

SECTION ONE

Introduction to Promoting Legal Frameworks for Democratic Elections

Establishing the “rules of the game” for elections should be a vital concern to political parties, candidates and citizens alike. Democratic elections serve to settle fairly and peacefully the competition among those seeking to exercise governmental powers as representatives of the people. Democratic elections also serve as the means for citizens to express freely their will as to who shall have the authority and legitimacy to wield the reins of government as their representatives. It is thus in the direct and immediate interests of electoral contestants – political parties and candidates – and of the population as a whole – citizens and their associations – to ensure that the rules for electoral competition, as well as the way those rules are enforced, guarantee that a genuine democratic election takes place.

ELECTIONS AND CONFLICT MANAGEMENT

In societies emerging from widespread violent conflict, peace negotiations almost always include scheduling elections. The antagonists may come to see elections as the means to settle who will occupy governmental offices, but to agree to put down arms, demobilize and turn to the ballot box instead of bullets they also must believe that the rules for the competition will provide a genuine chance to achieve their goals. The parties to the negotiations therefore should understand at least the essential elements of legal frameworks in order to arrive at agreements they value and at consequent political processes in which they have confidence. The framework for competition also must provide effective means for the contestants to seek redress for violations of the rules in order to ensure that they do not resort to violence to settle scores or return to open conflict. These are key factors for achieving a sustainable peace.

Facilitators and mediators of peace negotiations also must understand legal frameworks for elections in order to exercise responsibly their roles as honest brokers of agreements and processes that flow from them.

To mitigate conflict the antagonists must believe elections will provide a genuine chance for them to compete fairly for power.

Inclusion of citizen representatives in peace negotiations, where possible and in appropriate roles, provides additional perspectives on peace building and honors the precept that sovereignty belongs to and flows from the people. They too must grasp the substance of legal frameworks surrounding elections. Practice also demonstrates that citizens must understand the elements of legal frameworks in order to develop public confidence in an election and its related political process. Such confidence transfers to governments that result from democratic elections. This improves the potentials for peace and stability.

A discussion of the role of elections in managing conflicts over who will exercise governmental power and the potential for elections to exacerbate tendencies toward using violence in that rivalry are beyond the scope of this Guide. Nonetheless, practice demonstrates that employing inclusiveness, transparency and accountability promotes confidence and reduces potentials for violence in elections. It is particularly important to embrace these principles when developing legal frameworks for elections in conflict vulnerable societies.

POLITICAL PARTIES' INTERESTS IN LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS

Democratic political parties and candidates seek to win elections in order to manage governmental institutions in ways that advance public policies and allocate resources to achieve policy objectives. They contest elections by aggregating the votes of citizens who somehow believe that the policy objectives benefit their interests and/or those of society at large. To compete effectively, parties, candidates and those supporting or opposing referenda and other ballot initiatives must know the rules for competition – the legal framework for elections – including the avenues for seeking redress if the rules protecting their rights are violated.

Knowing the rules, however, is not enough. The electoral contestants must analyze the legal framework to determine whether the rules actually ensure a genuine chance to compete fairly. Political parties and other electoral contestants should be prepared to advance initiatives to defend and maintain elements of the legal framework that they deem essential for fairness, as well as to advocate for modifying the legal framework in order to remove impediments to fairness and to improve their chances of winning office.

This requires knowing how the legal framework for elections can be changed, both substantively and procedurally. A thorough understanding of the principles for democratic elections is required along with knowledge about various elements of the legal framework, how those elements can differ and the ways they can be put together to promote efficiency and integrity of election processes.

Knowing how legislative changes can be achieved through parliamentary procedures and how administrative rules can be modified is essential. Just as important is understanding what forces can be rallied to support either maintaining or changing elements of the legal framework.

This requires a keen sense of coalition building in legislative and regulatory processes and mobilization of civic organizations and citizens interested in participating in governmental and public affairs concerning electoral frameworks.

Establishing Expert Teams:

Party leaders and candidates must be knowledgeable about legal frameworks for elections, and practice demonstrates that it is necessary for them to establish expert teams that can provide analysis and advice concerning legal frameworks.

Party expertise has to encompass a number of elements: 1) constitutional provisions concerning the nature and type of electoral system (e.g., parliamentary or presidential or hybrids of the two systems and the corresponding offices to be elected; the type of proportional or plurality/majoritarian or mixed systems to employ; periodic timing of elections and terms of office; levels or tiers of elections, such as national, provincial and local); 2) constitutional and legislative provisions concerning civil and political rights relating to elections (e.g., concerning the rights to vote and to be elected, political expression, access to information, peaceful assembly and movement, equal protection of law); 3) legislative and administrative provisions concerning: party legal recognition and party/candidate ballot qualification; voter registration procedures; standards and means for delimitation of election districts; qualifications, powers and means for selecting members of election management bodies; access to media for electoral contestants; campaigning issues; party and candidate financing; party, candidate, citizen and election observer access to polling stations and voting, counting and tabulation procedures; and access to and functioning of electoral complaints and appeals procedures.

Monitoring Implementation of Legal Provisions:

Parties need to be able to analyze legislation and regulations and advocate for appropriate provisions on each of these subjects. They also have to be able to monitor implementation of provisions and take steps to ensure that they are enforced effectively and impartially.

Assembling expert teams solely at the leadership or party headquarters level therefore is insufficient. Parties must develop expertise at intermediate and local levels as well, if they are to ensure that the legal framework for democratic elections is properly implemented.

For example, drawing boundaries for election districts that respect equal suffrage, by including approximately the same number of citizens for each elected representative, and drawing boundaries that do not improperly discriminate against minority populations and do not discriminate on the basis of political opinion are not simply abstract considerations. Parties must be able to consolidate systematically knowledge of local conditions in light of legal provisions for delimitation of election districts. Similar types of knowledge are needed to ensure proper location of polling stations so that citizens gain an equal and genuine opportunity to vote. Party activists must know requirements for voter registration and procedures for checking the accuracy of voter registries, as well as for correcting them. Numerous other examples could

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be cited illustrating the importance of developing expert teams at intermediate and local party levels that are linked to headquarters teams.

Building capacities to implement legal frameworks for democratic elections requires internal education and the establishment of local expertise on framework issues by making use of linkages among party expert teams.

Safeguarding the integrity of election day voting, counting and vote tabulation procedures requires local party and candidate activists to possess clear knowledge of the legal framework in order to: prevent fraud and irregularities; fix problems on the spot and prevent development of major legal issues; and ensure that party and candidate poll-watchers capture appropriate and sufficient information concerning problems. Safeguarding electoral integrity also requires an effective communication structure so that a party or candidate can retrieve accurate and sufficient information needed to file timely complaints that meet burdens of proof in order to seek effective redress.

Party and candidate expert teams are needed to evaluate such information to determine how to inform the public about electoral problems as well as to employ complaint processes and seek redress. In addition, once a decision is taken to file electoral complaints before administrative bodies and/or courts, legal representatives must be fully versed in proper procedures for pursuing remedies, including timing, burdens of proof, types of remedies to be sought and techniques for effective argument of the case, as well as appeal procedures. While these factors are beyond the scope of this Guide, they cannot be underestimated. Pursuing effective remedies, including before available international tribunals when domestic channels are exhausted, is a critical part of promoting legal frameworks for democratic elections. This element of legal frameworks crosses over to training of lawyers and administrative bodies that review electoral complaints, as well as ensuring a well trained, independent judiciary.

Establishing political party or candidate expert teams concerning legal frameworks for democratic elections reinforces party structures, including linkages between the headquarters and party branches, requires rapid communication systems and integrated decision-making, encompasses internal education and training that reaches all the way to frontline activists and complements efforts to garner and protect votes. Building capacities concerning legal frameworks not only contributes to improving legislative and regulatory provisions and improving coalition building for legislative and regulatory advocacy, it reinforces basic elements of party building and helps ensure electoral victory.

CIVIL SOCIETY'S INTERESTS IN LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS

Elections are organized to determine accurately and honestly the people's will concerning who shall occupy governmental office for a periodic term. Referenda and other ballot initiatives are organized to determine accurately and honestly the people's will concerning the

issue presented for their vote. In both types of elections, how the people's will is determined has a crucial effect on whether their will is fully ascertained and honored. How the people's will is measured depends on the legal framework for elections and how that framework is implemented.

Citizens and civic society organizations therefore need to be knowledgeable about legal frameworks, engage in their development and monitor their implementation.

Democratic legislative and regulatory processes present opportunities for individual citizens to review existing legal frameworks and comment on proposed changes, as well as to suggest modifications. In order to ensure that citizens are guaranteed their right to vote and have a genuine opportunity to exercise that right, and for citizens to ensure that they are presented with a full range of electoral choices and the ability to make an informed choice among them, they must be aware of legal framework issues and the processes surrounding their formulation and execution. Learning about those processes requires a degree of direct investigation, though most citizens become aware of such matters through the media and civic organizations.

Journalists and other representatives of the media therefore have a responsibility to become knowledgeable about legal frameworks for democratic elections and to inform the population about related issues that deserve public attention and debate. This could range from fairness of requirements in candidate qualification to whether the use of electronic electoral technologies allows for appropriate verification of their accuracy and timely remedies of any related problems. A wide range of issues is presented by the various elements of an overall election process and framework provisions concerning them. Specialists, such as political scientists, law professors and information technology experts can contribute to the public debate about these issues, particularly if the media and civic organizations make use of their expertise and publicize their views.

Civil society organizations – including election monitoring organizations, human rights groups, lawyers associations, technology expert organizations, “think tanks,” civic education groups and others – play particularly important roles in analyzing legal frameworks for elections, offering recommendations for improving them and monitoring the processes surrounding them.

Participation in Legislative and Regulatory Processes:

Civil society organizations (CSOs) can play vital roles in developing, safeguarding and improving legal frameworks for democratic elections, if they establish relationships and take on advocacy roles with political parties, parliamentary groups and members, election management bodies and others responsible for administering electoral processes. Political parties and candidates create electoral integrity as they balance each other in their drive to win elections and project their views of the public interest for achieving genuinely democratic elections. CSOs can bring to the public policy arena comparative knowledge concerning legal frameworks and can advocate impartially for appropriate provisions and implementation that serves the public interest, as they can

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best envision it. CSOs thereby assume the responsibility of articulating fairly the public's interest and the responsibility for developing the expertise and resolve to faithfully protect that interest.

CSOs sometimes initiate public debate about whether a country should change or maintain basic components of the electoral system, such as presidential versus parliamentary systems and proportional representation versus plurality/majoritarian systems. Such debate is critical when a referendum on such issues could be placed before the citizenry or when such issues could be addressed by legislative action. CSOs also need to understand legislative and administrative processes to monitor the introduction of potential changes in legal frameworks and to advance their own initiatives for improving electoral frameworks.

Effective advocacy for maintaining or improving elements of legal frameworks for democratic elections requires skills at coalition building that can bring about legislative and/or regulatory action. Such coalition building requires relationships with those who can introduce or defend against legislative and regulatory changes. It also requires mobilizing other CSOs and citizens to support policy advocacy positions.

Monitoring Implementation of Legal Frameworks:

An adage often repeated in the electoral arena is that it is possible to conduct a credible election under a weak or even bad legal framework, if those with governmental power have the will to do so – and it is extremely difficult to conduct a credible election, even under a strong legal framework for democratic elections, if those with governmental power intend otherwise. Civil society therefore has a responsibility to organize itself to monitor implementation of legal frameworks to ensure that credible elections take place and to expose the facts when elections lack credibility. Knowledge of legal frameworks is essential to accurately making that distinction.

Leaders of CSOs concerned with protecting civil and political rights, ensuring electoral integrity and promoting citizen participation in elections and broader public affairs have to develop expertise concerning legal frameworks for democratic elections. Like political parties, such CSOs need to develop expert groups at their headquarters, intermediate and grassroots levels and develop effective communication mechanisms among them. Education, training, accurate monitoring of various elements of the election process, information gathering and reporting on findings and recommendations for improving legal frameworks and electoral practice depend on developing such expertise.

Where legal frameworks permit individual citizens to file complaints and/or petitions before administrative or judicial tribunals to seek redress for violations of electoral related rights, CSOs concerned with electoral integrity may take on a special responsibility of informing and even assisting citizens in complaint and appeals processes. Whether seeking to correct faulty entries on voter registries, provide access to polling stations for persons with physical challenges, ensure that citizens are allowed to cast ballots or challenge other faults in the electoral process, CSOs must develop expertise in the substance of legal frameworks and administrative and judicial procedures.

Where CSOs are provided standing to file complaints and legal challenges concerning election processes, their responsibilities for knowing legal frameworks are increased. Knowing procedures, gathering information that meets burdens of proof and making effective legal arguments become part of those responsibilities. In addition, CSOs should learn about requirements for filing petitions before international tribunals where their governments are parties to treaties or international agreements that provide such jurisdiction.

Interface with political parties, electoral authorities, the media and others, including interested members of the international community, is an important part of gathering accurate information and imparting credible findings and recommendations about the legal frameworks and their implementation. This is an integral component of promoting legal frameworks for democratic elections.

THE INTERNATIONAL COMMUNITY'S ROLE IN PROMOTING LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS

Citizens possess an internationally recognized fundamental right to genuine elections. Countries both create and accept international obligations to organize democratic elections by entering into treaties and other agreements. Intergovernmental organizations and certain international nongovernmental organizations and associations concern themselves with promoting democratic election, as well as broader human rights and democratic development. These organizations are often requested by governments, political parties and/or citizen groups to assess the character of their national election processes and offer recommendations and assistance in promoting genuine elections. This includes addressing legal frameworks for democratic elections.

While intergovernmental organizations typically require an invitation or request from member governments before they can engage in such matters, international nongovernmental organizations usually do not require a governmental request or invitation. Foreign governments frequently offer bilateral assistance in promoting legal frameworks for democratic elections and other matters concerning democratic development. International news media also make assessments concerning the nature of electoral processes in various countries.

Those involved in each of these types of international engagements should be knowledgeable about legal frameworks for democratic elections and about issues concerning implementation of legal frameworks. Whether making direct assessments of electoral laws, regulations and related framework issues, engaging in international election observation, which must address legal frameworks in an overall approach, assisting political party or civil society development or helping legislatures to strengthen their role in governance – addressing legal frameworks for democratic elections is an important task.

All activities by international actors concerned with promoting legal frameworks for democratic elections and related democratic development need to conform to ethical standards that respect sovereignty,

which belongs to and flows from the people of a country, by: 1) basing activities on international law – particularly the normative processes developing in international human rights law; 2) understanding that activities must serve the interests of the people of the country, rather than the interests of those who may be presently in power, who may be seeking it or other private interests; 3) employing best practices and lessons learned in offering knowledge, techniques and advice so that domestic actors can make the best decisions; and 4) ensuring transparency in the activities so that citizens may have trust and confidence that those receiving assistance are being empowered to act in the public's interest and those providing it are acting in accordance with international principles.

THE RELATIONSHIPS AMONG LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS AND OTHER LEGAL SUBJECTS

Out of necessity, this Guide focuses primarily on election laws and related framework issues. Nonetheless, a significant number of other laws and legal issues are interrelated with more narrowly defined election law and regulatory matters.

Among the laws and regulations that can affect electoral integrity are those concerning: registration of political parties and party financing; news and other mass communications media; nongovernmental organizations; establishment of citizenship; rights of refugees and internally displaced persons; population census requirements; political neutrality of civil servants, including government employees, law enforcement personnel, judges and prosecutors, and military personnel; political neutrality in the use of state resources; access to information; administrative law procedures; civil and criminal codes and procedures; and other matters. It is impossible to address all of these broader framework subjects in one Guide. It is important, however, to note that they all have potential impact on electoral integrity.

The key principles based in international human rights law that are essential to organizing democratic elections also provide important guidance when addressing these broader framework subjects. Inclusiveness, transparency and accountability are relevant to these subjects and contribute to legal frameworks and protections that comport with the rule of law and democratic governance.