "a clear separation between the State and political parties; in particular, political parties will not be merged with the State".

To allow for the effective regulation of the use of state resources, legislation should clearly define what is considered an abuse. For instance, while incumbents are often given free use of postal systems (seen as necessary to communicate their acts of governance with the public), mailings including party propaganda or candidate platforms are a misuse of this free resource. Legislation must address such abuses. The abuse of state resources or authority may include the manipulation or intimidation of public employees. It is not unheard of for a government to require its workers to attend a pro-government rally. Such practices should be expressly and universally banned by law. Public employees (civil servants) should not be required by a political party to make payments to the party. This is a practice the law should prohibit as an abuse of state resources and authority.

9.2. Placing Candidates or Parties on the Ballot

A founding principle for democratic elections is that of genuine electoral competition among political parties and candidates. This can only be achieved if there is meaningful opportunity for political parties and candidates to secure their names on the ballot

through a registration process that is predictable, fair and reasonable. This issue is determined not only by the legislation regulating elections, but also by the legal provisions governing the formation of political parties. The law regulating the formation and registration of political parties should not establish any unreasonable requirements in this process.

Although a legal framework should not hinder the general activities of political parties or independent candidates, it may establish requirements for political parties or independent candidates seeking to be placed on the ballot for a particular election. A place on the ballot for a particular election is usually granted when a political party or independent candidate meets one of the following requirements: (1) the payment of a monetary deposit; (2) the collection of a minimum number of signatures from registered voters; or (3) the allocation of a mandate or obtaining of a minimum percentage of the votes in the previous election. However, the simultaneous imposition of more than one of these requirements for ballot access should be considered as restrictive to political pluralism.

The legal framework should clearly set forth all details related to registration for a particular election. This includes the dates for the commencement and closure of the registration process, the time period during which signatures are to be collected in cases where these are required for registration, and the process by which these signatures are verified. Where the legal framework requires the collection of signatures, it needs to provide for a reasonable amount of time for their collection. The legal framework should provide for a uniform registration process that is the same for all candidates and political parties.

Regardless of the procedures available for registration, registration should not be tied to irrelevant requirements unrelated to the issue of whether a political party or independent candidate has sufficient support to be placed on the ballot. The grounds for the rejection of a registration application should be based on objective criteria that are clearly stated in the legal framework.

Where the collection of signatures is a requirement for registration, special attention should be given to the manner of validating signatures. An invalid signature should be just that and only that – an invalid signature. An invalid signature should not invalidate other signatures or the signature list.[43] A candidate or a party may be required to submit a fixed number of valid signatures or a fixed percentage of valid signatures. Where the law requires submission of a fixed percentage of signatures, it should be

43 The following example illustrates why, when signature collection is involved, registration should be based on the establishment of a fixed number of valid signatures, without regard to the number or percentage of invalid signatures that may be on the registration signature list. Assume a candidate for the parliament needs at least 1,000 valid signatures to meet the requirements for candidacy. Candidate B is extremely popular and collects 2,500 signatures. Of those 2,500 signatures, 2,130 are valid and 370 are invalid. Under the country's verification procedure, 875 signatures, or 35 per cent of the submitted signatures, are checked, of which 699 are valid and 176 invalid. Now, however, the law provides that further verification of the signatures on the signature lists shall be terminated because the number of invalid signatures found during the verifications constitutes more than 15 per cent of the total number of signatures verified in the signature lists. The end result is that a candidate who had 2,130 valid signatures, when only 1,000 were needed, is prohibited from being a candidate.

clear that the percentage is based on a readily identifiable number at a specified date, such as the number of registered voters in the constituency as announced by a specified election authority on a specified date. Regardless of whether a fixed number or percentage is stated in the law, the law should permit the submission of a total number of signatures above the threshold in the event that some signatures are determined to be invalid. However, the required number of signatures should not exceed one per cent of the total number of voters registered in the constituency.[44]

A credible process of signature verification would include the verification of all signatures submitted up to the point when the minimum number of verified signatures required for registration has been reached. Once the minimum number of signatures has been established, the political party or candidate should be registered.[45]

The procedures for checking signatures must be written carefully to prevent abuses or discrimination against or in favor of a particular political party or candidate. Objective rules that are non-discriminatory must apply. Otherwise, a list submitted for verification by one party or candidate may be scrutinized in great detail, while that submitted by another may be approved without any checks at all. The election legislation should specify how signatures are to be verified and make clear that this applies equally to all lists. Just as importantly, the law should specify the degree of detail to be used to verify signatures. In some countries, signature lists are checked for errors on the face of the document, e.g., the same voter signing twice, or a voter not providing his or her address where required, while in others more thorough checks are required, e.g., verification of the validity of identification document numbers and home visits to the signatories. The law should be clear as to what kind of verification process is involved, in order to ensure that all lists are exposed to equal scrutiny, under clearly stated objective criteria. The law should require the completion of appropriate forms or protocols reflecting the steps taken in the process of verification should there be a legal challenge over a particular registration or denial of registration.

Provisions regarding the geographic regions where signatures are obtained should be carefully considered. An election law may require that a party obtain a certain number of signatures in every region of the country. Such a provision discriminates against parties that enjoy strong public support, but whose support is limited to a particular region. Such a provision can also discriminate against small parties and national minorities and would be incompatible with the right to free association.[46]

44 Venice Commission, "Code of Good Practices in Electoral Matters", *op. cit.*, note 2.

45 In a country where the legal framework provides for the verification of signatures through statistical analysis of a sample of the signatures submitted, the law, as well as the protocol on registration or denial of registration, should specify the following: (a) the size of the sample to be drawn and checked; (b) the method by which the sample is to be drawn, which could involve the computer generation of random numbers; (c) the tests that are to be applied to determine whether a particular signature is valid; (d) a formula for determining the number of signatures in the sample that must be valid in order for the registration to be accepted; and (e) if necessary, the circumstances under which a further sample may be drawn.

46 See *Guidelines on Political Party Regulation* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2011), <http://www.osce.org/odihr/77812>.

A requirement that voters may only sign in support of one candidate or party is also problematic because signing to support the registration of a candidate or candidate list is not a substitute for voting for the candidate or candidate list. In the presence of such a restriction, a candidate who has collected the required number of signatures in good faith may be denied registration through no fault of his or her own, but because voters have signed more than one petition. In the worst case, voters may deliberately sign more than one petition in order to try to prevent the registration of a particular candidate.

Where monetary deposits are used as registration prerequisites, such deposits should be of a sufficient sum to discourage frivolous parties and candidates while, at the same time, not being so high as to prevent legitimate parties or candidates from obtaining access to the ballot. Additionally, it is considered good practice to return monetary deposits to parties or candidates receiving a certain number or percentage of votes. The threshold required for a refund should be reasonable. Provisions governing registration, including the size of a monetary deposit or the number of signatures required, must also consider the economic and demographic realities of the country. The size of a monetary deposit may appear reasonable but, in fact, be unreasonable for most citizens due to the economic realities.

Deadlines for the approval or rejection of registration requests by the registering authority should be stated in the law. The grounds for rejection must be clearly stated in the law and based on objective criteria. The law should allow for the correction of technical deficiencies within a reasonable amount of time after the rejection of an application. The law should provide for appeal to a court of law after final rejection of registration, should clearly specify the process by which appeals may be made, and should require an expedited court ruling to enable a candidate or party to be placed on the ballot where registration was improperly denied. Once registration is approved and all legal challenges have been resolved, or the deadline for such challenges has expired, the question of registration or possible de-registration should not again become an issue. This is necessary to avoid the abuse of or speculation about the abuse of the possibility of de-registration.



OSCE

10.

Equal Treatment and Access to Media

10.1. General Considerations

Regulation of media during elections can be a complicated subject due to the need to balance the rights of voters to receive information, the rights of candidates and political parties to convey political messages and rights of media to exercise the freedom of expression. Voters have the right to receive information from candidates and political parties in order to effectively exercise the right to vote. The right of voters "to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his

choice,"[47] is particularly applicable during elections. Assessment of media regulations must always keep in mind the fundamental right of voters to receive information.

Candidates and political parties also have the right to communicate their political messages, campaign platforms and views on the issues to voters. This can be done in a variety of media formats and through different ways of communication and coverage. It is important that candidates and political parties "have an equal opportunity to inform voters about their policies and not face discrimination in getting media access".[48]

The media have the right to inform the public about the election campaign and to express opinions. The media have the right to cover the candidates, political parties, campaign issues, the work of the election administration, problems and incidents arising during the campaign, events on election day and the announcement of election results. The rights of the media must be considered, as well as the rights of voters and candidates and political parties during elections.

The assessment of legal provisions for media regulation requires consideration of the provisions in their totality without undue focus on a single provision, due to the number of fundamental rights involved. Further, this is an evolving area of legal regulation and the reviewer should consider the most recent decisions of treaty bodies and the ECtHR when assessing legal provisions for media regulation during elections. This evolution in media regulation is also impacted by the increased use of the Internet and new media technologies in elections.

10.2. Equal Treatment and Access

Paragraphs 7.6 and 7.8 of the OSCE 1990 Copenhagen Document concisely summarize the standards for equal treatment and access to the media. Paragraph 7.6 requires that the government provide political parties and organizations "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities". Paragraph 7.8 requires that the government ensure that "no legal or administrative obstacle stands in the way of unimpeded access to the media on a nondiscriminatory basis for all political groupings and individuals wishing to participate in the electoral process".

The regulation of equal treatment and access can be challenging, as some states require strict equality in access and other states allow "equitable access", as opposed to strict equality. "Equitable access" has been recognized as satisfying the obligation of equal treatment, provided such access is "allocated according to objective criteria

47 "International Covenant on Civil and Political Rights", United Nations General Assembly, 16 December 1966, Article 19 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

48 *Handbook on Media Monitoring for Election Observation Missions* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012), page 14, <http://www.osce.org/odihr/elections/92057>.

for measuring overall levels of support."[49] The challenge for drafters of legislation is identifying the objective criteria for measuring overall levels of support. Some states have used the results from past elections as the measuring criteria. Other states have used the number of candidates being presented in the current election as the measuring criteria, based on the view that the current level of support is shown by the ability to present candidates for elections. Regardless of the approach taken in a state's legislation, any formula for "equitable access" must be assessed carefully in light of the obligation to provide equal treatment in access to political contestants who meet a threshold level of support based on objective criteria.

A country's legal framework should contain these guarantees and a clearly defined process for their timely implementation before and during elections. The process for establishing a formula or schedule for equal access to the media for a given election, whether the access be "strictly equal" or "equitable", should be understandable and objectively applicable. The different status of the public, state-owned media – funded by all taxpayers – and the private media, which may be granted broader discretion within the framework of election campaigns, also needs to be taken into account.

One practice that can ensure this standard is met is to require that the main political parties, i.e., those who received a certain minimum number of votes in past elections or have shown a current threshold level of support based on objective criteria, are provided the right to free time on public radio and television on a regular basis, not only during election periods. A legal framework stipulating that such political parties are guaranteed an established number of minutes of broadcasting per month can ensure this practice. During election campaigns, political parties and candidates could be allocated additional free time to disseminate information about their candidatures.

Free broadcasting time or free newspaper space is commonly allocated on an equal or equitable basis during election periods and under an established formula that can be applied objectively. Objective application can be facilitated by a law that specifies a minimum amount of broadcast time to be distributed to political parties and candidates. The amount of broadcast time distributed needs to be sufficient to ensure that voters receive information from candidates and political parties in order to effectively exercise the right to vote and that all political parties and candidates are able to compete effectively in the elections.[50]

49 See "Joint Statement on the Media and Elections", UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 15 May 2009, <http://www.article19.org/data/files/pdfs/press/joint-statement-on-the-media-and-elections.pdf>.

50 However, reviewers should also be mindful that, in countries with particularly liberal regimes for party registration, there may be hundreds of registered parties and many of these may choose to contest an election. In such an environment, a strict equal treatment of all election contestants may render the media coverage meaningless or impossible, even with the best good-faith treatment by the media. In such situations, some mechanism for the identification of the "major political interests" to receive preferential treatment based on broad political agreement may provide a solution for an equal treatment that is ineffective and provides qualitative information to voters. Private media are better positioned to address such circumstances, since the cost of advertising will likely be prohibitive for insignificant political parties.

In assessing or drafting legal provisions on equitable access, regulation related to media coverage of incumbents' activities, in the context of electoral campaigns, could be an additional area for review. Being part of government means attracting more media attention. Media coverage of policymakers' activities, including during electoral periods, is natural and necessary in ensuring the public's access to information. At the same time, while incumbents generally tend to receive more media exposure, the media should cover the activities of authorities in a balanced and critical manner and be guided by the principle of newsworthiness in the selection of material for coverage.

The issue of paid political advertising can also present a difficult area for regulation, as the rights to receive and impart information and the right of freedom of expression are clearly applicable. The ECtHR has found that, in at least one case, a ban on paid political advertising violated the right of freedom of expression under Article 10 of the European Convention on Human Rights.[51] Thus, any ban or limitation on paid political advertising must be drafted carefully in order to respect the right to freedom of expression. Where paid political advertising is permitted, there should be a guarantee of equal treatment and access. Inequality is created if the legal framework fails to ensure that the same commercial rate for such advertisements is offered to all political parties and candidates, and that the times and location of the advertising be on similar terms. If paid political advertising is permitted, then it should be offered at the same commercial rate for such advertising and under similar conditions to all political parties and candidates. Moreover, paid political advertising should be identified as such and should not be disguised as news or editorial coverage.[52]

Equal treatment and access to media, whether provided on a strictly equal or equitable basis, may be regulated in a country's law on media or public information instead of the primary election law. Additionally, the law may only provide general statements on equal or equitable treatment and access, and may delegate authority for promulgating the specifics of implementation to the central election-administration body or to a specialized media commission. Regardless of whether regulation is by statute or administrative provisions, monitoring of the media is recommended to ensure compliance. Further, there should be procedures in place for a political party or candidate to seek relief before an administrative body or court from the violation of equal or equitable treatment and access provisions, as well as to obtain an order directing the allocation of additional time to the party or candidate should this be necessary to remedy the violation.

The standard of equal or equitable treatment and access to media is undermined if state-owned or state-controlled media are able to favor a political party or candidate in news coverage, political coverage, forums or editorials. Biased coverage or treatment

51 See *TV Vest As & Rogaland Pensjonistparti v. Norway,* no. 21132/05, 11 December 2008; *Verein gegen Tierfabriken Schweiz* (VgT) v. Switzerland (No. 2) [GC], no. 32772/02, 30 June 2009. See also *Bowman v. United Kingdom* [GC], no. 24839/94, 10 February 1998.

52 See, "Recommendation No. R (99) 15 of the Committee of Ministers to Member States of the Council of Europe on Measures Concerning Media Coverage of Election Campaigns", Council of Europe, 9 September 1999. Also, see the *Handbook on Media Monitoring for Election Observation Missions, op. cit.*, note 48.

in state media should be prohibited, and authorities should be required to act immediately upon any violation.

10.3. Limitations on Freedom of Expression During Election Campaigns

A democratic election is not possible where the legal framework limits or inhibits campaign speech and expression. It is important that the legal framework protect free political expression and speech. The law should not impose any criminal sanction for speech that "defames" or "insults" election contestants.[53] Further, regardless of the source of law, the legal framework should not permit cancellation of candidacy or imprisonment for "defaming" another candidate or political party.

Freedom of expression is an essential foundation of democracy. The European Court of Human Rights has articulated this principle clearly.

> "(…) freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfillment. …, it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.
>
> The Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism."[54]

The ability of voters, candidates and political parties to freely and openly exchange political views is crucial. Any limitation of free expression and speech prevents a robust and vigorous campaign, which is critical to election campaigning in a democracy.

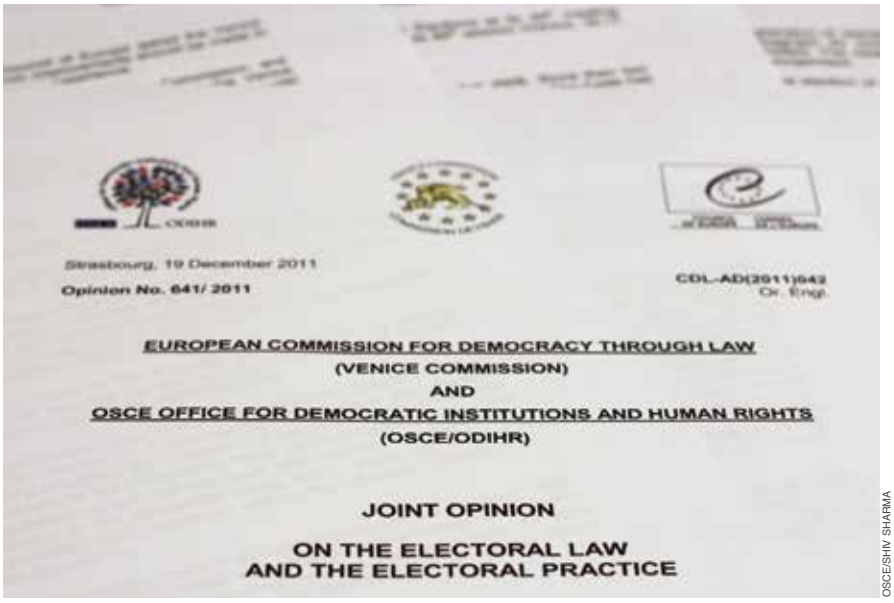
Any limitation to free political expression is contrary to international human rights law, unless the restriction is strictly necessary in a democratic society, as prescribed by

53 Representatives of international and regional institutions for freedom of expression have recommended the repeal of all criminal defamation laws. See "International Mechanisms for Promoting Freedom of Expression, Joint Declaration", UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, 10 December 2002, <http://www.osce.org/fom/39838>.

54 See judgments by the ECtHR on cases of *Koprivica v. Montenegro,* no. 41158/09, 22 November 2011, *Mizzi v. Malta*, no. 17320/10, 22 November 2011; as well as earlier cases of *Jerusalem v. Austria*, no. 26958/95, 27 February 2001 and *A. v. The United Kingdom*, no. 35373/97, 17 December 2002. The Court has ruled that the protection of political speech is so sacrosanct that it is virtually immune from prosecution in a defamation action.

Article 10 of the European Convention on Human Rights.[55] Additionally, such a limitation often violates free-speech guarantees found in a country's constitution. This standard is not applicable, however, to prohibitions on inflammatory speech calculated to incite another person to violence or ethnic hatred.

55 *Ibid.*


Strasbourg, 19 December 2011
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Or. Engl.
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)
AND
OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)
JOINT OPINION
ON THE ELECTORAL LAW
AND THE ELECTORAL PRACTICE
OSCE/SHIV SHARMA

11.

Campaign Finance and Expenditures

11.1. General Considerations

Campaign finance is a difficult subject of regulation in elections, due to the balance that must be sought between minimizing disproportionate expenditures, which may undermine the free choice of voters, and the rights of freedom of association and expression, which often are exercised by donating money or services to a candidate or political party. Further, as such donations are often made to political parties outside of an election campaign period, assessment of the regulatory framework should include consideration of political party funding laws that apply to general activities of a political party. This is an evolving area of legal regulation and the reviewer should consider the

most recent decisions of treaty bodies and the European Court of Human Rights when assessing legal provisions for campaign finance and expenditures.

11.2. Public (Government) Funding for Campaigns

If the legal framework provides for public (government) funding for campaigns, then this should be provided on the basis of equal treatment before the law. Paragraphs 7.6 and 7.8 of the OSCE 1990 Copenhagen Document provide guidance in this regard. Paragraph 7.6 requires that the government provide political parties and organizations "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities". Paragraph 7.8 requires that the government ensure that "no legal or administrative obstacle stands in the way of unimpeded access to the media on a nondiscriminatory basis for all political groupings and individuals wishing to participate in the electoral process". Provisions for public funding for campaigns should respect the principles of equal treatment before the law and non-discrimination. However, similar to media regulation, the principle of equal treatment in campaign finance may be applied with strict equality or on an equitable basis.

The legal framework should ensure that the distribution of public funds for campaigns is done in a fair, transparent, timely and accountable manner. The legal framework should ensure that no advantage is given to incumbents in the distribution of public funds for campaign purposes. This does not mean that public funding for campaigns cannot be based on "equitable" formulas. However, all provisions for public funding should be clearly stated in the law and based on objective criteria that are not open to arbitrary interpretation by state authorities.

11.3. Private Funding for Campaigns

The regulation of private contributions to campaigns is one of the most challenging areas that must be addressed in election legislation. On the one hand, private involvement in political campaigns through contributions is a positive way to exercise political rights. On the other, there is the risk of undue influence that can result from excessive or disproportionate contributions by a single contributor or group of contributors. Thus, a carefully balanced approach should be taken when regulating private funding for campaigns.

Any restriction on private funding of political campaigns must be scrutinized carefully. This is a sensitive area in which the country context is important because the constitutional framework in some countries considers the right to give money to a political campaign to be as rigorously protected as the right of political speech. Any restriction or limitation should be reasonable and protect the right of political expression through contributing to a political campaign, while also preserving the integrity of election processes. The legal framework should permit private funding of political campaigns and establish reasonable limitations on the amount of private contributions. Private contri-

butions should be allowed as, in the words of the ECtHR, freedom of political debate forms "the bedrock of any democratic system" and "freedom of expression is one of the conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature."[56] What is a reasonable limitation depends on the type of election and factors unique to the particular country, including relative costs of media advertising and other campaign materials.

Private contributors should be free to give campaign donations to candidates of their own choosing, in accordance with legal provisions regulating the amount, timeframe and method of contribution, as well as disclosure requirements. The law should not contain provisions that attempt to channel private funding to specific parties or candidates. An example of such a provision would be one prohibiting direct private contributions to political parties or candidates and, instead, requiring contributions be made to a "public" fund from which contributions are distributed to political parties and candidates pursuant to an established formula. Such a provision effectively requires a private contributor to support not only his or her preferred candidate, but also that candidate's opponents. The target recipient of private campaign funds should be determined solely by the donor of the funds.

Campaign finance law often regulates in-kind donations. In-kind donations are services and goods provided to parties and candidates free of charge or with a discount. Legislation should define how in-kind donations are valued and provide that in-kind contributions are subject to the same legal provisions applicable to monetary contributions. In states with expenditure limits, in-kind donations and discounted goods and services should count towards any expenditure limit based on the market value of the goods or services. Otherwise, an expenditure limit may be circumvented through the use of in-kind donations.

A growing issue in the area of campaign finance is regulation of expenditures by individuals that are not directly tied to a specific candidate or political party. These individuals are commonly referred to as "third parties". Legislation in some states covers campaigning, fundraising and spending by third parties. Instead of giving donations, third parties spread information to the public directly. Their activity, also called independent expenditure or independent speech, should not be prohibited. Under the freedom of expression guarantee, these third parties should be free to fundraise and express views on political issues. If their freedom to collect funds and run independent, parallel campaigns is limited, such a limitation has to follow a legitimate aim, be proportional to that aim, and be strictly necessary in a democratic society.[57] However, as third parties should have the right to expend funds during a campaign, those expenditures should also be subject to reasonable limitations and disclosure requirements. Donor disclosure rules should apply to all persons, groups, and entities, including third parties, for their funding and spending during an election campaign.

Another challenging aspect of campaign finance is the issue of whether it is appro-

56 *Bowman v. United Kingdom* [GC], no. 24839/94, §§ 41-41, 10 February 1998.

57 *Ibid.*

priate to place a limit on the amount a candidate or political party can spend in an election. An expenditure limit may be problematic in a country whose constitutional framework considers the right to spend money in a political campaign to be as rigorously protected as the right of political speech. Any limitation on expenditures might be considered a limitation to political speech. Within the context of international good practice, however, a reasonable limitation on expenditures is acceptable because a state has an obligation to ensure that the free choice of voters is not undermined, or the democratic process distorted, by the disproportionate expenditure on behalf of any candidate or party.[58] Further, a reasonable limitation can help promote the existence of a "level playing field" and ensure that the campaign information received by voters does not disproportionately favor one contestant because that contestant is able to monopolize the flow of information through campaign expenditures.[59]

11.4. Reporting and Disclosure Requirements and Sanctions for Violations

The regulation of campaign finances is ineffective without reporting and disclosure requirements for candidates and political parties. The legal framework should require periodic reporting, according to reasonable time intervals, of all contributions received and expenditures made by a contestant or in support of a candidate or political party. The legal framework should indicate whether the reporting period coincides with the election campaign or is extended beyond, taking into account the fact that some expenditures may occur before the official start of the campaign. The law should also specify that the use of state resources by an individual candidate or party in political office should be reported as expenditures and paid for by the election contestant.

The legal framework should specifically identify the government agency or body responsible for receiving and maintaining reports on campaign contributions and expenditures. The legal framework should clearly specify where and when such reports should be made available for public inspection. All campaign reports should also be subject to auditing by an appropriate government agency. The legal framework should specify the government agency with authority for audits and the parameters of the audit. The parameters of the audit must be clearly defined and applied uniformly to all reports, in order to prevent biased auditing in favor of or against a particular candidate or party.

Any penalties for failing to file reports or for filing reports with erroneous information should be clearly stated in the legal framework and should be proportional to the offence. For example, candidates should not be disqualified or be barred from running due to reporting irregularities. Any financial penalty imposed should be proportional and based on the nature and magnitude of the reporting irregularity. Although sanctions should not be disproportionate, sanctions should be severe enough so that they are effective and dissuasive. Additionally, the law must clearly identify the government

58 UN Human Rights Committee, General Comment No. 25, *op. cit.*, note 21, paragraph 19.

59 *Guidelines on Political Party Regulation, op. cit.,* note 46.

agency or body responsible for initiating legal actions for violations, whether by referral to the appropriate prosecutor or as a party to a legal proceeding in a competent court.

Sanctions for substantive violations of campaign finance regulations, like violations for reporting requirements, should be effective, proportionate to the violation and dissuasive. Criminal sanctions are appropriate for serious violations of campaign finance regulations that undermine the integrity of the election processes.



OSCE/JIFFER BOURGUIGNON

12.

Observers

A transparent electoral process is a standard necessary to ensure democratic elections. This standard is set out in Paragraph 8 of the OSCE 1990 Copenhagen Document, which recognizes the importance of the presence of observers, both foreign and domestic, to ensure transparency in the electoral process. The legal framework should provide for the presence of observers, domestic and foreign, and representatives of the media, political parties and candidates. In addition, observers from non-governmental organizations (NGOs) play an important role in enhancing the transparency of the electoral processes and should have the right to be accredited to observe. Further, laws regulating the formation and general activities of NGOs and public associations should not contain any unreasonable requirements for acquiring the legal status necessary to qualify to observe election processes.

The legal framework should provide clear and objective criteria on the requirements for registration as an observer, including applicable deadlines, which governmental authority accredits observers, the requirements to obtain observer status, and under what circumstance observer status can be revoked. The law should be clear that the rights of observers apply to all elections, including local elections and referenda. The law should also establish an expedited process for observers to obtain corrective relief when their rights are denied by an election-administration body, including the right to be registered as domestic observers.

The rights of observers should be clearly and precisely stated in electoral law. A general provision allowing observers to observe the election process is insufficient. Observers should be given unimpeded access to all levels of election administration at all times, effective access to other public offices with relevance to the election process, and the ability to meet with all political formations, the media, civil society and voters. The law should provide clear and precise provisions establishing the rights of observers to inspect documents, attend meetings and observe election activities at all levels, as well as to obtain copies of decisions, protocols, tabulations, minutes and other electoral documents, at all levels.

Observers should receive appropriate credentials at a time prior to elections sufficient to enable them to organize their activities effectively. An election is a process that includes activities before and after the actual vote. Effective election observation cannot be limited to observing only voting on the day of the election. Observers should continue to have rights of access throughout the entirety of the election processes, including the vote count, the tabulation of results, and the hearing and adjudication of all complaints and appeals by election-administration bodies and courts.

The legal framework should also be clear and precise concerning what an observer may not do, such as interfere with voting, take any direct part in the voting or counting processes, or attempt to determine how a voter will vote or has voted. It is necessary to strike a balance between the rights of observers and the orderly administration of the election processes. However, any requirement that could be onerous to observers and serve to hinder legitimate observation should be carefully considered. This is especially applicable to any provision that attempts to “muzzle” observers or prevent them from reporting or releasing information that has been obtained through their observation efforts.


OSCE/MATS LINDBERG

13.

Balloting Procedures

13.1. Secrecy of the Vote

Secrecy of the vote is a standard for a democratic election. It is set out in Paragraph 7.4 of the OSCE 1990 Copenhagen Document, which requires that votes are cast by secret ballot. Voters must have a guarantee that their voting choices will not be disclosed to other persons and that they will not be intimidated or face retribution as a result of how they chose to mark their ballots. This requires the legal framework to provide mechanisms for control and security of the ballot, particularly governing the casting of votes at the polling station, while ensuring that no individual ballot can be identified as being marked by a specific voter.

Under no circumstances, except for during the counting of ballots after the close of voting, should a polling-station committee member or other person be allowed to see,

handle or control a voter's marked ballot. However, this prohibition does not apply to a person legally authorized to assist a voter requiring assistance due to physical infirmity.

The principle of secrecy of the vote requires legal provisions to ensure that secret voting is not only a right on the part of the voter, but an absolute obligation. A frequent abuse of this requirement comes in the form of "family" or "group voting", which is still a relatively common practice in some countries. "Open voting", i.e., voting outside the polling booths in front of other voters, and thus disclosing the voter's choice, is another violation of the secrecy of the vote. Electoral legislation should make clear that every voter's ballot must be marked and cast secretly. Election officials should under no circumstances accept deviations from the principle of secrecy of the vote. However, the requirement for secrecy of the marked ballot should not be misapplied to prohibit or limit the rights of voters and others to disclose how they have voted in exit polls conducted outside polling stations.

13.2. Persons Allowed in Polling Stations

The legal framework should prohibit unauthorized persons from being present in polling stations. In particular, government officials who are not part of the election administration for the polling station, constituency or district should not be present and advise or instruct election administrators or voters. The legal framework should include an unambiguous prohibition against all unauthorized people being present in polling stations and the premises of other election-administration bodies. The legal framework may include an exhaustive list of those who may be present in polling stations or other premises during voting, counting and tabulation. Those permitted in polling stations should wear the form of identification specified in the law in order to be clearly identifiable by voters and observers.

Police officers and security personnel should enter polling stations only to vote or restore order. In the event the presence of police officers or security personnel is necessary to restore order in a polling station, they should enter only upon the request of the chairperson of the polling-station election commission, or a person acting on his or her behalf, and should leave as soon as order is restored.

13.3. Voting Procedures

All procedures regulating the voting process should ensure that voters are adequately identified and that other mechanisms are in place to prevent attempts at fraudulent voting. However, voting procedures should not be so cumbersome or complicated so as to hinder the voting process. Voting procedures should ensure that all ballots and voting materials are adequately safeguarded before, during and after voting.

In general, most voting is done on election day by voters who personally go to the polling station. Some voters, however, may not be able to personally go to the polling station on election day due to physical infirmity or travel. It is not uncommon for electoral

legislation to provide for alternative methods of voting, such as early voting, postal voting or "mobile voting", to facilitate greater participation. However, provisions for alternative voting must be carefully drafted in order to minimize the potential for fraud and to ensure the integrity of the electoral process. This is especially true regarding the identification of voters, both to demonstrate their eligibility to use an alternative method and to prove that the voter is in fact who he or she claims to be. Further, mechanisms must be in place to prevent a person from voting using both an alternative method and the regular voting process in the same election.

13.4. Mobile Voting

It is common for election legislation to provide for mobile voting by voters who are physically disabled or who cannot come to the polling station for other valid reasons. The voter accommodation principle underpinning the concept of mobile voting is commendable. However, provisions for mobile voting must be carefully drafted in order to minimize the potential for fraud.

If mobile voting is allowed under the legal framework, it is important to include safeguards to ensure the integrity of the mobile voting process. The following measures are recommended as part of any legal provisions for mobile voting:

- A procedure must be in place to identify voters using mobile facilities to prevent double voting. This requires an accurate record at the polling station to ensure that a voter using mobile voting is not able to also vote in the polling station. It also requires strict procedures for establishing the identity of the mobile voter during the process of mobile voting;
- Mobile voting should be used only in cases where it is difficult for the voter to travel to the polling station to vote. This fact is usually established by a written application to the polling station committee, where possible, explaining why it is difficult for the voter to travel to the polling station. The application needs to be submitted by the voter and acted upon by the polling station committee within deadlines established by law;
- Observers of all categories, or their representatives where numbers must be restricted for practical reasons (transport by helicopter, etc.), should be permitted to accompany the mobile ballot box;
- The number of ballot papers taken out for mobile use and the number later returned should be formally recorded in all election protocols and records;
- The number of voters who have used the mobile ballot box should be recorded in the polling station protocol and successive election commission protocols. This makes it possible to identify particular areas where the proportion of votes cast using mobile boxes is unusually high, which may be an indication of fraud if the

voting population in the area consists of persons who should not have any difficulty voting in person at the polling station;

- At least two members of the polling station committee should administer mobile voting jointly within the geographical territory covered by a polling station. These two – or more – members should not be from the same political party or appointed to the polling station committee by the same person or institution; and

- The law must clearly state where, when and how mobile voting ballots are to be counted and, particularly, whether they should be counted together with ballots cast in regular polling stations. The counting of mobile voting ballots should be done in the presence of accredited observers.

13.5. Postal Voting

A number of countries allow voters to cast their votes by receiving blank ballots and returning marked ballots through the national postal service. Postal voting can present logistical challenges, including dependence on the national postal service, the printing and processing of ballots, inner envelopes for securing marked ballots and outer envelopes for mailing them, and in providing special instructions to voters receiving the postal ballots. There may also be logistical challenges related to the printing and processing of forms used by voters to request that a postal ballot be mailed to them. The most serious challenge, however, is maintaining the secrecy of the vote, since the voter receives a ballot that is to be marked in an uncontrolled environment outside of the polling station. There may also be issues as to whether a marked ballot should be counted if it was mailed by an established deadline but, as a result of postal-service delay, is not received by election day. Although it is not possible for the legal framework to prevent violations of the principle of secrecy of the vote in postal voting, it is possible to provide for legal sanctions for violation of the secrecy requirement and to include other provisions to reduce the opportunity to undermine the integrity of the election through fraudulent postal voting.

The following provisions could be considered for inclusion in the legal framework to increase the security of postal voting:

- Clear and objective provisions stating under which circumstances a voter may apply to vote by mail. The law should clearly state whether postal voting is a voting option available to all voters or only voters who are not able to travel to a polling station on election day. The law should also state clearly whether it is possible to vote by mail from outside the country, a procedure that will involve foreign postal services in addition to the national postal service;

- An application requesting a postal ballot should be in writing and signed by the voter. The deadline for requesting a postal ballot should be set early enough to provide sufficient time for the election administration to check and verify the voter's signature and other personal identifiers that might be required by the legislation on

each application should there be a concern about the authenticity of the request for the postal ballot;

- Political parties and candidates should be prohibited from handling applications for postal ballots or completed postal ballot packages. Only voters, the election administration and postal service workers should be allowed to handle postal ballot packages;
- The postal ballot application form should include an affirmation from the voter that the ballot was cast in secret and only by the voter;
- There must be reasonable deadlines for returning postal ballots, in order to accommodate the logistical demands placed on the election administration;
- The law must clearly state the deadline, including the date and time, for the receipt of marked postal ballots if they are to be counted by the election administration. The law must also be clear as to whether the inclusion of any extraneous material or the failure to enclose requested materials, such as proof of the identity of the voter, will invalidate the ballot;
- The law must clearly state where, when and how postal ballots are to be counted; and
- Observers must be able to observe the verification and counting of returned postal ballots.

13.6. Early Voting

Early voting has been introduced in a number of countries to facilitate voter participation in elections. Unlike postal voting, early voting takes place in a controlled environment. Early voting in a controlled environment means that, from a certain day determined by the law, voters are able to cast their ballot at a specified public office, where an official will assure that secrecy of the vote is maintained. This public office may be an election commission or some other government office.

The length of the period during which early voting is allowed varies among the countries that permit such voting. A country may provide for a lengthy period of early voting, covering several weeks. Conversely, a country may provide for one or two days of early voting right before election day.

The following provisions could be considered for inclusion in the legal framework to increase the security of early voting:

- Clear provisions stating under which circumstances a voter may use the early voting process. The law should state clearly whether early voting is a voting option available to all voters or only to those who are not able to travel to a polling station on election day;

- Consideration should be given to having the time period during which early voting is permitted commence only after the accreditation of observers, to allow them to observe early voting;
- At the end of each day of early voting, an official protocol should be completed, similar in form to a regular polling station protocol, stating the number of voters, used ballots and spoiled ballots for that particular day of early voting;
- Sealed ballot boxes, voters lists and sheets, unused ballots and all election materials must be secured at the close of each day of early voting and kept secure;
- In order to plan for the number of ballots needed for early voting and the locations where ballots should be delivered, consideration should be given to requiring the submission by the voter to the election administration of a formal written request for early voting; and
- The law must clearly state where, when and how early voting ballots are to be counted and, particularly, whether they should be counted separately from or together with ballots cast in regular polling stations. The counting of early voting ballots should be done in the presence of accredited observers.

The burden placed on observer organizations and candidate proxies by an extended early voting process can be substantial. The inclusion of broad opportunities to vote early may also increase the possibility of electoral fraud. Early voting also places an added burden on election-administration bodies and can substantially hinder observation efforts. The recommendations above can help to mitigate these concerns.

13.7. Proxy Voting

In some countries a voter may be allowed to designate a proxy to vote in his or her place, if he or she is not able to travel to the polling station on election day, whether due to physical incapacity or some other legitimate reason. In many countries, however, proxy voting is not allowed, due to constitutional requirements that the secrecy of the ballot must be maintained and that the right to vote must be exercised personally by the voter. Proxy voting is open to abuse and, in some communities, often for cultural reasons, family members may give their votes to the head of the household to cast as he or she deems appropriate.

It is difficult to justify the use of proxy voting, particularly where postal, early or mobile voting is available. Should a legal framework provide for proxy voting, then the reviewer of the legislation should point out the concerns this raises with regard to the principle of secrecy of the ballot and the potential it creates for abuse. The reviewer of a country's legal framework for elections may recommend alternative voting procedures to proxy voting.

13.8. Military Voting

It is common for the legal framework to contain special provisions to ensure that members of the military are able to exercise their right to vote while on active duty. Although protecting the right to vote of a member of the military is important, the provisions must be written carefully to minimize the potential for abuse, including the possibility that undue influence may be brought to bear on conscripts by their commanding officers.

It is not unusual for electoral legislation to permit the setting up of special polling stations within military units located in remote areas that are far from any population center. While such an arrangement may be unavoidable, it should be accompanied by an express stipulation that this is strictly exceptional and, wherever geographically possible, voters serving in the military should vote in ordinary civilian polling stations.

When local elections are involved, a member of the military should normally cast a ballot in the constituency of the member's permanent place of residence. This is necessary to ensure that local representatives are elected by those who have residence in the community and not by transient voters with no real local ties.

13.9. Balancing the Accommodation of Voters with Safeguards against Fraud

A careful balance should be found between voter accommodation and the need to safeguard against potential voting fraud. If not drafted carefully, a provision intended to accommodate the needs of a special group of voters by establishing exceptional voting procedures can be abused by people attempting to vote more than once or who do not meet the legal requirements for the exceptional voting procedure. Thus, such provisions should be drafted and evaluated carefully. Reviewers of electoral legislation should assess whether the legal framework provides sufficient safeguards to prevent potential abuse and fraud when alternative methods of voting are permitted.



OSCE/JENS ESCHENBAECHER

14.

Transparency in the Counting and Tabulation of Votes

14.1. General Principles

A fair and honest count of the votes is a cornerstone of democratic elections. This standard is set out in Paragraph 7.4 of the OSCE 1990 Copenhagen Document, which requires that votes "are counted and reported honestly with the official results made public". This requires that votes be counted and tabulated in the presence of observers and that the entire process by which a winner is determined be completely transparent. The legal framework should provide for the presence of observers — both citizen and foreign — and representatives of the media, political parties and candidates during the counting and tabulation of votes.

The legal framework must clearly state the electoral formula that will be used to convert votes into mandates. Thresholds, quotas and all other details of the electoral formula should be clearly stated and all possibilities, such as ties, withdrawals and the death of a candidate, must be addressed. The law must clearly define which ballots are valid and which invalid. Rules for determining the validity of ballots should not be so stringent as to unreasonably disenfranchise voters. The paramount principle should be that if the will of the voter is clear, the ballot should be counted. For example, if a voter circles his or her choice rather than placing a mark next to it, this should not invalidate the ballot.

14.2. The Counting of Ballots

Regardless of whether ballots are counted at the polling station or at a central counting location, the law should ensure that observers can be present and that the election-administration bodies should facilitate their work. The legal framework should also provide safeguards where technology is used and ballots are not counted manually. Provisions must be in place in the legal framework so that the accuracy and soundness of hardware and software used for counting ballots can be verified independently. Whether manual, mechanical or electronic counting is used, procedures for auditing and inspection must be in place to ensure accuracy and reliability. Procedures must also be in place to allow objections to counting procedures to be registered, including to the criteria used to determine the validity of ballots.

The legal framework should clearly specify that observers can make copies, or shall be given copies, of all protocols and tabulation and tally sheets. The law must also clearly specify which government authorities, if any, are entitled to receive this information prior to the certification of the election results. Protocols and tally sheets should be finalized, in ink, in the premises of the respective election-administration body. Obvious errors or mistakes should be dealt with in the presence of all members of the respective election-administration body.

14.3. The Tabulation of Results

The legal framework should provide, in clear and unambiguous language, the procedures and respective deadlines for transferring the ballots, the protocol results of counting and other election materials from lower election-administration bodies to intermediate and higher ones for tabulation and safekeeping. The law should require that the figures for each set of results be available in table or some similar format that allows observers to trace the results at each polling station and counting location up through all levels of aggregation to the final results. The tabulation records should contain detailed information, including the number of ballots used and unused, the number of invalid and spoiled ballots, and the number of votes for each political party or candidate. This information should also be broken down for alternative methods of voting, such as early, postal or mobile voting (if applicable). This degree of detail is necessary to enable observers to track results and locate specifically where possible fraud might

have occurred if the numbers have been unlawfully changed during the tabulation processes. However, which information is actually published should be considered, as this could affect the secrecy of the vote (particularly when alternative voting methods were used by a limited number of voters).

A strictly defined division between election-administration bodies and state authorities is also vital during the process of tabulating the results. Electoral legislation needs to ensure the principles that only members of election-administration bodies should be involved in the process of tabulating election results and that observers should be given access to the process.

14.4. Public Announcement and Publication of the Counting and Tabulation of Results

The legal framework should clearly state whether election authorities may announce partial or preliminary results prior to final certification. A timely announcement of partial and preliminary results by the election administration will contribute to the overall transparency of the electoral process. It will also complement similar announcements of preliminary results from exit polls or from the headquarters of parties and candidates. This could also deter these headquarters from making erroneous statements. If results can be announced prior to final certification, then the legal framework should clearly regulate the process for making such announcements.

The legal framework should require that all relevant election documents be publicly accessible, including election protocols, detailed tabulation and tally sheets, and decisions determining or possibly affecting election results. It is good practice to publicly post such documents at all levels of the election administration, including polling stations and intermediate and higher levels of the election administration. These detailed tabulations may also be published in official gazettes and other media as soon as the results are certified. It is good practice to provide electoral stakeholders with such detailed results, both preliminary and final, in electronic form, or to post them on the Internet. Failure of the legal framework to require public posting of results of vote counts and tabulations at each level where they occur can only facilitate or increase the possibility of fraud.

14.5. Certification of Results and Procedures after an Election

The legal framework should clearly specify the dates for the final certification of the election results, how the process of final certification is to be carried out, including public announcement and notification to candidates that they have been elected, and the terms of office of elected candidates. Additionally, the law must be clear as to what circumstances require a recount or new election in any or all polling stations. The law should clarify who can request a recount or new election, the deadline for such requests, all necessary procedures involved in making the request, the deadline for adjudicating requests, and the date of recounts or new elections, as well as which pro-

cedures will govern them. It is important that a recount be subject to the same level of transparency as the initial count of the ballots.

The legal framework must provide for secure storage of all ballots and election materials until the deadline for making legal challenges to the certified results has passed. The law must also specify how long after the expiration of all deadlines for legal challenges ballots and election materials are to be destroyed by election officials, and how they should be destroyed. It is, however, appropriate for the law to require the archiving of some election materials, such as results protocols, for research, educational and historical purposes.

14.6. The Personal Safety Exception

In extreme circumstances, the publication of election results at the polling station level might jeopardize the safety of voters or election commission members. This possibility exists where an election is held shortly after a violent conflict, and where tensions remain high enough so that there is a probability of violence. The law may provide limited exceptions to these principles, applicable only in such extreme and volatile circumstances, in order to avoid situations likely to result in personal injury.



OSCE/URDUR GUNNARSDOTTIR

15.

Use of New Voting Technologies

15.1. General Considerations

It is important in countries that use New Voting Technologies (NVT) that the legal framework properly addresses the regulation of their use. Procedures and requirements for the use of information technology during electronic voting, counting and tabulation must be accurately reflected in the electoral legislation. Often, important parts can be found in other legislation, such as that relating to data protection. Previous court challenges to NVT and the resulting jurisprudence should also be consulted.

First, regulation could either be done primarily in electoral law itself or, alternatively, the legal framework could establish only general rules, leaving the detail to binding regulations issued by the electoral authority. While the latter is advantageous in terms of flexibility, it can give too much scope for election procedures to be adapted to the

needs of the technology, instead of the other way around, and to circumvent important safeguards if time becomes scarce due to any delays in the implementation of the NVT system.

Second, it is important, that the electoral legislation clearly defines at least the principles for secrecy, equality, universality, transparency and accountability. The equality and secrecy of the vote are included in the constitutions of many states. If special provisions are required to ensure that NVT systems guarantee these principles, these should ideally be set out in the electoral legislation. The suffrage guarantees applicable to paper-based voting should also be stated in the law as applicable to NVT. Although the way of voting is different using NVT, the basic suffrage principles remain, and cannot be disregarded. The legal framework must state this clearly, explicitly and unequivocally.

The legal text must incorporate technological processes correctly and precisely in a way that is transparent, objective and capable of being applied in all possible situations. The law needs to regulate the distribution, set-up, starting, operating, stopping and closing of the system, as well as storing, counting and tabulating of the votes. This is difficult enough when regulating paper-ballot elections and can present unique challenges for the regulation of NVT. As is the case in paper-based voting, the law needs to establish clear criteria to determine the validity of an electronic ballot, especially in cases of NVT system malfunction.

The electoral legislation should also address how the NVT system can ensure that votes are counted honestly. This means that in the event of a legal challenge or an audit of the results, the NVT system should provide the possibility of a meaningful verification of ballots cast electronically. Therefore, a fundamental principle to be taken into consideration is that the NVTs must produce a voter-verifiable paper record that the voter can view before leaving the voting booth, thus allowing the voter to ensure that his or her choice has been recorded accurately. Another fundamental principle is that mandatory audits should be conducted after the voting in a meaningful number of randomly selected polling stations. There must also be the possibility for additional audits in other polling stations where required by a legal challenge or the need for a re-count.

The electoral legislation should regulate the extent to which observation of NVT is possible. There are different opinions on how access to NVT should be regulated in legislation – whether the principle of full access should be included, or whether it should apply only to specific aspects that are necessary for a "minimum level of transparency". Access can be provided through the possibility to test NVT in an adversarial manner (in which specialists attempt to identify security weaknesses or other flaws in an unscripted manner), or through the review of documentation from the start of the project, including feasibility studies, procurement material, manuals, evaluation and certification reports, source codes, or electronic logs of the system. Regardless of which view prevails, a country's electoral legislation should clearly address this issue and provide necessary details so that observers, candidates and political parties know precisely what rights they have to access NVT.

Another issue that must be addressed is how to establish the principle of accountability in the electoral legislation and regulations. If the NVT or parts thereof are supplied by private vendors, legislation should carefully regulate the responsibility of vendors in order to ensure that there are consequences for failure to fulfill contractual obligations related to NVT. Private vendors should not replace any relevant functions of the electoral administration, which should remain in full control of the electoral process. Similarly, certification agencies and other bodies must be held strictly accountable in order to ensure that they fulfill the duties and responsibilities placed on them by the law.

In terms of security of the NVT, it is important for the legal framework to include criminal provisions for attacks on NVT systems, with appropriate sanctions for violations. These criminal sanctions may already exist in criminal laws protecting computer systems or electronic networks. However, it may be more appropriate to provide specific provisions in the electoral legislation for attacks on NVT systems.

Special attention needs to be given to the legal provisions for complaints and appeals. The legal framework should allow for complaints and legal challenges to be related to the use of the system itself during the voting and counting process or to other elements of the process, such as certification, or to concerns that the NVT system has failed to function properly. Although NVT allow for rapid reporting of results, this should not preclude the possibility to appeal decisions or to challenge results, and the deadlines established by law should appropriately reflect this right.

In the event of legal challenges to the results, there should be guidance as to what the legal basis is for conducting a recount, and what body has the authority to order a recount. A recount may be required if there is a complaint claiming that there is evidence of an anomaly or failure in NVT that could have affected the results.

Finally, it is necessary that the legislation covering NVT be in line with established data protection regulations. Paragraph 24 of the 1991 OSCE Moscow document recognizes the right to privacy. This is especially relevant in technological applications where a voter's identity may be recorded in some way, such as in an Internet voting process.

Next to establishing minimum criteria for NVT use, specific areas that must be addressed in legislation include:

- The scope of access to NVT that will be provided to observers, candidates and political parties;
- The procedural steps for audits and recounts;
- The primacy of the voter-verifiable paper record in determining the results in the event of legal challenges;
- Defining the contractual obligations of vendors, certification agencies and suppliers;
- Accountability provisions for public officials and election administration;

- Criminal sanctions in case of NVT abuse;
- Complaints and appeals in regards to NVT use; and
- Data-protection regulations.

The above areas should be addressed in detail in text that is understandable to the general reader and not just technologically savvy individuals. This is particularly important in cases where the introduction of NVT is likely to introduce legal challenges before and during elections.

15.2. Data Protection Regulations for Automatic Processing of Data

The protection of an individual voter's personal data has become more critical with the proliferation of electronic technologies in elections. In addition to the general right to privacy and protection of one's personal data, there are specific standards that apply when personal data are "automatically processed". It is important that the reviewer of legislation assess legal provisions against standards for the automatic processing of data, as well as the general right to privacy.

Personal data are defined as any information relating to an identified or identifiable individual. Automatic processing includes the following operations if carried out in whole or in part by automated means: storage of data, analyzing those data, their alteration, erasure, retrieval or dissemination. The automatic processing of personal data is subject to the following principles:

- Domestic legislation of the state must contain data protection provisions for the regulation of the automatic processing of personal data;
- Personal data are only collected for specific, limited, explicitly stated and legitimate purposes with the consent of the person;
- Personal data that are processed must be adequate, relevant, correct and, if necessary, up to date; all reasonable measures must be taken to complete, correct, block or erase data that are incomplete or incorrect;
- Personal data are not processed for any purpose incompatible with that for which they are collected and no more personal data are processed than is necessary;
- Sensitive data revealing criminal convictions, political opinions, religious beliefs or other beliefs, as well as personal data concerning health or sexual orientation may not be processed automatically unless domestic law provides appropriate safeguards;
- Appropriate security measures are taken for the protection of personal data against accidental or unauthorized destruction or loss, as well as against unauthorized access, alteration or dissemination;

- Personal data are not kept for a period longer than is necessary;
- Voters are made aware of the existence of automated personal-data files, the categories of personal information contained in the files, and who controls the files;
- Every person has the right to access in an intelligible form, at reasonable intervals and without excessive delay or expense, confirmation of whether her or his personal data are stored in an automated file;
- Every person has the right to have personal data corrected or erased if they are inaccurate or have been processed contrary to the law;
- Every person has a right to a remedy if a request for correction or erasure is not honoured and the request was justified;
- Domestic law must provide appropriate sanctions and remedies for violations of these basic principles; and
- Any exception or restriction in the basic principles are, as with other exceptions and restrictions on human rights, limited to those that are necessary for the protection of fundamental values in a democratic society.

The above data protection principles should be respected and applied to any new information technology introduced in election processes. The above principles are also evolving, as international documents are being revised to attempt to keep pace with changes in technology. This is another area of legal regulation where the reviewer must also consider the most recent decisions of treaty bodies and the ECtHR in regard to privacy issues.



OSCE/BERNHARD KNOLL

16.

Protection of Electoral Rights

16.1. General Principles

The legal framework must provide effective procedures and remedies for the protection of electoral rights at all stages of the election, including voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[60] The right to vote and to be elected is a human right, requiring an effective remedy for its violation. Procedures adequate to protect suffrage and other electoral rights must be in

60 For additional information, see *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2000), <http://www.osce.org/odihr/elections/17567>.

place before, during and after elections. Thus, the legal framework for elections must set forth detailed and sufficient provisions protecting electoral rights.[61]

How the electoral legislation protects electoral rights is, in large part, determined by the overall framework regulating administrative bodies, courts and the adjudication of complaints by the judiciary. As a result, as in the case of choosing an electoral system, the legal framework chosen to protect electoral rights will not be the same in all countries.

16.2. Transparency in Administrative and Legal Proceedings

Proceedings on complaints and appeals, including within the election administration and in the courts, should be transparent and accessible by the public. The consideration and resolution of complaints and appeals, like any other electoral process, should be transparent, so that voters and candidates can be assured that the will of voters has been respected. Transparency also requires not only that decisions be taken in such a way that the public has access to proceedings and documents, but also that decisions include the substantive reasons and explanations supporting them. It must be clear that a decision has a factual and legal foundation and is not arbitrary.

16.3. Consistency and Uniformity in Processes and Decisions

The legal framework should provide a clear and understandable complaint and appeal process that defines the role of each level of election-administration bodies and each level of court. In order to ensure consistency and uniformity in processes and decisions, the legal framework should avoid establishing multiple venues for the consideration of the same issue. This is critical to developing reasoned decisions and building stable administrative and court practice for the protection of electoral rights and the resolution of electoral disputes. The legal framework must create clear and efficient processes and identify which bodies act as fact-finding bodies of first instance and which act as appellate review bodies.

16.4. The Right to File Complaints and Seek Protection

The legal framework should clearly state who is permitted to file complaints of electoral violations with election-administration bodies and courts. The legal framework should stipulate that every voter, candidate and political party has the right to lodge a complaint with the competent authority when an infringement of electoral rights has occurred. Care must be taken when drafting such provisions to ensure that the right to seek protection of electoral rights is not unduly restricted to a limited number of groups, such as political parties or candidates.

61 ODIHR has published a comprehensive review of good practice and standards for resolving electoral disputes, which is referenced in the Appendix and in note 60. This publication presents a thorough analysis of the relevant issues and should be used by reviewers of electoral legislation when considering the issue of protection of electoral rights. This chapter discusses the major points that should be addressed in the legal framework for protecting electoral rights.

16.5. Deadlines for Filing Complaints

Deadlines are necessary and there is obvious value in avoiding protracted challenges and litigation pending the determination of election results. Deadlines should not, however, be so restrictive as to undermine the prospect of achieving a just solution to a legitimate complaint. A short deadline can lead to injustice or circumvention of the will of voters where, for instance, the complainant is unable, through no fault of his or her own, to lodge a timely complaint. Consideration should be given, in the public interest and that of justice, to providing a legal exception that extends the deadline where the complainant could not learn of the violation in the requisite time through the exercise of reasonable diligence.

16.6. Expeditious Decision-Making on Complaints

The law must require that the appropriate election-administration body or court consider, determine and render a prompt decision on a complaint. A principle common to many legal systems is that "justice delayed is justice denied". A remedy that is granted too late is of little remedial benefit. An example would be a decision to reverse an election-administration body's refusal to register a candidate that is only handed down after the election.

Some complaints can be determined within a relatively short timeframe. Other complaints, however, may require longer to be adjudicated. Deadlines for the consideration of complaints should, therefore, allow for a degree of flexibility, taking into account the level of the election-administration body or court and the nature of the complaint. Once a decision is made on a complaint, it should be expeditiously communicated to the complainant and to all interested and affected parties, who should also be provided copies of the written decision.

16.7. Evidentiary Issues

Evidentiary issues are raised in most electoral disputes. A question over what evidence will be admitted for consideration can become critically important, as the winner of the evidentiary question is often the winner of the electoral dispute. It is important that the legal framework anticipate evidentiary issues and provide guidance before there is an electoral dispute. All parties should know in advance what types of evidence will be considered as probative of the issues to be decided in the adjudication of the dispute.

One issue that arises repeatedly is that of whether certain polling station records are to be considered "conclusive" proof of an issue or as a type of evidence that the court considers along with other types of evidence. This issue is repeated frequently in elections where the electoral legislation provides for a "record book" or similar document to be maintained in the polling station. One view is that stringent evidentiary requirements should be applied and the failure to record a legal violation in the polling station "record book" prevents a contestant from receiving an effective legal remedy. Under this view, credible evidence may be presented concerning violations or errors that occurred

during the vote count or tabulation of results in the polling station or election commission, but the evidence will be disregarded based on the absence of a written notation of such a violation or error in the "record book".[62]

Although efficient for disposing of cases, the above-mentioned approach is formalistic and may result in disregard for the protection of suffrage rights. A better approach is for the legal framework to provide for the consideration of any evidence that, based on the circumstances, is sufficiently trustworthy and provides that the interests of voters and justice will best be served by its consideration. The ECtHR has counseled against "formalism" in the adjudication of electoral disputes:

> "The applicant's subsequent appeals […] were not addressed adequately either. In particular, both courts relied on extremely formalistic reasons to avoid examining the substance of the applicant's complaints, finding that he had not submitted duly certified copies of the relevant observers' affidavits and that he had not attached to his cassation appeal documentary proof that he had indeed applied to the CEC. […] In the circumstances of the present case, however, the Court finds that such a rigid and overly formalistic approach was not justified under the Convention.
>
> In this respect, the Court recalls the Venice Commission's Code of Good Practices in Electoral Matters, which cautions against excessive formalism in examination of election-related appeals, in particular where the admissibility of appeals is concerned."[63]

Regardless of what evidentiary standards are provided for by the legal framework for resolving electoral disputes, the law must give ample warning to electoral participants of the consequences for failure to preserve particular forms of evidence or failure to raise objections or make entries in official forms, protocols and polling-station records. If the law clearly specifies the consequences for failure to preserve particular forms of evidence, then contestants have no excuse when their complaints are rejected for lack of the required evidence.

16.8. Remedies

The legal framework should provide effective remedies for protecting electoral rights. When election results are disputed, an effective remedy may require the authority to declare the results invalid, in the case of serious violations. Where irregularities may have affected the allocation of a mandate or determination of the winner, the only effective remedy may be invalidation of the results.

62 A similarly restrictive view has been taken by some concerning the nature of the protocol table form that is completed at the polling station, which lists the candidates and the number of votes they have received. Some have argued that election-administration bodies' protocols are not decisions or acts of an election-administration body, but simply mathematical calculations, and that a mathematical calculation is not the subject of a court challenge. This view also holds that the failure to record an objection in the protocol form results in a waiver of the right to complain about the protocol.

63 *Aliyev v. Azerbaijan*, no. 18705/06, §§ 85-93, 8 April 2010.

In some instances, invalidation of results will not be the appropriate remedy. Where the correct results can be determined through a recount of ballots or careful scrutiny and correction of protocol forms, it would be more appropriate to determine the will of the voters than to invalidate the results. The legal framework should ensure that the remedy applied is the one that provides the best solution for correcting the wrong. It should be kept in mind that a single form of remedy is not the solution for all electoral wrongs. Thus, the legal framework should provide a specific remedy to address the specific harm involved.

16.9. The Right to Appeal to a Court

The law must provide the right to appeal a final decision of the election administration to an appropriate court. The appropriate court should have the authority to review and exercise final jurisdiction in the matter. The processes in the court and decisions of the court should also be subject to the general principles stated above regarding the initial consideration of complaints, particularly concerning transparency and the proper remedy for the wrong.

16.10. Criminal Provisions to Deter Violation of Electoral Rights

The protection of electoral rights is critical for establishing a legal framework that is conducive for the conduct of democratic elections. Thus, not only must there be mechanisms for effective remedies to protect electoral rights, but there should also be sufficient criminal or administrative penalties to deter violations of the law and prevent injury to suffrage rights. However, care must be taken not to create a system where politically motivated and unsubstantiated charges are prosecuted against opponents. Further, all sanctions and penalties should be proportionate punishment for the conduct that resulted in the harm.

APPENDIX

1. Sources of Standards

A. The United Nations

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) to have access, on general terms of equality, to public service in his country.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

CONVENTION ON THE POLITICAL RIGHTS OF WOMEN

Article 1

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.

Article 2

Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.

Article 3

Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

Article 41

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 29 - Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

A. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

   I. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

   II. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

   III. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

B. Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination

and on an equal basis with others, and encourage their participation in public affairs, including:

I. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

II. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:

(a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;

(b) The right to seek freely opportunities for employment and to participate in economic activities;

(c) The right to associate freely and participate equally in community affairs;

(d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and

(e) The right to communicate in a language they understand.

B. The Organization for Security and Co-operation in Europe

CONCLUDING DOCUMENT OF THE VIENNA MEETING (THIRD FOLLOW UP MEETING TO THE HELSINKI CONFERENCE) VIENNA, 1989

(11) They confirm that they will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They also confirm the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and security necessary to ensure the development of friendly relations and cooperation among themselves, as among all States.

(12) They express their determination to guarantee the effective exercise of human rights and fundamental freedoms, all of which derive from the inherent dignity of the human person and are essential for his free and full development. They recognize that civil, political, economic, social, cultural and other rights and freedoms are all of paramount importance and must be fully realized by all appropriate means.

(13) In this context they will

(13.7) - ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; hey will, *inter alia,* effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

(15) The participating States confirm their determination to ensure equal rights of men and women. Accordingly, they will take all measures necessary, including legislative measures, to promote equally effective participation of men and women in political, economic, social and cultural life. They will consider the possibility of acceding to the Convention on the Elimination of All Forms of Discrimination Against Women, if they have not yet done so.

DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (29 JUNE 1990)

The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and cooperation that they seek to establish in Europe. They therefore reaffirm their commitment to implement fully all provisions of the Final Act

and of the other CSCE documents relating to the human dimension and undertake to build on the progress they have made.

In order to strengthen respect for, and enjoyment of, human rights and fundamental freedoms, to develop human contacts and to resolve issues of a related humanitarian character, the participating States agree on the following:

(1) The participating States express their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government, and reaffirm that the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace.

(2) They are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

(5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

- (5.1) - free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;
- (5.2) - a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate;
- (5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;
- (5.4) - a clear separation between the State and political parties; in particular, political parties will not be merged with the State;
- (5.5) - the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;
- (5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

- (5.8) - legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;
- (5.9) - all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;
- (5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;
- (5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;
- (5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;
- (5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- (5.20) - considering the important contribution of international instruments in the field of human rights to the rule of law at a national level, the participating States reaffirm that they will consider acceding to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments, if they have not yet done so;
- (5.21) - in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.

(6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.

(7) To ensure that the will of the people serves as the basis of the authority of government, the participating States will

- (7.1) - hold free elections at reasonable intervals, as established by law;
- (7.2) - permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
- (7.3) - guarantee universal and equal suffrage to adult citizens;
- (7.4) - ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;
- (7.5) - respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;
- (7.6) - respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;
- (7.7) - ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;
- (7.8) - provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a nondiscriminatory basis for all political groupings and individuals wishing to participate in the electoral process;
- (7.9) - ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

(8) The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

(9) The participating States reaffirm that

- (9.1) - everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright;
- (9.2) - everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards;
- (9.3) - the right of association will be guaranteed. The right to form and subject to the general right of a trade union to determine its own membership freely to join a trade union will be guaranteed. These rights will exclude any prior control. Freedom of association for workers, including the freedom to strike, will be guaranteed, subject to limitations prescribed by law and consistent with international standards;

(10) In reaffirming their commitment to ensure effectively the rights of the individual to know and act upon human rights and fundamental freedoms, and to contribute actively, individually or in association with others, to their promotion and protection, the participating States express their commitment to

- (10.3) - ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in nongovernmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups;

(24) The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured. Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

(31) Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in

full equality before the law. The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.

CHARTER OF PARIS FOR A NEW EUROPE - CSCE SUMMIT (21 NOVEMBER 1990)

Human Rights, Democracy and Rule of Law

Democratic government is based on the will of the people, expressed regularly through free and fair elections.

Everyone also has the right: (...) to participate in free and fair elections.

DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE, MOSCOW 1991

(18) The participating States recall their commitment to the rule of law in the Document of the Copenhagen Meeting and affirm their dedication to supporting and advancing those principles of justice which form the basis of the rule of law. In particular, they again reaffirm that democracy is an inherent element in the rule of law and that pluralism is important in regard to political organizations.

- (18.1) Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives.
- (18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.

(19) The participating States

- (19.1) - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
- (19.2) - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, *inter alia*, provide for
  - prohibiting improper influence on judges; (…)

(26) The participating States reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.

- (26.1) They consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards.

(40.2) - comply with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), if they are parties, and, if they have not already done so, consider ratifying or acceding to this Convention; States that have ratified or acceded to this Convention with reservations will consider withdrawing them;

(41) The participating States decide

- (41.1) - to ensure protection of the human rights of persons with disabilities;
- (41.2) - to take steps to ensure the equal opportunity of such persons to participate fully in the life of their society;

HELSINKI DOCUMENT: THE CHALLENGES OF CHANGE (SUMMIT OF HEADS OF STATE OR GOVERNMENT), HELSINKI 1992

Migrant Workers

The participating States

(36) Restate that human rights and fundamental freedoms are universal, that they are also enjoyed by migrant workers wherever they live and stress the importance of implementing all CSCE commitments on migrant workers and their families lawfully residing in the participating States;

BUDAPEST DOCUMENT: TOWARDS A GENUINE PARTNERSHIP IN A NEW ERA (SUMMIT OF HEADS OF STATE OR GOVERNMENT), BUDAPEST 1994

Freedom of expression/Free media

36. The participating States reaffirm that freedom of expression is a fundamental human right and a basic component of a democratic society. In this respect, independent and pluralistic media are essential to a free and open society and accountable systems of government. They take as their guiding principle that they will safeguard this right.

ISTANBUL DOCUMENT (SUMMIT OF HEADS OF STATE OR GOVERNMENT), ISTANBUL 1999

25. We reaffirm our obligation to conduct free and fair elections in accordance with OSCE commitments, in particular the Copenhagen Document 1990. We recognize the assistance the ODIHR can provide to participating States in developing and implementing electoral legislation. In line with these commitments, we will invite observers to our elections from other participating States, the ODIHR, the OSCE Parliamentary Assembly and appropriate institutions and organizations that wish to observe our election proceedings. We agree to follow up promptly the ODIHR's election assessment and recommendations.

26. We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.

27. Non-governmental organizations (NGOs) can perform a vital role in the promotion of human rights, democracy and the rule of law. They are an integral component of a strong civil society. We pledge ourselves to enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms.

PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the opinion of the people in the choice of the legislature.

CONVENTION ON THE PARTICIPATION OF FOREIGNERS IN PUBLIC LIFE AT LOCAL LEVEL

Article 6

Each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfills the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.

However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession, that it intends to confine the application of paragraph 1 to the right to vote only.

2. Supplementary Sources

OSCE/ ODIHR

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