



PROMOTING LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS



An NDI Guide for Developing Election Laws
and Law Commentaries

Patrick Merloe

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NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS (NDI)

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ABOUT NDI

The National Democratic Institute for International Affairs (NDI) is a nonprofit organization working to strengthen and expand democracy worldwide. Calling on a global network of volunteer experts, NDI provides practical assistance to civic and political leaders advancing democratic values, practices and institutions. NDI works with democrats in every region of the world to build political and civic organizations, safeguard elections, and promote citizen participation, openness and accountability in government.

Democracy depends on legislatures that represent citizens and oversee the executive, independent judiciaries that safeguard the rule of law, political parties that are open and accountable, and elections in which voters freely choose their representatives in government. Acting as a catalyst for democratic development, NDI bolsters the institutions and processes that allow democracy to flourish.

Build Political and Civic Organizations: NDI helps build the stable, broad-based and well-organized institutions that form the foundation of a strong civic culture. Democracy depends on these mediating institutions—the voice of an informed citizenry, which link citizens to their government and to one another by providing avenues for participation in public policy.

Safeguard Elections: NDI promotes open and democratic elections. Political parties and governments have asked NDI to study electoral codes and to recommend improvements. The Institute also provides technical assistance for political parties and civic groups to conduct voter education campaigns and to organize election monitoring programs. NDI plays a leading role in international election observation and was an initiator and co-drafter of the Declaration of Principles for International Election Observation. The Institute has organized international delegations to monitor elections in dozens of countries, helping to ensure that polling results reflect the will of the people.

Promote Openness and Accountability: NDI responds to requests from leaders of government, parliament, political parties and civic groups seeking advice on matters from legislative procedures to constituent service to the balance of civil-military relations in a democracy. NDI works to build legislatures and local governments that are professional, accountable, open and responsive to their citizens.

International cooperation is key to promoting democracy effectively and efficiently. It also conveys a deeper message to new and emerging democracies that while autocracies are inherently isolated and fearful of the outside world, democracies can count on international allies and an active support system. Headquartered in Washington D.C., with field offices in every region of the world, NDI complements the skills of its staff by enlisting volunteer experts from around the world, many of whom are veterans of democratic struggles in their own countries and share valuable perspectives on democratic development.

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This Guide was prepared by the National Democratic Institute (NDI) to assist political parties, civic organizations, legal activists and others concerned with developing legal frameworks for democratic elections. The Guide reflects nearly 25 years of NDI experience in more than 90 countries around the globe in their efforts to ensure electoral integrity, popular participation and democratic governance.

The Institute has been called upon to provide commentaries on the development of electoral frameworks, including examples as diverse as: the 1989 Roundtable negotiations that led to the transfer of power in Czechoslovakia; the 1991 negotiations concerning Senegal's electoral code; the CODESA negotiations that brought about multi-racial elections in South Africa; the framework for elections following the 1994 return to civilian government in Haiti; the 1995 proposed Palestinian Council election law; and the 1998 frameworks proposed for elections in Indonesia and Bosnia and Herzegovina. NDI also has offered recommendations on legal frameworks as part of over 150 international election observer delegations that examined election-day, pre-election and post-election developments. NDI election law commentaries and election observation statements are available at <http://www.ndi.org/globalp/elections/elections.asp>.

The Institute recognizes that questions concerning passage of laws and their implementation are matters that relate to national sovereignty. NDI, therefore, places emphasis on working in support of local civic and political activists, legal experts, legislators and electoral and other governmental officials as they develop legal frameworks for elections. The Institute has supported election law development efforts of local actors in its programs and has provided assistance to political parties and civic organizations concerning election law development in more than 40 countries.

NDI also cooperates with the efforts of other international organizations in promoting electoral integrity. The Institute, along with the United Nations Electoral Assistance Division (UNEAD) and The Carter Center (TCC), was a convener of the process that led to the *Declaration of Principles for International Election Observation*, now endorsed by 32 international organizations, which continue to interact concerning issues relating to assessing the character of elections. NDI also collaborates on the development of international principles for democratic elections with the UNEAD, the Organization of American States (OAS), the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the European Commission (EC), the Council of Europe's Venice Commission, Southern Africa Development Community Parliamentary Forum (SADC-PF), International IDEA, and other intergovernmental organizations, non-governmental groups and regional associations of domestic election monitors and parliamentarians.

The Institute admires the efforts of political and civic activists, electoral officials, legislators and legal experts who are seeking to advance legal frameworks for democratic elections. This is a complicated task that requires an open and inclusive political process, for its outcome directly affects the compact between the citizens of a country, in whom sovereignty resides, and those who seek the authority to exercise the powers of government.

While there are many permutations and combinations of the various elements that make up electoral frameworks, building broad dialogue and political consensus among citizens and electoral contestants concerning the rules for competing for power are critical to developing confidence in election processes and governments that result from elections.

NDI recognizes those who have promoted democratic electoral frameworks in their countries and have sought outside advice on this subject. The Institute expresses its deep gratitude to the many experts – politicians, legislative drafters, legal scholars and political rights activists from many countries – who have contributed their time to improve NDI's contributions to analysis, commentaries and recommendations concerning legal frameworks for democratic elections. They are too numerous to name, though their contributions have been and remain invaluable.

This Guide was written by Patrick Merloe, NDI Senior Associate and Director of Electoral Programs. Sections of the Guide were reviewed by: Hrair Balian, USA (The Carter Center, formerly with OSCE/ODIHR); Sandra Coliver, USA (Open Society Justice Initiative); Andrew Ellis, UK (International IDEA); Matthew Frumin, USA (NDI Senior Advisor, formerly with the law firm of Steptoe & Johnson); Rafael Lopez-Pintor, Spain (IFES, formerly with the Universidad Autónoma de Madrid); Gerald Mitchell, UK (OSCE/ODIHR); David A. Marcello, USA (International Legislative Drafting Institute); Armando Martinez-Valdes, Panama (UN Electoral Assistance Division); Lawrence M. Nobel, USA (law firm of Skadden Arps, formerly General Council to the US Federal Election Commission); Simon Osborn, UK (Electoral Reform International Services); Jessie V. Pilgrim, USA (comparative election law expert); Donald J. Simon, USA (the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, formerly General Counsel to Common Cause); and Felix Ulloa, El Salvador (NDI Resident Director in Morocco). NDI is grateful to each of these experts for providing their comments; the Institute, however, is responsible for any errors or shortcomings that may be presented in the Guide. Joseph A. Scrofano, former NDI legal intern, provided invaluable research assistance in the development of Sections Two and Appendix Four of the Guide. Tara R. Gingerich, formerly with the law firm of Steptoe & Johnson, and Ann Colville Murphy, former NDI Elections Legal Advisor, provided important contributions to Section Four and research assistance for Appendix Four of the Guide. Working on the production of the Guide were: Richard Klein, NDI Senior Advisor, Linda Patterson, former NDI Program Officer; Julia Brothers, NDI Program Officer; Laura Grace, NDI Senior Program Assistant; and Elizabeth Owerbach and Sarah Saperstein, NDI interns. Layout of the Guide was produced by Marc Rechdane, Resident Graphic Designer, in NDI's Beirut office.

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NDI hopes that this Guide will make a contribution to those seeking to develop frameworks for democratic elections. The Institute recognizes that sound electoral frameworks are a necessary but insufficient precondition for democratic elections. Ultimately, political will is essential to ensuring that laws are implemented properly and in ways that promote citizen confidence in elections and their outcomes. Readers of the Guide are encouraged to contact NDI with any comments, suggestions or requests.

Kenneth Wollack
President, NDI

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HOW TO USE THIS GUIDE

This Guide is designed to assist political parties, candidate support groups, civil society organizations and legal activists in assessing electoral related laws and developing commentaries, recommendations and advocacy for advancing legal frameworks for democratic elections. It also can be used by journalists and others seeking to understand issues concerning electoral laws and their implementation.

While the Guide is designed for use by domestic constituencies interested in promoting electoral integrity, it can also be used by the international community in assessing electoral laws and promoting democratic elections, including, for example, international election observation missions, rule of law and legislative strengthening initiatives and the donor community.

The Guide provides a variety of tools arranged by sections. Not all of the sections need to be used at the same time, nor do they necessarily serve the same purposes.

Section One notes rationales for why parties, candidates, civic groups and others should analyze and then defend or seek to change certain provisions of legal frameworks for elections. It also notes why it is important to go beyond analysis and advocacy concerning legal frameworks and engage in monitoring implementation of the frameworks.

Section Two provides a systematic description of the underlying international human rights law principles for democratic elections and the normative process that is affecting state practice and citizen expectations in this area. Reviewing carefully the principles of inclusiveness, transparency and accountability as the sources for developing public confidence, the section provides the necessary grounding for analysis and advocacy concerning legal frameworks for democratic elections, as well as monitoring their implementation.

Section Three reviews basic issues in developing legal frameworks for democratic elections. It provides an overview and general guidance for law and regulation drafters and commenters on legal frameworks. This Section provides brief discussions of key points in addressing elements of the legal framework. Those analyzing or drafting legal frameworks should also review carefully the materials presented in Section Four of the Guide.

Section Four presents a checklist that addresses 16 common elements of legal frameworks for elections, goals that each element should accomplish in promoting democratic elections, a number of criteria to evaluate in analyzing whether the framework meets those goals and a number of questions to consider in determining whether the framework promotes democratic practices. It is a tool for understanding whether a legal framework provides a sound foundation for democratic elections and for identifying areas that should be improved.

The Guide also includes a list of places where NDI has provided commentaries on electoral laws and a list of places where parties and civil society organizations have developed such commentaries in part with NDI assistance. They appear as Appendices One and Two, respectively. They may help in identifying countries with similar traditions or framework issues for further inquiry by the reader.

Appendix Three sets out relevant provisions from international human rights instruments, which provide the underpinnings for legal frameworks for democratic elections. These provisions are important for developing national legislation, advocacy and judicial and regulatory deliberations.

Appendix Four presents relevant rulings by international human rights tribunals and other international bodies that decide actions brought to them concerning election related rights. The case citations are followed by brief annotations. This allows legal advocates to identify specific decisions and juridical trends that could have an impact on particular cases that they might lodge before domestic administrative and judicial forums and international tribunals.

In addition, the Guide includes a list of published resource materials that could be useful to those pursuing the promotion of legal frameworks for democratic elections, electoral integrity and democratic governance beyond elections. This list appears in Appendix Five of the Guide.

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

Parties need to be able to analyze legislation and regulations and advocate for appropriate provisions.

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

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

Knowing procedures, gathering required information and making effective legal arguments are part of CSO responsibilities.

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.

SECTION TWO

Human Rights – The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections*

Elections belong to the people. Principles for democratic elections are usually traced to the precept that citizens have the right to take part in government and in the conduct of public affairs of their countries. This precept is enshrined in Article 21 of the Universal Declaration of Human Rights (Universal Declaration) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), as well as in other international human rights instruments.¹

These threshold concepts embody the understanding that sovereignty belongs to and flows from the people of a country, stated in the Universal Declaration as: “The will of the people shall be the basis of the authority of government....”² Article 25 of the ICCPR requires that every citizen therefore must be provided “the right and the opportunity,” without discrimination based on distinctions such as race, gender, religion, language, property or political or other opinion and without unreasonable restrictions “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....”³

Elections therefore are organized explicitly to ascertain and honor the people’s will as to who should occupy elected office and govern in the people’s interest. This illustrates the collective character of the right to genuine elections, while international human rights instruments principally address individual rights in the electoral context.⁴ The collective element of the right to genuine elections goes to the essence of sovereignty

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belonging to the people, who have the right to self-determination, including the right to freely determine their political status and freely pursue their economic, social and cultural development through participation in government and public affairs, directly or through their freely chosen representatives.⁵

International principles for democratic elections have been increasingly recognized in recent years. State acceptance of principles concerning democratic elections is evidenced by assent to treaties, declarations and other international instruments,⁶ by decisions in international legal fora⁷ and by what is now a general practice of inviting election observers from intergovernmental and nongovernmental organizations that base their activities on respect for and promotion of international human rights.⁸ Recognition is also evidenced by publications of highly respected institutions⁹ and publicists¹⁰ in the field.¹¹ In effect, state practice demonstrates consensual participation in a process of normative development, where electoral processes are assessed based on principles that reflect internationally recognized human rights and fundamental freedoms.¹²

While universal and equal suffrage, exercised through the rights to vote and to be elected, may be subjected to reasonable restrictions, for elections to be "genuine" the franchise must be extended broadly. Reasonable restrictions on the exercise of electoral related rights must be imposed only in good faith and be necessary in order for governments to meet their obligations to respect and ensure electoral related rights.¹³ Other legal principles contained in internationally recognized rights reinforce this point, including the right to equality before the law, equal protection of the law and the provision of effective remedies required to redress violations of rights.¹⁴

Similarly, for elections to be genuinely democratic, other internationally recognized human rights must also be broadly exercised in the electoral context, without discrimination or unreasonable restrictions, including:

- The right to associate into political organizations (such as political parties, candidate support organizations or groups favoring or opposing referenda propositions);¹⁵
- The right to peacefully assemble for meetings, rallies and to otherwise demonstrate support for electoral competitors;¹⁶
- The right to move freely to build electoral support;¹⁷
- The right to be free of the threat of violence or other coercion, while making political choices or exercising political expression;¹⁸
- The right to hold political opinions without interference;¹⁹ and
- The right to freedom of political expression, including the freedom to seek, receive and impart information and ideas in order to develop informed choices required for "the free expression of the will of the electors."²⁰

Each of these rights is also applicable for citizens who choose to associate and act in community to promote electoral integrity, through organizations that conduct nonpartisan domestic election monitoring, popular education about electoral related rights, activities to encourage participation in election processes and similar actions relating to the rights to vote and to be elected.²¹ The actions of such groups depend upon and simultaneously reinforce the principles discussed in

this Section - inclusiveness, transparency and accountability, which provide the bases for public confidence in elections.

DEMOCRATIC ELECTIONS REQUIRE INCLUSIVENESS

The interrelationships between and among the right to genuine elections and other internationally recognized civil and political rights illustrates that democratic elections must be inclusive both for citizens who want to exercise their right to vote and for those who seek to be elected. An anti-discrimination norm obliges states to provide inclusiveness in electoral processes. The norm against discrimination takes the force of a principle for democratic elections as the requirements for universal and equal suffrage combine with the general prohibition against discrimination, the rights to equality before the law and equal protection of the law and the right to remedies that effectively redress rights violations. Provisions concerning all of these concepts are found in international human rights instruments.²²

The principle of inclusiveness is a central consideration in the choice of a country's electoral system.²³ While there are numerous types of electoral systems and possible combinations of systems, to be democratic, the principle of the authority of government deriving from the will of the citizens - expressed through universal and equal suffrage - is a prerequisite that must be respected.²⁴ The principle of inclusiveness also applies to the development of the combination of laws that make up the legal framework for election processes.²⁵ The decision making process concerning the structure, composition and powers of election administration also must be a subject of inclusiveness, because that governmental body has to demonstrate that it is free of discrimination towards the electors and the electoral competitors and that it is capable of "guaranteeing" that the free expression of the will of the electors will be accurately recorded and honored.²⁶

Ensuring the Right and Opportunity to Vote:

In addition to avoiding unnecessary restrictions, the inclusiveness principle requires countries to identify factors that impede citizens from exercising the right to vote and to take positive measures to overcome those factors. Positive obligations are based on governments' responsibility to provide an opportunity, as well as a right, to vote without discrimination or unreasonable restrictions.

Positive obligations are illustrated clearly when considering electoral related rights provided in the ICCPR. The requirement to provide a genuine opportunity to exercise electoral related rights combines with the ICCPR's general character of creating immediate obligations for states that are parties to the treaty.²⁷ Governments therefore should take steps to educate people about their electoral related rights and remove barriers to participation for those traditionally underrepresented in election processes and participation in government and public affairs, such as women, minorities (including those who communicate in minority languages), citizens who do not read or write and those with physical challenges and disabilities.²⁸

The inclusiveness principle is the guiding force for the process of devel-

An anti-discrimination norm obliges states to provide inclusiveness in the electoral process.

oping a registry of voters.²⁹ The primary purposes of developing a voter registry are: on the one hand, to maximize the opportunity for eligible citizens to vote, by pre-screening them and reducing election day bureaucracy, thus promoting universal suffrage; and, on the other hand, to limit the possibilities for ineligible people to vote and to limit possibilities for illegal multiple voting, thus protecting equal suffrage by preventing dilution of the weight of legally cast ballots.³⁰

Restrictions on the right and opportunity to vote must be limited generally to requirements concerning citizenship, residency and minimum age (usually the age of majority) or to smaller categories of citizens relating to mental incapacity, criminal record or present service in the military or police.³¹ The trend concerning the latter categories is to broaden the franchise, for example, by requiring a court proceeding to determine that a person does not have the capacity to make an informed electoral choice, by allowing military and police personnel to vote and by limiting restrictions on the voting rights of those convicted of crimes in accordance with the principle of proportionality of punishment to the nature of the crime.³²

A voter registration process, for example, must present a genuine opportunity for citizens to appear on the registry on a nondiscriminatory basis, including a reasonable chance to inspect and correct the voter registry before elections take place. Likewise, the location of polling stations and supplies provided them must offer citizens a genuine and equivalent opportunity to cast their votes. Governments also must inform citizens sufficiently about these and other matters relating to the right to vote (and to be elected) so that opportunities presented by law can be realized in practice.³³

Ensuring the Right and Opportunity to Be Elected:

The principle of inclusiveness also applies to those who seek to exercise their right to be elected. Legal recognition of political parties must not be unreasonably restrictive, nor may access to the ballot be unreasonably restricted for political parties and candidates competing for election.³⁴

Candidature requirements, for example, concerning minimum age or educational levels, residence, descent or criminal record must be based on reasonable and justifiable criteria, as should provisions relating to the doctrine of incompatibility of offices.³⁵ Requirements for collection of signatures for legal recognition or ballot qualification, deposits or fees and the timing of filing deadlines for qualifying for inclusion on the ballot must not be overly burdensome or discriminatory.³⁶ Likewise, the application of acceptable requirements for legal recognition, access to the ballot and other rules may not be enforced by election authorities in a manner that is arbitrary or discriminatory or that creates barriers to inclusiveness of those seeking to be elected.³⁷

A failure to apply the principle of inclusiveness to those seeking to be elected not only abridges the rights of would-be candidates. The right to vote includes the right to choose among those who seek to represent the electors.³⁸ Elections in which voters go to the polls, even in large numbers, when candidates and political parties have been unjustly denied the opportunity to appear on the ballot or where they are denied a full opportunity to appeal for votes may be electoral exercises, but they are not genuine, democratic elections.³⁹

Fair electoral competition is also based on the principle of inclusiveness. Electoral competitors must not be subject to legal or administrative obstacles to appealing for the support of the electors.⁴⁰ This applies to the exercise of the rights of association, assembly, movement and expression, which are necessary for conducting a campaign to garner electoral support.⁴¹

Electoral competitors also must be able to enjoy freedom from violence, intimidation, coercion and retribution for their electoral efforts, just as citizens must be free from these factors when making their electoral choices.⁴² Fair electoral competition requires equality before the law, equal protection of the law and provision of effective remedies for violation of the rights of electoral competitors. This applies to governmental agencies and officials well beyond election authorities, including the police, prosecutors, courts, administrative law bodies, government employees and even government controlled mass media and authorities empowered to address fairness and conduct of private media, as well as to those charged with overseeing requirements concerning campaign finance.⁴³

Universal and equal suffrage, therefore, have multiple applications when the conditions for suffrage are considered in the context of the right to vote and to seek election. The prohibition against unreasonable restrictions – which is consistent with the principle of good-faith adherence to obligations to respect and ensure the exercise of internationally recognized human rights – combines with the anti-discrimination norm to demand inclusiveness toward electors and electoral competitors alike.

DEMOCRATIC ELECTIONS REQUIRE TRANSPARENCY

Transparency is a byword in any discussion of democratic elections,⁴⁴ yet the bases for claims that election processes must be transparent are not often explored.⁴⁵ It may be argued that transparency is implied in other election related rights. Indeed, it is impossible to imagine how citizens could take part in government and public affairs, as provided, for example, in Article 21 of the Universal Declaration and Article 25 of the ICCPR, unless the processes surrounding government and public affairs are open to public knowledge and scrutiny. More specifically, it is not possible to know whether the right to be elected and the right to vote are being ensured by governments unless electoral processes are “transparent.”⁴⁶

The principle of transparency in democratic elections is not predicated solely on such deductions, though they lead logically to the proposition that the transparency principle is identifiable in the penumbra of electoral related rights found in treaty obligations and other state commitments concerning genuine elections. The principle of transparency, nonetheless, is more directly based on internationally recognized human rights and fundamental freedoms.

The basis for the requirement for transparency in electoral processes is the freedom to seek, receive and impart information, which is integral to the right to freedom of expression.⁴⁷ The freedom to seek, receive and impart information takes on a powerful role in society, when it is

The basis for transparency is the freedom to seek, receive and impart information which is integral to freedom of expression.

The right to information is central to whether electors and electoral contestants are able to vote and to be elected.

exercised in the context of elections. In fact, the rights to vote and to be elected cannot be exercised without also exercising the freedom to seek, receive and impart information – if an election is to be genuine. While a person or a political party could theoretically seek to be elected and not seek to impart any information to the electors, and while a citizen could theoretically go to the polls without ever seeking or receiving information about the electoral competitors, such propositions are ludicrous.

The will of the people provides the basis for the authority of government, and in turn the government must guarantee the free expression of the will of the voters through genuine elections.⁴⁸ The right to seek, receive and impart information concerns the right of the electors to gain and share knowledge and opinions necessary to form their will regarding the electoral competitors, whether they are candidates, political parties or those supporting or opposing propositions put forth in referenda. It also concerns the freedom of the news media to cover issues they deem to be significant to the public debate surrounding elections.

The right to seek, receive and impart information is central to whether the electors and electoral contestants are able to pursue the “opportunity” as well as the rights to vote and to be elected.⁴⁹ In this respect, electors and electoral contestants must be provided with information about electoral procedures so that they may exercise their rights. The right to seek, receive and impart also encompasses information concerning the integrity of electoral processes. Such information concerns whether all elements of the overall process needed to realize universal and equal suffrage, including guaranteeing a secret ballot and an honest count, are being established effectively and honored.

Information Concerning Electoral Contestants:

Governments should ensure that no legal or administrative obstacles impede efforts of electoral contestants to provide information to citizens as part of their campaigns to gain support (or for the contestants to seek or receive information about citizen attitudes regarding election related issues).⁵⁰ Governments likewise should ensure that no legal or administrative obstacles impede efforts of citizens to seek, receive and impart information that might assist their decision making about electoral choices.⁵¹

These obligations include access to the mass communications media (such as newspapers, radio, television and the Internet), use of the mail service, telephone services and distribution by hand of flyers and other printed materials.⁵² Government controlled media have an obligation not to discriminate politically concerning electoral candidates and have an affirmative obligation to provide fair access for them to address the public with their appeals for electoral support; governments also have an obligation to take steps to ensure nondiscrimination concerning treatment of electoral contestants by private media.⁵³

Information Concerning the Exercise of Electoral Rights:

Providing the electorate and those seeking to be elected with sufficient, timely information about how, when, where and other requirements for candidate qualification, voter registration, voting and other electoral matters (whether referred to as “voter education” or by a broader

term) is essential to ensuring the opportunity to freely exercise electoral rights.⁵⁴ Positive obligations discussed above under “Ensuring the Right and Opportunity to Vote” apply in this respect.

Leaving prospective voters and electoral contestants in an information vacuum – without accurate information needed to exercise their rights – may, by omission, constitute an unreasonable restriction on the exercise of electoral related rights. Governmental obligations to provide information concerning the exercise of electoral related rights fall generally to election authorities, although, this activity should also be taken up by state controlled media, and electoral competitors and nonpartisan citizen organizations may also seek to provide this type of information to the public.⁵⁵ In the case of electoral contestants and citizen organizations, governments are obliged to ensure that there are no unnecessary restrictions on their disseminating such information.

Information about Electoral Processes:

Rhetoric about transparency in election administration is common, and the commitment of many electoral officials to the principle of transparency is strong.⁵⁶ Application of the right to seek, receive and impart information about administrative elements of the election process, however, is not a simple matter.

A number of interests interface when transparency in election processes is considered, including efficiency in organizing elections, privacy interests of citizens (particularly concerning voter registration information) and proprietary interests of companies that supply and service electoral materials. Balancing of interests when approaching such issues should start with the recognition that the will of the people is the basis of the authority of government and that elections are organized precisely to ascertain and honor that will.⁵⁷ The interests of citizens, both as electors and as electoral competitors, in knowing that the processes surrounding elections are accurate and honest therefore should receive the paramount position when balancing of interests is required.

Other interests can and must be accommodated, but administrative convenience (even the need for administrative effectiveness), privacy or proprietary rights cannot be allowed to eclipse citizens' rights to information about election processes.⁵⁸ Since sovereignty belongs to the citizens of a country, and the authority of government derives from the will of citizens expressed in genuine elections, information concerning how a government meets its obligation to organize an election process that honors the electorate's will belongs to the citizens as well. Governments therefore have an affirmative obligation to provide electors and electoral contestants with information about the workings of electoral processes.

This obligation is established in international jurisprudence. It is clearly established, for example, that member states of the Organization of American States (OAS) have an affirmative obligation to provide government held information to their citizens under the freedom to seek, receive and impart information and ideas, which is protected by the American Convention on Human Rights (American Convention).⁵⁹ The Inter-American Court of Human Rights stated in *Marcel Claude Reyes, et al. v.*

*Chile*⁶⁰ that a state's actions "should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately."⁶¹ The case held directly that denial of a request by a nongovernmental organization for information concerning an environmental matter of public interest violated the right to seek, receive and impart information provided in Article 13 of the American Convention, and the reasoning in Marcel Claude Reyes should carry over to the electoral context with equal force.

The European Court of Human Rights has not yet ruled that state parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) have an affirmative obligation to provide citizens with access to government held information under the Convention's Article 10 right to seek, receive and impart information and ideas.⁶² However, the court recognized, in its admissibility decision in *Sdruzeni Jijoceske Matky v. Czech Republic*,⁶³ an independent Article 10 right to receive documents held by governmental authorities, which was violated by refusing a nongovernmental organization's request for information concerning the design and construction of a nuclear power station, when the group was a party in an administrative proceeding concerning the station's environmental impact and sought the information to help prove its claim.

The European Court of Human Rights is presently considering the right to seek and receive information in the electoral context, in the pending case of *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia*.⁶⁴ In that case, an Armenian nongovernmental organization is seeking redress for the failure of election authorities to provide requested information concerning the authority's decision making processes and information concerning campaign contributions and expenses of certain political parties. The case presents an opportunity for the court to recognize the importance of electoral transparency in explicit terms.

The principle of transparency is central when considering the ever widening role of electronic technologies in election processes. Whether electronic technologies are employed in delimitation of election districts, development of voter registries, recording and tabulating votes or other sensitive matters, the technology employed, in addition to benefits from its use, poses the risk of negating transparency. The rights of electoral contestants, citizen organizations that monitor and promote electoral integrity and the news media to see into, scrutinize and understand the accuracy and efficacy of such technologies is critical to genuine elections.

The impact of technologies, such as electronic voting and creation of voter registry databases, illustrates the importance of access to election processes by electoral contestants and citizens (through election monitoring groups and the news media, as well as through direct citizen involvement). Their involvement must begin at the early stages of formulating public policies about whether to employ such technologies, the requirements for technology design, procurement criteria, testing and certification processes and the means of providing effective remedies should problems develop in the use of electronic electoral technologies.⁶⁵

Election Monitoring and Observation:

State practice almost universally demonstrates acceptance that electoral contestants have a right to be present in polling stations on election day to witness and verify the integrity of voting, counting and results tabulation procedures. Best practices are increasingly expanding this example of the transparency principle to accepting the presence of party and candidate agents in all elements of election processes, such as during voter registration, printing of ballots, and packaging and distribution of sensitive election materials.⁶⁶

State practice also demonstrates a growing acceptance of the right of citizens to participate in public affairs and to seek and receive information about election processes through the activities of nonpartisan domestic election monitoring organizations, including accrediting them to be present in polling stations and to witness other election processes.⁶⁷ Both domestic and international news media commonly play roles as election monitors. International election observation also is largely accepted through state practice as further demonstration of the transparency principle in elections.⁶⁸ International organizations have defined a body of methodologies for international election observation that are premised on the principle of transparency.⁶⁹

The transparency principle, like the principle of inclusiveness, has a multidimensional role in ensuring that elections are genuinely democratic. This is another example of the inseparability of the right to genuine elections from the exercise of other internationally recognized civil and political rights.

DEMOCRATIC ELECTIONS REQUIRE ACCOUNTABILITY

Elections are a principal mechanism through which citizens hold accountable those who occupy elected office. The requirement that elections be periodic is at the heart of creating governmental accountability to the citizenry.⁷⁰ All international human rights instruments that address electoral matters require that elections be periodic.⁷¹

While elections create an accountability mechanism, there must also be accountability within election processes, if elections are to be genuine. The accountability principle helps to realize electoral inclusiveness required by the rights to universal and equal suffrage for prospective voters and electoral contestants. The accountability principle is also linked to the principle of transparency, which is needed to understand how officials are conducting public affairs and thereby hold them answerable for their actions or inactions.

The principle of accountability in election processes includes several facets. Among them are: the need to provide effective remedies to citizens for violations of electoral related rights; the need to create administrative accountability for those organizing elections and those conducting governmental activities related to elections; and the need to bring to account those who conduct criminal acts that affect electoral related rights.⁷²

While elections create an accountability mechanism, there must also be accountability within the election process.

Effective Redress for Violation of Electoral Rights:

The legal framework for elections must establish effective means of redress for those whose claim that their electoral related rights have been abridged.⁷³ This includes mechanisms that provide appropriate remedies in an administrative context and through judicial processes. Such procedures must provide for a fair hearing by a competent tribunal and access to an appeals process.⁷⁴

Electoral complaint mechanisms and legal challenges concerning electoral outcomes receive considerable public attention, particularly when the remedy applied is a recount or reelection.⁷⁵ Nonetheless, effective redress procedures are required for all elements of electoral processes, from delimiting electoral districts, to legal recognition as a political party, to party or candidate qualification for the ballot, to ballot design, to inclusion on voter registries and other matters.⁷⁶

To be effective, any remedy must address the harm created by the violation of electoral rights and cure the harm in a timely manner. Moreover, to be effective, remedies granted by administrative processes and judicial procedures must be enforced by competent authorities or else they are simply hollow gestures.⁷⁷

While even technical issues take on a sensitive nature in the electoral context, redress concerning them can be pursued properly through administrative procedures, while judicial review (either in the first instance or by appeal) must be available for redress concerning violations of fundamental rights and freedoms. The distinction can best be illustrated by example. If a political party or candidate is assigned an improper place on a ballot (depending on the applicable system of allocating ballot positions, such as alphabetical order or lottery assignment), an administrative process should be able to provide an effective remedy. If the party or candidate is denied a place on the ballot by the governmental authorities, then a judicial review would be required to ensure protection of the right to be elected. If a person's name is misspelled or other information is inaccurate on the voter registry or the person's voter identification card, an administrative procedure should be sufficient to remedy the problem. However, if the person's name is omitted from the voter registry or the error would likely result in disenfranchisement on election day, then a judicial process should be available to protect the right to vote.

A critical element in providing effective remedies in the electoral context is timeliness. In many instances accountability requires that time be of the essence. For example, if a party or candidate does not receive legal recognition or is denied a place on the ballot, every day that passes could cause irreparable harm to the opportunity to be elected. If news media carry a defamatory story or advertisement concerning an electoral contestant, a correction or right of reply may only be effective if it is provided immediately, even if it is given the same prominence as the offending coverage. These examples demonstrate that a variety of mechanisms, some with expedited procedures, are needed if an electoral process is to protect electoral related rights and be accountable for abuses and deficiencies.⁷⁸

It is often difficult to separate the accountability principle from the principle of transparency in the electoral context. The needs for timeliness and for transparency are clearly illustrated, for example, in the case of providing effective remedies where electronic voting technologies are employed.

Where votes are recorded solely on an electronic device, with no paper record, and circumstances seem to justify a recount, it may be impossible to determine whether the technology performed properly without extensive computer forensic examinations. Such examinations may take extended periods and may not satisfy standards for reliability of evidence in judicial or administrative proceedings. In such an instance, a reelection could be the only remedy, though holding another election is not likely to replicate the conditions of the first, and the outcome could differ from the will of those who voted in the original election. In this case, the lack of transparency into the voting process negates the possibility for timeliness and effective remedies.

If a paper record is available, a question may arise as to whether the paper or the electronic recording is the actual (or more acceptable) expression of the voters' will.⁷⁹ Should computer forensic examinations be required of the electronic record, they may not provide a timely or sufficiently reliable basis upon which to determine who should be declared the winner. In that case the paper record would be the best evidence, even if the electronic record technically was the first imprint of the voters' choices. This illustrates the interrelationship among transparency, timeliness and accountability.

Administrative Accountability Measures for Government Bodies and Officials:

There must also be administrative accountability measures through which election management bodies (EMBs) and other governmental agencies concerned with electoral processes account for their performance. These measures should address ensuring integrity in electoral processes, which includes administrative actions to provide universal and equal suffrage and to accurately record and honor the electors' will. The measures should include addressing financial responsibilities and discipline of officials who abridge citizens' electoral rights or whose failure to appropriately discharge their duties harms the electoral process.

Such accountability measures take a variety of forms.⁸⁰ Holding regular consultations with electoral contestants and others concerned with electoral integrity provides a means to present information and answer concerns and complaints. Conducting various forms of audits by independent sources and internal reviews by special committees and auditors general also develops accountability, particularly where there are public reports of such activities. Allowing electoral contestants, nonpartisan election monitors and the news media to attend sessions of the national election management body (usually called the Central Election Commission or a similar title) and subsidiary bodies when policies are being formulated provides a means for creating accountability. Personnel disciplinary procedures require measures to protect privacy interests, while reporting on the existence of such procedures, the number of times they are invoked and the numbers of persons penalized or dismissed contribute appreciably to accountability.

Legislative oversight through committee hearings about the efficacy and integrity of administering electoral processes by EMBs and other government entities that affect matters concerning electoral related rights (such as police, prosecutors, media oversight bodies, the military and others that often support electoral authorities) can be critical accountability mechanisms. Such hearings can address whether election administration is performing in an effective and impartial manner, whether state resources and protections are being applied impartially and whether electoral procedures provide effective redress. The work of budget and public accounts committees of the legislature, as well as public accounting and government integrity offices set up by legislatures, also can be vital accountability mechanisms.

Criminal Liability for Violating Electoral Rights:

Accountability in elections requires the application of criminal law and procedures, including providing due legal process and full rights protections, to those who commit electoral fraud or other criminal acts that abridge electoral rights.⁸¹ Criminal liability plays an important role in bringing perpetrators of electoral crimes to account for their actions and in deterring potential wrong doers, whether they might be manipulators of electoral systems through rigging voter lists, stuffing ballots boxes, hacking electronic technologies or conducting politically motivated coercion, from vote-buying to violence. This is particularly important in countries where there has been a culture of impunity for violations of civil and political rights.

The accountability principle applies to the role of the police in investigating criminal acts that violate electoral related rights.⁸² Whether the police pursue impartially and effectively their duty to enforce the law is a matter of particular concern. The antidiscrimination norm requires that political opinion not be a factor in whether someone is subjected to investigation or arrest, as well as to whether persons are overlooked because they support those holding political power or attacked those holding unpopular political positions. Internal review commissions, civilian review panels, government sponsored human rights institutions (such as ombudsmen offices and human rights commissions) and legislative oversight can help ensure impartial and effective police action in the electoral context.

The accountability principle also applies to prosecutorial action and inaction.⁸³ Bringing to trial those who commit election related crimes is the duty of prosecutors. Criminal laws, including provisions of the electoral law that address criminal matters, should clearly define crimes and the standards to be used by prosecutors in bringing criminal proceedings, particularly delineating the conditions for prosecutorial discretion. This is important for establishing political impartiality and efficacy in prosecution of election related crimes. Prosecutors should be required to report on the number of election related cases being pursued, their progress and how many are brought to trial. This can have an important impact on accountability.

Court proceedings for criminal cases concerning electoral related rights must be open to public. In addition to ensuring protections for those accused of crimes, open proceedings assure the public that courts are holding accountable those who commit such crimes. Open

proceedings also provide a means for assessing the manner in which electoral related cases are handled, which can enhance judicial accountability. The attention needed in order to provide proper and expedited judicial procedures in electoral related cases can also contribute to developing capacities that are more broadly helpful to judicial functioning.

PUBLIC CONFIDENCE IS ESSENTIAL TO DEMOCRATIC ELECTIONS

Public confidence in an election process is – in essence – the degree of trust that citizens deem is warranted in governmental authorities' capacity to ensure that electoral rights are respected and the will of the electors is accurately determined and honored.

In this light, the inclusiveness principle, the transparency principle and the accountability principle come together to illuminate the indispensable role of public confidence in democratic elections. Each of these principles feeds public confidence in elections, and, to the degree that these principles are deficient, public confidence in elections – and in the government that results from elections – diminishes.

Assent of the Electoral Competitors:

Public confidence, like universal and equal suffrage, relates to those who seek to be elected as well as to the electors. Should those who seek to occupy governmental office and to wield the powers of government concerning people, national wealth and resources lose confidence in elections as the best means to attain their goal, they could turn to non-democratic ways of gaining power.

An essential role of elections in any society is to settle peacefully the competition for political power.⁸⁴ Election processes therefore must be inclusive, be transparent and provide effective redress, thus guaranteeing a real opportunity to exercise the right to be elected. These elements are necessary to win and maintain the confidence of the electoral competitors as a basis for their assent to compete within the legal framework and respect the electoral rights of others. This helps to reinforce elections as a means of mitigating potentials for violence and managing political conflict.⁸⁵

While it is essential to gain the confidence of those seeking to be elected, it would be mistaken to assume that it is sufficient to gain the buy-in of electoral competitors and to proceed to the polls as if elections were principally to serve their interests. Those who seek to be elected lack authority unless it is based on the free expression of the electors' will, and the strength of that authority depends significantly upon whether citizens have confidence in the electoral process. In order to gain the benefits of public confidence, electoral competitors should take measures to convince the public that, while competing vigorously, the competitors will take effective steps to ensure electoral integrity.

Demonstrating capacities to monitor election processes and to seek redress through complaint mechanisms is an element of showing the public that the competitors are acting to reinforce electoral integrity and thus to build public confidence in elections. Parties and candidate

The principles of inclusiveness, transparency and accountability come together as the base for public confidence in elections.

support organizations also can do much to build public confidence in the electoral process by agreeing publicly to abide by the laws and a code of conduct.⁸⁶

Codes of electoral conduct that are negotiated among the electoral competitors, sometimes done with the participation or facilitation by EMBs and/or civil society organizations, that include a public ceremony announcing the agreement and that contain a procedure to convene signatories to air grievances about breaches of the code's provisions can play important confidence building roles in election processes.⁸⁷ Electoral competitors should include instruction about the provisions of the code of conduct in training programs for their activists and institute internal accountability procedures that address the code of conduct and relevant laws. Publication of such actions can enhance public confidence building.

Citizen Confidence in Election Processes:

Elections are the vehicle through which citizens express their will, but citizens may decline to participate in election processes unless they are confident that they can exercise their right to vote free from coercion and retribution for their political choices. Secrecy of the ballot therefore is fundamental to public confidence, because it ensures protection against retribution and thus encourages free expression of the electors' will.⁸⁸

Electoral authorities, governmental leaders, electoral contestants, the news media and citizen groups all play important roles in establishing or diminishing public confidence in elections, because their actions and their messages contribute, among other things, to trust or distrust in ballot secrecy. Voting and counting procedures must meticulously safeguard secrecy of the vote, including addressing concerns that may result from introduction of electronic technologies that could link electronic voter registries and electronic recording of votes (either literally or by comparison of time stamps in registries and on voting machines).⁸⁹ Voter education by electoral authorities and various other sources is central to reinforcing that the ballot will be secret. Voter education on this point should be sophisticated enough to address popular concerns about the type of voting and counting processes that are being used and should make clear that anyone who attempts to violate secret balloting will be held criminally liable.

The public also must have confidence that the election process will be impartially and effectively implemented in order for citizens to develop the trust required to participate in – and legitimize – an election. Steps therefore must be taken not only to correctly administer election processes but to ensure that they are free from the perception of partisanship.⁹⁰

A critical element in establishing and maintaining public confidence concerns perceptions of the ability of electoral authorities to perform their duties impartially and effectively. The composition of EMBs and the leadership of EMBs are at the core of this matter. While there are several methods of composing EMBs that have proven to be successful in organizing democratic elections, the trust of the electoral competitors and confidence of the public depends largely upon whether there is a sufficient participation and buy-in (respecting the principles of inclu-

siveness and transparency) in choosing EMB members and EMB leadership.⁹¹ If the electoral contestants are satisfied at the outset that the EMB is composed in a manner that ensures impartiality and effectiveness, there is a significant advantage in establishing public confidence in the election process. Evaluation of EMB performance as the process unfolds will then be a matter of maintaining or losing confidence, rather than working to establish it.⁹²

Authorities must realize that elections are more than technical matters and that electoral processes are part of a compact between citizens and the government that represents them. Elections demonstrate how a government treats and respects citizens through a wide range of institutions and processes, as demonstrated above in this Section. Actions by governmental authorities concerned with electoral matters at national and local levels that reach out to and include constituencies with interests in electoral integrity – such as organizing public meetings, consultations, liaison committees, press conferences and similar actions – build public confidence. The degree of transparency in election administration will also have a large impact on how impartiality is perceived.

One of the most important ways that electoral authorities can establish and maintain public confidence is through welcoming and accrediting representatives of the electoral competitors, nonpartisan election monitoring organizations, news media and even international election observers. Inclusiveness, transparency and accountability can all be reinforced by the activities of these electoral actors, and their reports on the election process, if credible, contribute to building the appropriate degree of public trust in elections.⁹³ At the same time, this factor presents a major responsibility for these actors to conduct their activities impartially and professionally.

Citizen organizations, the news media, EMBs and others also play broad roles in voter education and mobilization of citizen participation in election processes. Beyond informing citizens about where, when and how to exercise their right to vote through voter registration and going to the polls on election day, activities that address why it is important to vote and civic education about the nature of representative, democratic governance contribute to public confidence levels. Such activities need not require that citizens simply listen passively. Community forums, debates, broadcast media, call-in shows and interactive on-line programs, whether organized by citizen groups, media outlets, EMBs or others, provide information needed for electors to make informed voting decisions. These activities also help to create an environment in which electors and those seeking to be elected will likely gain increased confidence in the integrity of the election process.

Perceptions of fairness in electoral competition also have significant effects on public confidence. Maintaining state impartiality is an important element in perceptions of electoral fairness. This concerns actions of state institutions far beyond EMBs. Fairness in media coverage of electoral contestants not only affects how electors might exercise their choices at the ballot box, but public perceptions of unfairness undermine confidence in the electoral process. The roles of campaign and political party finance also are important, not just in determining the

resources that electoral competitors may be able to expend, but also in perceptions concerning fairness of the electoral system.

The subject of public confidence is multifaceted. Some elements are relatively nebulous, but specific obligations of governmental authorities and of the electoral competitors can be identified and placed into the principles of inclusiveness, transparency and accountability that are central to electoral integrity. Actions can be planned and carried out to address public expectations for performance and thereby establish and maintain public confidence that an election process is genuine.

CONCLUSION

The right to genuine democratic elections includes an important collective element and involves a wide range of internationally recognized human rights and fundamental freedoms. State practice demonstrates a developing normative process concerning electoral related rights. The anti-discrimination norm that emerges from the combination of the general prohibition against discrimination found in international human rights instruments and the instruments' provisions recognizing universal and equal suffrage, equality before the law, equal protection of the law and the right to effective remedies underpins electoral related rights. These rights interrelate through the principles of inclusiveness, transparency and accountability in the electoral context. The degree that these principles are upheld through the legal framework and in practice, by a broad array of governmental institutions and electoral actors, provides the basis for public confidence in elections and in the governments that result from them.

These points are captured in Article 21 of the Universal Declaration, which states that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections...." The provisions of the ICCPR make clear that governments have affirmative obligations in "guaranteeing the free expression of the will of the electors." Normative development concerning elections, hopefully, will continue and further ensure that typical practice respects and promotes electoral related rights. The consequences of that further development should provide authority and legitimacy for those who will seek office through elections and should enhance possibilities for democratic governance that honors the people's right to pursue their economic, social and cultural development through participation in government and public affairs, directly and through freely chosen representatives.

ENDNOTES

¹ See, e.g., Universal Declaration of Human Rights art. 21, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Convention on Elimination of Racial Discrimination]; Convention on the Elimination of All Forms of Discrimination Against Women art. 7, G.A. Res. 34/180, (Dec. 18, 1979), U.N. GOAR Supp. (No. 46) at 193, U.N. Doc. a/RES/34/180, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Convention on Elimination of Discrimination Against Women]; African Charter on Human and Peoples' Rights art. 13(1), June 26, 1981, Organization of African Unity (OAU) Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 59 [hereinafter ACHPR]; American Convention on Human Rights art. 23, November 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter ACHR]; First Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, March 20, 1952, 213 U.N.T.S. 262 [hereinafter ECHR]; Conference on Security and Co-operation in Europe (OSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension art. 6, June 29, 1990, 29 I.L.M. 1305 (1990) [hereinafter Copenhagen Document]; Arab Charter on Human Rights (1994) art. 19; Southern African Development Community (SADC) Guidelines Governing Democratic Elections (2004); Inter-American Democratic Charter, adopted by the OAS General Assembly on Sept. 11, 2001, Lima Peru.

The Universal Declaration, as a UN General Assembly resolution does not create legal obligations *per se*, though it is applicable to all UN member states and has become a normative instrument that *de facto* obliges states to respect the rights it recognizes. It may be seen as an authoritative explanation of human rights obligations provided by UN Charter arts. 55 and 56 and in some respects as customary law, though electoral provisions in art. 21 of the Universal Declaration thus far have not been considered as customary law. The ICCPR creates legal obligations between and among the 160 countries that are states parties to the treaty. Another 5 countries have signed the ICCPR but have not completed ratification. The only non-signatory countries to the ICCPR that are frequently discussed in the electoral context are Burma (Myanmar), Cuba, Fiji, Oman, Pakistan (which has recently signed but not yet ratified), Qatar, Saudi Arabia, Singapore and United Arab Emirates. A list of states parties and signatories to the ICCPR is available at http://www.unhchr.ch/html/menu3/b/treaty5_esp.htm; a list of non-states parties is available at "International Covenant on Civil and Political Rights," Wikipedia (11/27/07) http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights.

² Art. 21(2), Universal Declaration, *supra* note 1; see para. 6, Copenhagen Document, *supra* note 1 ("The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis for the authority and legitimacy of government. ...").

³ Art. 25, ICCPR, *supra* note 1. The conduct of public affairs, referred to in art. 25(a) of the ICCPR, as interpreted by the UN Human Rights Committee in its role of providing guidance to states parties to the ICCPR, is a broad concept relating to the exercise of political power through legislative, executive and administrative processes, including the formulation and implementation of policy. Paras. 5 & 8, General Comment No. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)*: . 12/07/96; CCPR/C/21/Rev.1/Add.7 (General Comments) [herein after General Comment 25], available at <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?OpenDocument>.

⁴ There is an interrelationship between the collective character of the right to genuine elections and individual electoral related rights. Art. 1(1) of the ICCPR states: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 1 constitutes Part I of the ICCPR and concerns a right that belongs to "peoples." Part II of the ICCPR, beginning with article 2, concerns individual rights. The right to self-determination recognized in art. 1(1) is often exercised through an independence plebiscite or referendum, which is a type of election, and the individual rights of article 25 and other electoral related rights come into play. In addition, art. 25's right to participate, directly or indirectly through freely chosen representatives, in the public affairs of a country is informed by the content of article 1. That participation is, among other things, to allow citizens to pursue economic, social and cultural development. This helps to define the content of democratic governance that results from the exercise of electoral related rights. Appreciating the relationship should not lead to confusing collective and individual rights. For discussion of the emergence of the rights to democratic governance and role of participatory rights see Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) [hereinafter *Emerging Right to Democratic Governance*]; Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L. 537 (1992) [hereinafter *Right to Political Participation in International Law*].

⁵ See *supra* note 4. Art. 1(1), ICCPR, *supra* note 4, pertains directly to independence initiatives of non-self-governing and trust territories, such as the independence referenda held in Montenegro in 2006 and Timor-Leste in 1999. See *Right to Democratic Governance*, *supra* note 4, at 58-59.

⁶ See, e.g., the international human rights instruments, *supra* note 1.

⁷ See, e.g., United Nations Human Rights Committee views in *Altesor v. Uruguay*, Communication No. R.2/10 (10 March 1977), U.N. Doc. Supp. No. 40 (A/37/40) at 122 (1982) (meeting of 29 Mar. 1982) (*inter alia*, art. 25 electoral related rights violated because of 15 year ban from voting or being elected under domestic law), available at <http://www.law.wits.ac.za/humanrts/undocs/session37/2-10.htm>; European Court of Human Rights decision in *Labita v. Italy*, E.H.R.L.R. 2000, 6, 666-669 (26772/94) E.C.H.R. (Art. 3 of Protocol 1 electoral related rights violated because of removal from voter registry under accusation of collusion with the Mafia and person was acquitted of charges) available at <http://www.echr.coe.int/Eng/Press/2000/Apr/Labita%20jud%20epress%20.htm>; Inter-American Court of Human Rights decision in the *Case of Yatama v. Nicaragua*, Judgement of June 23, 2005 (*inter alia*, art. 23 electoral related rights violated by undue restriction in electoral law, regulated in a discriminatory manner, prevented candidates from an indigenous political party from appearance on the ballot; court noted close relationship to voters rights by depriving them of options in the election) [hereinafter *Yatama v. Nicaragua*], available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.doc.

⁸ See *Declaration of Principles for International Election Observation*, Commemorated October 27, 2005, at the United Nations, and endorsed by 32 intergovernmental and nongovernmental organizations, available at www.access-democracy.org/library/1923_declaration_102705.pdf [hereinafter *Declaration of Principles*].

⁹ See, e.g., COMPENDIUM OF INTERNATIONAL STANDARDS FOR ELECTIONS (NEEDS, European Commission 2007) [hereinafter *Compendium*] (providing an authoritative description of the elements of electoral standards, matrices of countries' international obligations concerning elections and a comprehensive collection of international

instruments) available at <http://www.needs-network.org/publications.html>); Southern African Development Community Parliamentary Forum, *Norms and Standards for Elections in the SADC Region* (2001), available at http://aceproject.org/ero-en/regions/africa/regional-resources-africa/sadcpf_electionnormsstandards.pdf/view; The European Commission on Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report* (2002), available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf); Existing Commitments for Democratic Elections in OSCE Participating States, OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2003) [hereinafter Existing OSCE Commitments], available at http://www.osce.org/documents/odhr/2003/10/772_en.pdf; Office of the United Nations High Commissioner for Human Rights, *Human Rights and Elections*, UN Professional Training Series No. 2, available at <http://www.ohchr.org/english/about/publications/docs/hrelections.pdf>; Organization of American States, *A Manual for OAS Electoral Observation Missions* (October 2007), available from OAS Department for Cooperation and Electoral Missions; Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections* (1994), available at <http://www.ipu.org/english/structure/cnldocs/154-free.htm>.

¹⁰ See, e.g., GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS: INTERNATIONAL LAW AND PRACTICE* 160-67 (Inter-Parliamentary Union 2006); Emerging Right to Democratic Governance, *supra* note 3; Right to Political Participation in International Law, *supra* note 3; Gregory Fox, *Election Monitoring: The International Legal Setting*, 19 *Wis. Int'l L.J.* 295 (2001); Elizabeth F. DeFeis, *Elections – A Global Right?*, 19 *Wis. Int'l L.J.* 321 (2001); Jørgen Elklit & Andrew Reynolds, *A Framework for Systematic Study of Election Quality*, 12:2 *DEMOCRATIZATION* 147 (2005). The author of this Guide addressed many of these concepts in Patrick Merloe, *Democratic Elections: Human Rights, Public Confidence and Fair Competition* (a compilation of two papers presented in *African Election Administrators Colloquium*, published by United Nations, African American Institute, IFES and NDI 1994), available at http://www.accessdemocracy.org/library/005_ww_demelections.pdf.

¹¹ The sources described *supra* notes 6-10, are somewhat analogous to the sources of international law set forth in Article 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." In each of the areas discussed *supra* there is evidence of the development of a normative process concerning electoral related rights.

¹² While principles for democratic elections have not reached the level of international custom, the factors described above evidence an ongoing normative process. For a discussion of state participation in processes of normative development, see Ellen Hey, *State Consent to a Process of Normative Development and Ensuing Problems*, in *TEACHING INTERNATIONAL LAW* (Martinus Nijhoff Publishers; Leiden 2003).

¹³ The Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) 63 *A.L.I.J.* 875 (1969) (entered into force, Jan. 27, 1980), provides at article 26 that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 of that treaty states that: "A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 25 of the ICCPR, *supra* note 1, requires that the rights set forth may

not be subjected to "unreasonable restrictions," and the UN Human Rights Committee has interpreted this to mean that any restrictions must be based on objective and reasonable criteria that protect the franchise. See General Comment 25, *supra* note 3, at paras. 4, 10-11, & 13-16. The Copenhagen Document, *supra* note 1, at paragraph 24 creates a commitment of the OSCE participating States to ensure that any restrictions on rights "are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights [recognized in the Document] are ensured." Paragraph 24 commits OSCE participating States to not impose 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 other commitments, in particular the Universal Declaration of Human Rights..." While the Copenhagen Document is not a treaty, para. 24 creates a good faith commitment for the 56 OSCE participating states.

¹⁴ E.g., arts. 7 & 8, Universal Declaration, *supra* note 1; arts. 2 & 26 ICCPR, *supra* note 1.

¹⁵ See, e.g., art. 20, Universal Declaration and art. 22, ICCPR, *supra* note 1; paras. 8, 12 & 26, General Comment 25, *supra* note 3; paras. 7.5 & 7.6, Copenhagen Document, *supra* note 1.

¹⁶ E.g., art. 20, Universal Declaration and art. 21, ICCPR, *supra* note 1; paras. 8 & 12, General Comment 25, *supra* note 3; para. 7.7, Copenhagen Document, *supra* note 1.

¹⁷ E.g., art. 13, Universal Declaration and art. 12, ICCPR, *supra* note 1; para. 12, General Comment 25, *supra* note 3; para. 7.7 Copenhagen Document, *supra* note 1.

¹⁸ E.g., arts. 3, 7 & 21(1) Universal Declaration and arts. 9, 17 & 25, ICCPR, *supra* note 1; paras. 11 & 19, General Comment 25, *supra* note 3; para. 7.7, Copenhagen Document, *supra* note 1.

¹⁹ E.g., art. 19, Universal Declaration and art. 19 ICCPR, *supra* note 1; paras. 8, 12, 19 & 25 General Comment 25, *supra* note 3; para. 9.1 Copenhagen Document, *supra* note 1.

²⁰ E.g., arts. 19 & 21, Universal Declaration and arts. 19 & 25, ICCPR, *supra* note 1; paras. 8, 12 & 25 General Comment 25, *supra* note 3; para. 9.1 Copenhagen Document, *supra* note 1.

²¹ The rights to association, peaceful assembly, movement, holding opinions, expression and freedom from violence and coercion play important roles in the exercise of the rights to participate in government and public affairs within and beyond the electoral context. Those who act to promote and protect human rights, including electoral related rights, through peaceful and non-violent means, are often referred to as human rights defenders. These people uncover rights violations, subject them to public scrutiny and press for those responsible to be accountable. The United Nations has taken a number of actions to protect the rights of such persons, which highlights the importance for governments to ensure the rights of those who act to protect and promote electoral related rights. See, e.g., 56/163. *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, General Assembly Res. A/RES/56/163 (20 Feb. 2002) available at <http://www.unhcr.ch/huridocda/huridoca.nsf/FramePage/SRHRdefenders%20En?OpenDocument&Start=1&Count=15&Expand=1>.

²² The anti-discrimination norm is evidenced by provisions of numerous international human rights documents. E.g., the human rights instruments *supra* note 1: arts. 2 (general non-discrimination provision), 7 (equality before the law and equal protection of the law) & 8 (effective remedies) of the Universal Declaration; arts. 2 (general non-discrimination provision and effective remedies), 3 (equal right of men and women to enjoyment of human rights), 26 (equality before the law, equal protection of the law, requirement of states to prohibit discrimination and provide equal protection against discrimination) ICCPR; Convention on Elimination of Racial Discrimination; Convention on Elimination of Discrimination Against Women; arts. 2 (general non-discrimination provision), art. 3 (equality before the law and equal protection of the law) ACHPR; arts. 1 (general non-discrimination provision), 24 (equal protection of the law), 25 (judicial recourse and remedies) ACHR; arts. 13 (effective remedy), 14 (general non-discrimination provision) ECHR. There also is a general United Nations Charter obligation to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Articles 55 & 56, Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945). The UN Human Rights Committee, in its capacity of interpreting provisions of the ICCPR as guidance to states parties, issues General Comments on the ICCPR. In General Comment 18, para. 1, the Committee states: "Non-discrimination, together with equality before the law and equal protection of the law without and discrimination, constitute a basic and general principle relating to the protection of human rights." *General Comment 18, Non-discrimination*: 10/11/89 [hereinafter General Comment 18], available at <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

²³ The choice of an electoral system should be a central focus for respecting the right to participate in government and public affairs, through including in deliberations about this vital issue those who associate in order to regularly seek elected office (political parties) as well as including citizen input to such deliberations, and ultimately by citizens making the decision about their electoral system through referendum. The discussion of this issue, however, is more germane to discourse about democratic governance, which is beyond the purview of this Guide.

²⁴ See ELECTORAL SYSTEMS AND DEMOCRACY (Larry Diamond & Marc Plattner, eds.; Johns Hopkins Univ. Press; Baltimore 2006); THE INTERNATIONAL IDEA HANDBOOK OF ELECTORAL SYSTEM DESIGN (Stockholm 1997) [hereinafter Electoral System Design]; ELECTORAL SYSTEMS IN COMPARATIVE PERSPECTIVE: THEIR IMPACT ON WOMEN AND MINORITIES (Wilma Rule & Joseph Zimmerman, eds.; Greenwood Press; Westport, CT 1994). When an absolute monarchy (e.g., Swaziland) or a military government (e.g., Pakistan) holds elections for a legislative body to which the monarch or military grants limited powers, the electoral exercise would only create limited legitimacy, depending in part on the degree to which the election process respects the principles discussed in this Section and depending on the nature of the powers granted to the legislature, while the authority for those elected would derive from the degree of public confidence earned through the election process. The governmental system would still not be democratic nor would the elections qualify as genuinely democratic elections, though they could be meaningful to some extent in the country's context, depending on a variety of factors. Consideration of such issues is beyond the purview of this Guide.

²⁵ For a general review of issues to consider and types of laws concerning the legal framework for elections, see OSCE ODIHR, GUIDELINES FOR REVIEWING LEGAL FRAMEWORKS FOR ELECTIONS (WARSAW 2002); INTERNATIONAL IDEA, INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS, (Stockholm 2003); Patrick Merloe, PROMOTING LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS: AN NDI GUIDE

(Forthcoming 2008) [hereinafter Promoting Legal Frameworks]. While requirements for democratic legislative processes is beyond the purview of this Guide, involving the public, including electoral competitors, prospective voters and other elements of civil society, in development of legal frameworks for elections is consistent with respecting the right to participate in government and public affairs. See *supra* note 8; para. 5, General Comment 25, *supra* note 3.

²⁶ See para. 20, General Comment 25, *supra* note 3; para. 7.4 Copenhagen Document, *supra* note 1; ELECTORAL MANAGEMENT DESIGN: THE INTERNATIONAL IDEA HANDBOOK (Stockholm 2006) [hereinafter Electoral Management Design]. Rafael Lopez-Pintor, *Electoral Management Bodies as Institutions of Governance* (UNDP; New York 2000) [hereinafter EMBs as Institutions of Governance]. Impartiality and effectiveness of electoral management bodies (EMBs) is a threshold matter for democratic elections; accomplishing these essential elements is a complex task. Involving the public and political competitors in a policy making process concerning EMBs is consistent with respect for the right to participate in public affairs. See para. 5, General Comment 25, *supra* note 3.

²⁷ Article 2(1) of the ICCPR provides that: "Every State Party to the present Covenant undertakes to respect and to ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." Article 25 confines its recognition of electoral related rights to citizens. Art. 2(2) provides that: "Where not already provided for by existing legislative or other measures. Each State Party to the present Covenant undertakes to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The UN Human Rights Committee has interpreted these provisions to create immediate obligations to refrain from violating recognized rights (i.e., negative obligations) and to take steps to ensure respect for and exercise of the rights (i.e. positive obligations). The positive obligations include protection against acts by private persons and entities (as well as governmental actors) and that states adopt legislative, judicial, administrative, educative and other measures to ensure enjoyment of the rights and freedoms recognized in the ICCPR. The Committee has also stated that the obligations created by the ICCPR are binding on all branches of government of the states parties (executive, legislative and judicial), as well as public, governmental authorities at all levels of government (national, regional and local), which would apply to electoral authorities and all governmental bodies that play a role in respecting and ensuring electoral related rights. See, UN Human Rights Committee paras. 3-7, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*: . 26/05/2004. CCPR/23/C/21/Rev.1/Add.12 (General Comments) [hereinafter General Comment 31], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).

²⁸ See General Comment 25, *supra* note 3, at paras. 11 (voter registration efforts and voter education), 12 (positive measures to overcome specific difficulties to exercise of electoral related rights, such as illiteracy, language barriers, minority languages, poverty and impediments to freedom of movement); General Comment 31, *supra* note 27, at para. 7 (raise levels of public awareness of rights); UN Human Rights Committee, *General Comment 28, Equality of rights between men and women* (article 3), U.N. Doc. CCPR/21/Rev.1/Add.12 (2000) [hereinafter General Comment 28], para. 3 (remove obstacles to equal enjoyment of rights, educate the population, adjust legislation), available at <http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80?Opendocument>. For discussion of measures that can be taken to enhance national minorities' participation in elections see OSCE ODIHR, *GUIDELINES TO ASSIST NATIONAL MINORITY PARTICIPATION IN THE ELECTORAL PROCESS* (Warsaw 2001) and to enhance women's participation in elections see OSCE ODIHR, *HANDBOOK FOR MONITORING WOMEN'S PARTICIPATION IN ELECTIONS* (Warsaw 2004).

²⁹ See paras. 10 & 11, General Comment 25, *supra* note 3. For a general discussion of the three major voter registration methods (individual initiated, periodic and compulsory registration) and challenges concerning inclusiveness in registration processes, see RICHARD KLEIN AND PATRICK MERLOE, BUILDING CONFIDENCE IN THE VOTER REGISTRATION PROCESS: AN NDI MONITORING GUIDE FOR POLITICAL PARTIES AND CIVIC ORGANIZATIONS (2001) [hereinafter Building Confidence in Voter Registration], at 1-18.

³⁰ See generally, William Kimberling, *A Rational Approach to Evaluating Voter Registration*, REGISTERING VOTERS: COMPARATIVE PERSPECTIVES (John C. Courtney, ed. Center for International Affairs, Harvard University; Cambridge, Massachusetts 1991).

³¹ See, Building Confidence in Voter Registration, *supra* note 29, at 7-18.

³² *Id.*, *supra* note 31; para. 14 General Comment 25, *supra* note 3; para. 6, General Comment 31, *supra* note 27. Voting by citizens living outside a country's territory and voting by non-citizens in sub-national elections are specialized topics beyond the scope of this Section.

³³ Paras. 11-12, General Comment 25, *supra* note 3. While the issue of voter turnout and efforts to promote it are beyond the purview of this Guide, see generally INTERNATIONAL IDEA, ENGAGING THE ELECTORATE: INITIATIVES TO PROMOTE VOTER TURNOUT FROM AROUND THE WORLD (Stockholm 2006).

³⁴ E.g., art. 25 ICCPR; paras. 15-17, General Comment 25, *supra* note 3; paras. 7.5-7.6, Copenhagen Document, *supra* note 1.

³⁵ Paras. 15-16, General Comment 25, *supra* note 3. Seeking or holding certain elected offices may be incompatible with holding other offices (such as, those in the judiciary or military or civil service), because of inherent conflicts of interest. The doctrine of incompatibility of offices, nonetheless, should provide practical means for a person to resolve the real or potential conflicts of interest (e.g., stepping down from office at a reasonable point before an election or upon nomination or qualification as a candidate).

³⁶ Paras. 15-16, General Comment 25, *supra* note 3.

³⁷ See OSCE ODIHR, *Restrictions on Political Parties in the Election Process: OSCE Human Dimension Background Paper 7* (October 1998); see also Yatama v. Nicaragua, *supra* note 7, at para. 229.

³⁸ See para. 15, General Comment 25, *supra* note 3; see also Yatama v. Nicaragua, *supra* note 7, at para. 226.

³⁹ See art. 25, ICCPR, *supra* note 1 ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions ... (b) To vote and to be elected...."); paras. 7.5-7.8 Copenhagen Document, *supra* note 1.

⁴⁰ See paras. 7.6-7.8, Copenhagen Document, *supra* note 2 (participating States must provide political parties and candidates "with the legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities..." and must "ensure that the law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence not intimidation bars the parties and the candidates from free presenting their views and qualifications..." and provide that "no legal or administrative obstacle stands in the way of unimpeded access to the media on a nondiscriminatory basis....").

⁴¹ See paras. 25-26, General Comment 25, *supra* note 3.

⁴² See *supra* notes 12-17 & 33.

⁴³ See paras. 19, 20, 25 & 26, General Comment 25, *supra* note 3; paras. 7-9 & 15, General Comment 31, *supra* note 28; paras. 7.5-7.8, Copenhagen Document, *supra* note 1; SANDRA COLIVER AND PATRICK MERLOE, GUIDELINES FOR ELECTION BROADCASTING IN TRANSITIONAL DEMOCRACIES (Article 19; London 1994) [hereinafter Guidelines for Election Broadcasting], at 69-70, 77-90; ORGANIZATION OF AMERICAN STATES & INTERNATIONAL IDEA, FUNDING POLITICAL PARTIES AND ELECTION CAMPAIGNS IN THE AMERICAS (Steve Griner and Daniel Zavatto, Eds.; Stockholm 2005); IFES, *Program on Money and Politics*, available at <http://www.moneyandpolitics.net>.

⁴⁴ E.g., "Transparency is the term for a clear and open process, which is understandable and accountable to the electorate.... Transparency is essential to the electoral process because it eliminates the appearance of impropriety and limits the possibility of electoral fraud...." in Association of Central and Eastern European Election Officials, International Foundation for Election Systems, Central Election Commission of the Russian Federation, *Transparency in Election Administration* (undated) [hereinafter Transparency in Electoral Administration], at 2, available at aceproject.org/ero-en/topics/voter-registration/vrx_o005.pdf; "[E]lection management is founded on basic, but fundamental, guiding principles; independence, impartiality, integrity, transparency, efficiency, and service orientation." *Guiding Principles of Electoral Management*, in ACE Project (undated) [hereinafter Guiding Principles], available at <http://aceproject.org/ace-en/topics/em/em20>; Electoral System Design, *supra* note 26, at 24.

"Transparent: (1a): having the property of transmitting light without appreciable scattering so that bodies lying beyond are entirely visible... (2a) free from pretense or deceit...." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1986). "Transparency, as used in the humanities implies openness, communication, and accountability. It is a metaphorical extension of the meaning used in the physical sciences: a "transparent" object is one that can be seen through. Transparency is introduced as a means of holding public officials accountable and fighting corruption. ..." Transparency (humanities), Wikipedia (11/29/07) available at [http://en.wikipedia.org/wiki/Transparency_\(humanities\)](http://en.wikipedia.org/wiki/Transparency_(humanities)).

⁴⁵ While it is difficult to demonstrate the non-discussion of a subject, a review of documents relating to electoral standards makes this point readily apparent. See, e.g., *supra* note 9, Compendium; Existing OSCE Commitments and other documents cited.

⁴⁶ Article 2(1) of the ICCPR, *supra* note 1, provides that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...." This creates an immediate and affirmative obligation for governments. Article 25 of the ICCPR speaks specifically to "citizens" regarding countries' affirmative obligation to respect and ensure rights. See *supra* note 27 & accompanying text.

⁴⁷ E.g., art. 10, Universal Declaration, art. 19 ICCPR, art. 9, ACHPR, art. 13, ACHR, art. 10 ECHR para. 10.1 Copenhagen Document, *supra* note 1.

⁴⁸ This formulation is an immediate juxtaposition of language from art. 21(3) of the Universal Declaration and art. 25(b) of the ICCPR, *supra* note 1. See para. 6, Copenhagen Document, *supra* note 1.

⁴⁹ Art. 25 of the ICCPR, *supra* Note 1, provides every citizen with 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... To vote and to be elected at genuine periodic elections... guaranteeing the free expression of the will of the electors...".

⁵⁰ See para. 7.8, Copenhagen Document, *supra* note 1. para. 25, General Comment 25, *supra* note 3; Guidelines for Election Broadcasting, *supra* note 43, at 69.

⁵¹ *E.g.*, *supra* note 1; art. 19, Universal Declaration, art. 19 ICCPR, art. 13 ADHR and art. 10 ECHR.

⁵² See para. 7.8, Copenhagen Document, *supra* note 1. para. 25, General Comment 25, *supra* note 3; Guidelines for Election Broadcasting, *supra* note 43, at 69.

⁵³ Guidelines for Election Broadcasting, *supra* note 43, at 69-70, (duty of government media to inform the public about matters relevant to elections, duty of balance and impartiality), 77 (replies and corrections), 78-90 (news coverage and direct access for electoral contestants), 94-97 (complaint mechanisms and judicial review; referenda); Existing OSCE Commitments, *supra* note 9, at 19-20.

⁵⁴ See para. 11, General Comment 25, *supra* note 3 ("Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.").

⁵⁵ See Electoral Management Design, *supra* note 26, at 67; Guidelines for Election Broadcasting, *supra* note 43, at 91-92.

⁵⁶ See, *e.g.*, Transparency in Electoral Administration, *supra* note 44.

⁵⁷ *E.g.*, provisions of international instruments *supra* note 1, including art. 21, Universal Declaration and art 25, ICCPR.

⁵⁸ Transparency applies to a range of electoral activities, including, among others: drafting or modifying electoral laws and regulations; selecting electoral administrators, from the highest bodies down to the polling sites; delimiting election districts; qualifying of parties and candidates for the ballot; establishing the mechanism for voter qualification, such as a voter registry; training election officials; setting up and running information technology systems; designing, producing and distributing ballots and other sensitive electoral materials; establishing polling sites; conducting voting, counting and results tabulation procedures; conducting electoral complaint mechanisms and judicial reviews of electoral challenges; announcing official election results; and certifying winning contestants.

⁵⁹ Article 13, ADHR, *supra* note 1. All 35 independent countries of the Western Hemisphere are members of the OAS; Cuba's membership is in suspension, but the remaining 34 participate actively in the Organization. The OAS member states have taken specific actions to affirm their positive obligations concerning the right to seek, receive and impart information. See, *e.g.*, OAS General Assembly Resolutions AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy," second operative paragraph; AG/RES. 2288 (XXXVII-O/07) of June 5, 2007, on "Access to Public Information: Strengthening Democracy;" Inter-American Commission on Human Rights Declaration of Principles on Freedom of Expression, para. 4, states that:

"Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies." Available at <http://www.iachr.org/declaration.htm>.

⁶⁰ *Marcel Claude Reyes, et al. v Chile*, Case No. 12.108 (09/19/06), Inter-American Court of Human Rights [hereinafter Marcel Claude Reyes], available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

⁶¹ *Id.*, at para. 86.

⁶² See *supra* note 1. The ECHR has as High Contracting Parties 47 countries spanning Europe that make up the Council of Europe (CoE); the status of one CoE applicant country, Belarus, is suspended "due to its lack of respect to human rights and democratic principles," while the 47 participate actively in the COE. See About the Council of Europe, available at http://www.coe.int/T/e/Com/about_coe.

⁶³ *Sdruzeni Jijoceske Matky v. Czech Republic* (07/10/06), (App. No. 19101/03) European Court of Human Rights, available at <http://hudoc.echr.coe.int>.

⁶⁴ *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia* (decision pending), (App. No. 11721/04) European Court of Human Rights. The Council of Europe is presently considering the first international instrument on access to government held documents, the Draft European Convention on Access to Official Documents (state of progress of the work at the end of the 15th meeting of the DH-S-AC, 3 - 6 July 2007), available at <http://www.access-info.org/data/File/Draft%20Convention%20as%20at%206%20July%202007.doc>. The text of the Convention, upon final adoption and should it enter into force, would have a significant impact on state obligations in the area and consequently on the jurisprudence of the European Court of Human Rights. Access to information about electoral processes also is reinforced by article 42 of the European Union's Charter of Fundamental Rights (Dec. 7, 2000), which provides a right of access to documents held by EU institutions to citizens of EU states; though not legally binding it can be invoked by courts in EU member states.

⁶⁵ See VLADIMIR PRAN AND PATRICK MERLOE, *MONITORING ELECTRONIC TECHNOLOGIES IN ELECTORAL PROCESSES* (NDI 2007) [hereinafter *Monitoring Electronic Technologies*].

⁶⁶ See *Transparency in Electoral Administration*, *supra* note 44.

⁶⁷ Paragraph 8 of the Copenhagen Document, *supra* note 1, recognizes the importance of domestic election observers, as well as international election observers, and OSCE participating states commit to invite such observers to witness their national elections, as well as "facilitate similar access for election proceedings held below the national level." Paragraph 20 of General Comment 25, *supra* note 3, provides that security of ballot boxes (more broadly speaking, the vote) "must be guaranteed" and the "vote should be counted in the presence of candidates or their agents." It further provides that: "There should be independent scrutiny of the voting process ... so that electors have confidence...." Nonpartisan domestic election monitors fulfill this independent role, as do international election observers, who typically deploy fewer observers than domestic monitors. For a listing of over 65 countries where nonpartisan domestic election observation takes place, see Appendix 1B, MELISSA ESTOK, NEIL NEVITTE & GLENN COWAN, *THE QUICK COUNT AND ELECTION OBSERVATION* (NDI 2002) [hereinafter *The Quick Count and Election Observation*].

⁶⁸ See ERIC BJORN LUND, *BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY* (Woodrow Wilson Center Press 2004) at Appendix, pp. 311-26 (approximately 100 countries appear in a partial list of those that allow international election observation).

⁶⁹ See Declaration of Principles for International Election Observation, *supra* note 8.

⁷⁰ See paras. 7&9, General Comment 25, *supra* note 3. "Account: [3] to furnish a justifying analysis or a detailed explanation of ones financial credits and debits or of the discharge of any of one's responsibilities...." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1986). "Accountability is a concept in ethics with several meanings. It is often used synonymously with such concepts as answerability, enforcement, responsibility, blameworthiness, liability and other terms associated with the expectation of account-giving. As an aspect of governance, it has been central to discussions related to problems in both the public and private (corporation) worlds. ... In leadership roles, accountability is the acknowledgment and assumption of responsibility for actions... encompassing the obligation to report, explain and be answerable for resulting consequences." Accountability, Wikipedia (11/29/07), available at a. <http://en.wikipedia.org/wiki/Accountability>; citing Sterling Harwood, "Accountability," in John K. Roth, ed., *Ethics: Ready Reference* (Salem Press, 1994), reprinted in Sterling Harwood, ed., *Business as Ethical and Business as Usual* (Wadsworth Publishing Co., 1996).

⁷¹ See *supra* note 1. Non-periodic accountability mechanism applicable to those holding elected office, such as recall and impeachment, are beyond the scope of this Guide.

⁷² This Section considers domestic remedies, however, redress concerning electoral related rights may also be pursued in international legal fora, such as the European Commission of Human Rights and European Court of Human Rights (for those from countries that are parties to the ECHR), Inter-American Commission on Human Rights and Inter-American Court of Human Rights (for persons from countries that are parties to the ACHR) and the UN Human Rights Committee (for persons from countries that recognizes the competence of the Committee to receive individual communications the First Optional Protocol to the ICCPR). See, e.g., *supra* notes 7, 60 & 63-64. Promoting Legal Frameworks, *supra* note 25, will present an annotated set of citations of cases before these international fora that concern electoral related rights.

⁷³ E.g., art. 2(3) of the ICCPR provides: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have and effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his [or her] right thereto determined by competent judicial, administrative or legislative authorities, or by any other authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that competent authorities shall enforce such remedies when granted."

⁷⁴ *Id.*, art 2(3)(c); see BARRY WEINBERG, RESOLUTION OF ELECTION DISPUTES: LEGAL PRINCIPLES THAT CONTROL ELECTION CHALLENGES (IFES 2006) [hereinafter Resolution of Electoral Disputes]; *Resolving Election Disputes in the OSCE Arena: Towards a Standard Election Dispute Monitoring System* (OSCE ODIHR 2000) [hereinafter Resolving Electoral Disputes].

⁷⁵ See *infra* Chapters 9 & 10; *Symposium: Evolving International Standards Pertaining to the Resolution of Election Disputes, Panel II*, 57 ADMIN. L. R. 3 (2005), at 869-901.

⁷⁶ See Resolution of Election Disputes, *supra* note 74; Resolving Election Disputes, *supra* note 74.

⁷⁷ See art. 2(3)(c), *supra* note 63, paras. 8, 15-19, General Comment 31, *supra* note 27.

⁷⁸ See Resolution of Election Disputes, *supra* note 74.

⁷⁹ With Direct Recording Electronic (DRE) systems, a voter uses a touch screen or keyboard to electronically record a choice, while a paper record (sometimes called a voter verified paper audit trail) can be produced as evidence of the choice. The electronic impression technically comes first, and the paper record may or may not present an accurate representation of that choice. At the present time, the problems associated with the electronic record so outnumber the potential problems with creating an accurate paper record of the voter's choice that a paper trail is a prerequisite though not a magic solution, to integrity and accountability in the voting process where DREs are used. Optical Mark Recognition (OMR) systems scan choices recorded on paper ballots, and the paper remains as evidence of the voter's choice. Digital pens create an electronic record, with a ball reading microscopic dots on specialized paper, while leaving ink on the paper, thus simultaneously creating an electronic and paper record of the voter's choice. The basic question to ask when approaching electronic technologies in election processes is whether there is sufficient transparency to identify problems and provide effective remedies. For a general description of electronic technologies employed in voter registration and voting processes and issues presented for monitoring and accountability, see *Monitoring Electronic Technologies in Election Processes*, *supra* note 65.

⁸⁰ See *Electoral Management Design*, at Chapter 9, *supra* note 26; EMB as *Institutions of Governance*, *supra* note 26.

⁸¹ See Paragraph 8, General Comment 31, *supra* note 27.

⁸² See para. 15, General Comment 31, *supra* note 27.

⁸³ See *id.*

⁸⁴ See Declaration of Principles, *supra* note 8.

⁸⁵ See *POSTCONFLICT ELECTIONS, DEMOCRATIZATION & INTERNATIONAL ASSISTANCE* (Krishna Kumar, ed., Lynne Rienner Publishers, London 1998); William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 *CHI. J. INT'L L.* 683, 689-91 (2006).

⁸⁶ See GUY GOODWIN-GILL, *CODES OF CONDUCT FOR ELECTIONS* (Inter-Parliamentary Union, Geneva 1998).

⁸⁷ See International IDEA, *Code of Conduct for Political Parties Campaigning in Democratic Elections* (Stockholm 1999), at 8-13.

⁸⁸ See para. 20, General Comment 25, *supra* note 3.

⁸⁹ See para. 20, General Comment 25, *supra* note 3; *Monitoring Electronic Technologies*, *supra* note 65, at 59-60.

⁹⁰ Existing OSCE Commitments, *supra* note 9, at 57.

⁹¹ See *Electoral Management Design*, *supra* note 26, at Chapter 4 - Composition, Roles and Functioning of an EMB.

⁹² See *supra* "Administrative Accountability Measures for Government Bodies and Officials," at pp. 11-12.

⁹³ The roles of agents of the electoral competitors are addressed *supra* in this Section at "Assent of the Electoral Competitors." Issues related to the activities of the news media are discussed in *Guidelines for Election Broadcasting*, *supra* note 43. The role of nonpartisan domestic election monitors is addressed in *HOW DOMESTIC ORGANIZATIONS MONITOR ELECTIONS: AN A TO Z GUIDE* (NDI 1995); *The Quick Count and Election Observation*, *supra* note 67; *Handbook for Domestic Election Observers* (OSCE ODIHR 2003); *The Work of Domestic Election Observation Groups Around the World* (ERIS, London Undated), available at <http://www.needs-network.org/pdfs/Promoting-and-Defending-Democracy.pdf>. International election observation is described in *Principles for International Election Observation*, *supra* note 8.

SECTION THREE

Developing Legal Frameworks That Promote Democratic Elections

Every law is a reflection of the balance of political power at the moment it is passed. The same is true in varying degrees of regulations promulgated to interpret and guide implementation of the law, depending on who drafts the regulations and the processes for issuing them. Recognizing these factors is important in promoting democratic legal frameworks. This is particularly true when developing a legal framework for democratic elections, because elections provide the definitive means for the population to exercise its right to periodically rebalance the distribution of political power.

The process by which legal frameworks are developed therefore is vitally important to achieving democratic elections. The principles of inclusiveness, transparency and accountability, which help to ensure fairness and promote public confidence, should be fundamental elements of the process for developing the legal framework, just as they must be imbedded in the substance of the framework itself. The process by which the legal framework is developed reflects the political will to establish democratic governance, of which elections are a part, or the likelihood that elections may be used as a means to govern in a less than democratic manner.

DEMOCRATIC PROCEDURES FOR DEVELOPING THE LEGAL FRAMEWORK

It is important to recognize that the process of developing the legal framework is not simply a matter of reaching an agreement among those parties that hold power at a given moment, or even among a broader circle of those who would like to compete for it through elections. Political parties should engage in dialogue about the elements of the legal framework for elections and, at a minimum, must convince a legislative majority to enact or amend electoral related laws. However, democratic elections are not likely to be achieved where one party holding a majority of seats in parliament decides behind closed doors what the legal framework for elections will be, nor are democratic

Elections provide the definitive means for the population to periodically rebalance the distribution of political power.

The process by which the legal framework is developed reflects the degree of political will to establish democratic governance.

elections likely where two parties holding a required majority collaborate privately. The interests of all those who would seek to be elected, as well as the electorate's interests in ensuring genuine elections, must be reflected in a legal framework, if genuinely democratic elections are to be achieved. Practice demonstrates that the process for developing the legal framework must provide an opportunity for all prospective electoral contestants and the public to participate and directly express their interests, so that the framework may be based on open dialogue and broad agreement.

There are a variety of mechanisms for reaching agreements on the rules for electoral competition. Legislative caucuses of the political party groups and independent legislators negotiate about the elements of the legal framework for elections. Parties negotiate outside the legislature on an ad hoc basis or as part of formal negotiations, such as a peace or reconciliation process, national roundtables or conferences and other fora. Extra-parliamentary parties can be brought into such negotiations as can representatives of civil society, and community forums can be organized to inform and involve interested citizens. Such steps can be particularly important when rules for elections are to be addressed.

Legislative and Regulatory Calendars:

When electoral related laws are to be developed or modified through regular legislative procedures, publishing the legislative calendar well in advance is important for providing extra-parliamentary political parties, civil society organizations and individual citizens an opportunity to prepare and represent their interests in the process. Surprise legislative maneuvers to gain an electoral advantage may provide a tactical advantage for certain interests, but they subvert the democratic character of elections and undermine the legitimacy of those who are elected to office.

Experience also demonstrates that it is inappropriate to make major or significant modifications of electoral related laws too close to an election date. Stability and predictability in the rules of the game are important for maintaining fairness in electoral competition and for building and maintaining public confidence in election processes. If political parties, candidates and/or civil society groups desire to modify the legal framework for elections, they should conduct their analysis of the framework and begin their advocacy efforts well in advance of upcoming elections. This is both a matter of strategic planning and of inclusiveness exercised by those who have the power to set legislative and regulatory calendars.

While the legal framework should be stable in the months preceding elections, conducting timely assessments of the strengths and weaknesses of election processes once they are completed, drawing lessons learned from the electoral experience and tackling needs for improvements in the legal framework are also important parts of properly developing legal frameworks for democratic elections. Taking actions after elections are concluded to improve the legal framework provides an important opportunity for those who win office to demonstrate their commitment to inclusiveness, transparency and accountability and thus to strengthen democratic governance.

Public Knowledge and Input:

Publishing drafts of proposed electoral related laws and modifications of laws is also important for inclusiveness, transparency and accountability, and for developing fairness and public confidence in the democratic character of elections. This allows analysis and advocacy by those with interests in elections and electoral integrity.

Employing mechanisms for public input into the legislative process is crucial as well. Allowing written public comments and suggestions for alternative provisions is an important element in providing inclusiveness. Publicly posting such submissions on an Internet website and by other means is important, because it allows the public and prospective electoral competitors to evaluate alternative provisions for the legal framework and reassures the public that the process is accepting input.

Conducting public legislative hearings on proposed electoral laws and their possible modifications also informs the public. Hearings should permit those in the legislative minority (or opposition) to air concerns about proposed electoral related provisions and to offer alternatives. Hearings that also permit public input through oral and written testimony increase inclusiveness in the process of developing legal frameworks for democratic elections. Holding hearings in public sessions, broadcasting them on radio and television and making them available via the Internet increases transparency and can contribute significantly to public confidence in the process.

Public forums, which are less formal than hearings, can be held in the legislature's facilities and even at venues around the country to help inform the public and gain input on the legal framework. Such steps are particularly valuable when new legal frameworks for elections are being developed and when major changes to the framework are under consideration, such as changing the electoral system, or if there are proposed major changes in the balance of legislative and executive powers within the system of elected offices.

Similar methods of addressing inclusiveness, transparency and accountability are required for ensuring fairness and promoting public confidence in promulgating regulations for interpreting and implementing electoral related laws. Countries employ differing administrative law constructs and use different devices to regulate these matters, such as formal regulations or by-laws, orders from governmental executive offices and administrative bodies that are under them or that are independent agencies (such as EMBs), or various types of instructions from higher to subordinate administrative entities.

Providing notice of consideration of regulations, publishing draft regulations, allowing the public to submit oral and written comments and suggested modifications, and holding hearings and public forums play important roles on broad framework issues. Even more narrow rules or instructions on seemingly mundane issues should be published and made easily accessible to electoral contestants and interested citizens, so that the public can develop confidence that the legal framework is inclusive, transparent and accountable.

Constitutional, Legislative and Regulatory Drafting:

While a comprehensive discussion of standard rules for constitutional, legislative and regulatory drafting are beyond the scope of this Guide, a few considerations are important to emphasize. The text of the legal framework for democratic elections should be consistent with constitutional provisions and international principles, which may be applicable through the country's international obligations. National legal doctrine will determine the method for resolving inconsistencies, if any, between the constitution and applicable international obligations.

For example, some countries require through constitutional provisions that international treaty obligations are automatically part of national law, and some countries say that such international obligations are determinative where domestic law conflicts with the international obligations, while other countries hold that international obligations only have domestic effect when the national legislature acts to provide such effect.

Consistency of Legal Provisions. Legal framework drafters should also ensure that the constitution, laws and regulations concerning elections are consistent with one another. Law and regulation drafters should ensure that election related laws and regulations are internally consistent in their use of terms. Providing a section in the law and in regulations that sets forth definitions of terms can be useful in identifying and avoiding inconsistencies. In addition, the framework for elections should be considered against international principles and practice to identify and address any significant omissions that may appear in the nation's legal framework.

A number of other laws are likely to be linked to or part of the legal framework for democratic elections as well. They may include laws on: legal recognition of political parties and organizations; party and/or election campaign financing; registration of nongovernmental organizations (including domestic nonpartisan election monitoring organizations); media ownership, licensing and activities; access to government held information; election administration; standards relating to qualification and use of electronic information and communication technologies; administrative law and procedure; civil procedure; and criminal law and procedure. A review for inconsistencies should also cover such laws.

Though it could be a time consuming process, acting to remove inconsistencies in such laws will prevent conflicts of laws and related legal complications during the election period that could compromise delivery of effective remedies through electoral complaint processes. Rules and mechanisms for resolving conflicts of laws also should be reviewed to ensure that provisions concerning electoral related rights and administration are treated as controlling law except where constitutional provisions are concerned.

Clear and Plain Language. Electoral related laws and regulations also should be reviewed by drafters to remove ambiguities wherever possible. Providing a definition of terms section can help reduce ambiguities, however, ambiguity can be produced in the text by using a defined term in an unusual manner. A careful review of the text to remove ambiguities, as well as inconsistencies, before a law or regulation is finalized and put into effect is a valuable practice, because it can

prevent confusion and disputes concerning framework provisions.

Using language in the elements of the legal framework for democratic elections that electoral contestants and the general population will easily and clearly understand is another important part of drafting. While there is some debate internationally on the advisability of using so-called “plain language,” there is agreement that – to be effective – legal frameworks must be easily and clearly understood.

Level of Detail. Another drafting challenge concerns the level of detail required to address appropriately the various aspects of legal frameworks for democratic elections. Practice demonstrates that the answer differs somewhat depending on the substance of the framework element that is being addressed and whether it is being addressed at the constitutional, legislative or regulatory drafting level. The constitution should address in significant detail: issues relating to the structure of government (e.g., types of presidential or parliamentary systems); definition of proportional, plurality/majoritarian or mixed electoral systems; descriptions of elected offices and their powers; eligibility requirements for being elected and to vote; requirements for recognition of citizenship if it is required to qualify for being elected or to vote; the types of civil and political rights and freedoms to be protected and promoted; and the conditions under which an election may be called as well as who has the authority to call the election. Description of the nature, powers, composition, qualifications, appointment, terms, basis for removal of EMB members and the EMB chair may also be appropriate for the constitution.

Most elements of the legal framework for democratic elections will be addressed in significant detail within election related laws, particularly in the primary election law or comprehensive election code. While election laws and codes contain a significant level of detail, the legal framework must anticipate that not all questions will be addressed in the law itself. The law must therefore provide for the promulgation of regulations to guide interpretation and implementation of the law by election officials and others involved in the election process. This may include a formal regulatory rulemaking process and/or procedures for informing electoral contestants and the public about proposed regulations (such as in the form of rules, by-laws, orders, instructions or similar administrative actions) and providing for their input and participation in the process of issuing such regulations.

While, for example, the constitution may require equality before the law, equal protection of the law, due process of law, process before a competent and independent tribunal, provision of effective remedies, and universal accountability before the law, the electoral law must give these precepts grounding in the electoral context, and regulations should provide even more specifics about various complaint mechanisms, remedies and accountability mechanisms, including enforcement provisions. In combination, these levels of description of the legal framework for democratic elections must address each element of the election process.

Language should be used in the legal framework that electoral contestants and the general public will easily and clearly understand.

ELEMENTS OF FRAMEWORKS FOR DEMOCRATIC ELECTIONS

There are a number of elements that typically appear in legal frameworks for democratic elections. They may be divided or labeled somewhat differently, though the categories outlined below provide an overview of the various election processes. Please see Section Four of this Guide, which suggests goals that each element of the framework should pursue, criteria for evaluating whether the element achieves the goals and detailed questions to consider in analyzing whether the corresponding framework provisions promote fair, democratic electoral practices. The brief review provided below is intended to highlight key aspects of legal frameworks needed when addressing various election processes, while Section Four provides a more detailed basis to conduct a review and questions to consider when developing a legal framework for democratic elections.

Recognition of Rights and Description of Governmental Structure and the Electoral System:

As noted previously, the constitution and electoral laws should recognize as fundamental the right to genuine democratic elections and electoral related rights. They should define clearly and in detail the features of the country's governmental structure and electoral system. This requires definition of the:

- Constitutional and legal protections for civil and political rights related to genuine democratic elections;
- Type of presidential or parliamentary system or hybrid of the two, indicating offices to be elected;
- Unicameral or bicameral legislative system at national and sub-national levels of government, as well as description of the executive branch of government below the national level;
- Levels or tiers of government and corresponding electoral systems for intermediate and local governments;
- Requirements, if any, for minimum voter turnout for an election to be deemed valid;
- Requirements, if any, for legally compulsory voting;
- Type of proportional, plurality/majoritarian, other or mixed electoral systems, and the specific method for allocating seats, including "electoral quotient" and how to calculate "remainders" in proportionate systems, and methods where preferences or transfer of votes are employed;
- Definitions of the minimum percentage of votes ("thresholds") required, if any, for award of seats;
- Type of voting procedures for open, closed or other types of lists, if a party list system is adopted;
- Use of single or multiple member electoral districts;
- Requirements for demarcation of electoral boundaries and the acceptable ratios of persons to elected representative;
- Special mandates or election system requirements concerning electing women or members of minorities;
- Requirements for timing of elections;
- Specifications if referenda and other ballot initiatives are allowed, including who may initiate them, what body determines

whether they qualify for the ballot, the qualification requirements, and the timing of placing the issue to a vote; and

- Specifications for changing any of these provisions in the constitution and law.

These provisions all form part of a compact between the people and their representatives. While countries that are in an early phase of adopting democratic governance may need to adjust these elements, frequent changes in the structures of government and electoral systems can produce instability and a lack of public trust. Changes in these matters therefore should be undertaken cautiously and with broad public involvement, open dialogue and inclusiveness in building agreement for significant modifications.

Election Districts:

Equal suffrage requires that the weight of each person's vote be essentially the same. This has particular significance when developing the legal framework for delimiting election districts. If there is a significant difference between election districts in the ratios of persons to representative, then the votes of persons in the districts are not equal. While there are some differences among long-established democracies concerning the acceptable variance between election districts in this ratio, the differences are small.

Equal suffrage also requires that every citizen's vote should have equal weight irrespective of distinctions such as race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status. Demarcation of election district boundaries therefore may not be drawn in ways that divide minority communities and thus reduce their voting power. The legal framework also is required to prohibit discrimination in drawing electoral boundaries in order to disempower constituencies based on political opinion (commonly referred to as "gerrymandering").

Defining criteria for demarcating electoral boundaries must be combined with developing mechanisms to ensure that boundaries are then properly drawn. This not only requires setting up a body to draw the boundaries that is likely to be impartial and competent, but also to provide a process that is transparent, inclusive of interested constituencies and accountable to the public. These elements can be successfully included whether the demarcation is conducted by a legislative entity, special commission, EMB or other body.

Election Management Body (EMB) and Election Administration:

Legal framework provisions concerning the body charged with the responsibility of organizing democratic elections are sensitive and complex. The EMB must be impartial and competent, and it must be perceived to be both by the electoral contestants and the public. The process for developing this portion of the legal framework should have the buy-in of as many of the prospective electoral contestants as possible, while maintaining required standards for performance of the EMB. This is a matter of establishing public trust in the EMB as it comes into being, which provides a critical advantage over working to establish public confidence if suspicions exist from the outset.

The EMB must be impartial and competent, and must be perceived to be both by the contestants and the public.

While there are several ways to define the process of appointment of EMB members and selection of the EMB chairperson, the most important elements are inclusiveness of electoral competitors and transparency in the process. For example, once the qualifications of the EMB members and chairperson are defined, a supermajority vote to confirm or appoint the members, which includes support of governing and opposition parties, is one such method. Defining differing constituencies that provide political balance and allowing each to appoint or nominate a number of EMB members is another such method. Whether these or other methods are employed, an inclusive method that is appropriate to the national circumstances should be provided.

Selection of the EMB chairperson can be by a supermajority vote by the legislature or by the EMB members themselves or even appointment by the head of state with supermajority confirmation or appointment from a list of candidates provided by the legislature to the head of state that is derived from an inclusive method. It is also vital to carefully define the appointment of subordinate election administration bodies at intermediate and local levels and their lines of responsibilities to the EMB in terms that promote transparency and confidence of electoral contestants and the public.

One generally accepted indicator of an EMB's impartiality is its being insulated from partisan political pressures. Standing as an independent body, rather than being part of a government ministry, has proven to be a successful approach, though there are examples (particularly in long-established democracies) where impartial action has been conducted by electoral bodies that are part of ministries. Having a budget allocation provided directly from the national legislature, with accountability to the legislature, has proven to be a critical measure to ensure effectiveness, impartiality and public confidence in EMBs.

Making sufficient resources available to the EMB, financial and otherwise, including assigning personnel and requiring assistance from other governmental agencies is another important provision to include in the legal framework. Safeguards must be included to ensure that all such officials maintain political impartiality and that the EMB is responsible for their activities. These factors point to the need for the EMB to be provided with capacities for training electoral officials and mechanisms for holding electoral officials accountable for proper discharge of their responsibilities. These elements of the legal framework contribute to the sustainability of democratic election administration.

Powers of EMBs vary among countries, with some providing almost all electoral related functions to the EMB, while others charge the EMB with the core duties of organizing the election day and immediately related activities and allocate to other bodies functions relating to election boundary delimitation, political party registration and financing, media conduct over the election period and other matters. Providing transparency and accountability mechanisms for all such bodies is central to establishing inclusiveness and confidence of the electoral contestants and the public.

Monitoring by Parties, Candidates, Referenda and Ballot Initiative Groups, Domestic Nonpartisan Election Monitors, News Media, and International Election Observers:

The legal framework is key to ensuring that all elements of the election process are open to monitoring by political parties, candidates, groups supporting referenda and other ballot initiatives, domestic nonpartisan election monitoring organizations, news media and international organizations. In turn, providing for this type of transparency is crucial for ensuring inclusiveness, accountability and the resulting sense of fairness among electoral contestants and public confidence.

Political parties and candidates have vested interests in protecting their rights to seek election. Traditionally, legal frameworks have allowed their representatives into election facilities, including polling sites and counting centers, to witness voting, ballot counting and vote tabulation processes. Legal frameworks also recognize the right for such representatives to monitor many other processes, including, for example, drawing election districts, voter registration processes, as well as ballot production and distribution. As the checklist presented in Section Four demonstrates, legal frameworks should open all electoral procedures to such representatives to observe, raise concerns, request that problems be addressed and gather information that may be used to seek redress through complaint mechanisms.

When referenda or other ballot initiatives are presented to the electorate, parties and citizen groups take political positions supporting and opposing them. They therefore assume direct interests in the electoral outcome concerning such ballot measures and should be allowed access to all relevant elements of the election process.

Across the globe, nonpartisan domestic election monitoring organizations have developed to protect and promote the right to genuine democratic elections. This activity is an expression of the right of association, the right of citizens to participate in government and public affairs and the right to seek and impart information. The legal framework, therefore, also should provide access to such monitors, as it does for representatives of electoral contestants, though the framework may vary on whether to provide status to such monitors to raise concerns with election officials at polling stations and other facilities.

News media play a vital role in providing information to citizens so that they can understand the character of election processes and establish the warranted degree of public confidence in them. Media representatives also are exercising the right to seek and impart information about the election, and the legal framework should provide access for them to all elements of the process.

International election observers can play an important role in assessing the character of elections and making recommendations to promote democratic elections. While international observers do not have standing as citizens to observe elections, many countries have commitments under international organizations to permit such observers, and there is a widespread state practice allowing them. Legal frameworks therefore

The legal framework is key to ensuring that all elements of the election process are open to monitoring.

should provide for the presence of international election observers to witness all elements of the election process.

Voter Registration and Voter Lists:

Voter registration serves to guarantee that all eligible voters can exercise the right to vote and that illegal voting is prevented. This ensures against disenfranchisement and against diluting the weight of each person's legitimate vote, thus supporting equal suffrage. It also helps to streamline election day voting procedures by pre-screening prospective voters.

The legal framework therefore must cover a significant number of provisions concerning:

- Voter eligibility, including procedures for denying the franchise to some persons based on acceptable criteria concerning inability to make free and informed choices, or denial of political rights due to criminal conviction, and including procedures for restoring voting eligibility;
- Processes for creation of the voter registry, whether by citizens taking steps to register, government conducting enumerations or transferring information from civil population registries;
- Procedures for citizens, political parties, candidates and civic organizations to review the preliminary voter registry, verify its accuracy and seek corrections;
- Procedures for inspecting the final voter registry and seeking corrections;
- Processes for challenging the eligibility of a voter on election day; and
- Processes, if any, for seeking enfranchisement on election day, including exercising the right to vote and to have a challenged or provisional ballot included in the official election results.

As with other elements of the election process, providing transparency procedures – including monitoring of the process by electoral contestants, domestic nonpartisan election monitors, news media and international observers – as well as complaint procedures and effective remedies must be part of the legal framework concerning voter registration and voter lists.

Voter Education:

Elections cannot be genuinely democratic unless voters understand the differences among the electoral contestants so that they can cast an informed vote. Voters must also know when, where and how to register to vote, as well as when, where and how to vote. The legal framework therefore must include provisions for the EMB's responsibilities for conducting voter education, which should include information on electoral contestants, voter registration and voting procedures (including ballot secrecy) through educational guides or other means.

The framework should also mandate that military personnel be provided voter education information. It should require that such voter information state that superior officers and noncommissioned officers may not attempt to influence how military personnel vote. The framework

also should require that there must be safeguards to protect the secret ballot for military voters. Similar information should be made available to all incarcerated persons who have the right to vote.

Government owned and controlled news media should be required to cooperate with the EMB in providing voter education information to the public. The legal framework may also require independent public media and privately owned media to cooperate in providing voter education information, if that is done under conditions that are not overly burdensome to their financial and other private interests.

The legal framework should also provide that citizen organizations are free to conduct voter education as long as it accurately describes the positions of electoral contestants and accurately describes voter registration and voting procedures.

Legal Recognition and Status of Political Parties:

The legal framework must provide, on a nondiscriminatory basis and without undue restrictions, provisions concerning the legal recognition and continuation of the legal status of political parties and other political organizations, such as candidate support groups and groups supporting or opposing referenda and other ballot initiatives. The recognition of political organizations as legal entities, with the right to seek elected office or to influence citizen choices on referenda and other ballot initiatives, is fundamental to democratic elections.

Requirements for legal recognition of political parties may be set forth constitutionally. If this is done, it is usually done in general terms. Whether or not the constitution explicitly provides for legal recognition of political parties and other political organizations, the details for party registration and legal recognition are almost always provided for by law. While several models can be identified concerning types of political party laws, many take one of two basic approaches:

- A minimal requirements approach, with legal recognition granted as a matter of administrative routine upon submission of the party's name, symbol, officers, charter and perhaps a small list of members; and
- A more rigorous approach, with added requirements for evidence of a large number of members and/or supporters (e.g., through submission of signatures), perhaps with a minimum geographical distribution in the country, a party manifesto and a significant registration fee.

The legal framework may address certain aspects of the internal functioning of political parties (such as requiring that they must employ internal democracy) or candidate selection, if it is done by convention or by primaries. The framework may also address disclosure concerning party financing.

Ballot Qualification:

The legal framework must provide clear procedures for qualifying parties, candidates, referenda and other initiatives for the ballot. The pro-

The legal framework must provide recognition of political parties and other political organizations.

visions may not be discriminatory, overly burdensome or unduly restrictive, though they should ensure that only qualified parties, candidates and appropriately worded referenda and initiatives appear on the ballot.

Ballot qualification provisions often include submission of a specified number of signatures. The requirements must be realistic given the timeframe for collecting signatures and national conditions. One problem to avoid is restricting citizens to signing only one petition for ballot qualification. This unfairly affects the rights of voters and of electoral contestants, because voters often see the requirement as committing their vote and thus a violation of secret voting, and the process opens them to potential intimidation should they be hesitant to sign a petition. Electoral candidates cannot be expected to know whether a person signed other petitions, even though a candidate's ballot qualification efforts could be harmed if the signature is invalidated.

Procedures for verifying signatures must be nondiscriminatory, and the framework should include safeguards against arbitrary application of the procedures. The provisions also should include transparency mechanisms for representatives of the electoral contestants, referenda and ballot initiative groups, domestic nonpartisan election monitors, news media and international observers.

Election Campaigning:

The legal framework for democratic elections must ensure fair conditions for electoral contestants, sometimes referred to as a level playing field. There are numerous facets that the framework must address, including procedures to facilitate violence free and intimidation free conditions for the electoral contestants to:

- Organize and train campaigners;
- Move from town to town and from door to door and use public spaces to seek votes;
- Hold meetings, rallies, marches and other means of peaceful assembly to garner and demonstrate electoral support;
- Make use of mass communications tools, such as the postal services, telephones, instant messaging and Internet; and
- Reach prospective voters via print and broadcast news media to appeal for votes.

Just as important, the legal framework must also ensure that prospective voters are free from violence, intimidation and fear of retribution for exercising freely the right to vote, so that they may participate in an election campaign in order to seek and receive information about the electoral contestants.

The legal framework must require political impartiality of all government officials in the exercise of their duties, including issuing of permits for campaign activities and providing facilities for such activities. It must require that government resources not be used for electoral advantage of any party, candidate or group supporting or opposing referenda or other ballot initiatives. The framework also must provide requirements for election officials and law enforcement personnel to honor equal protection of the law and provide effective remedies in securing proper election campaign conditions.

Campaign Resources:

Where the legal framework provides campaign resources to political contestants, it must do so on a nondiscriminatory basis that sets equitable treatment for all contestants. If funding is provided, categories may be established concerning the main electoral contestants and lesser contestants. Categories must be based on clear and objective criteria, for example the number of votes and/or seats won in the prior elections. The framework must also contain safeguards against arbitrary or discriminatory application of the criteria. Where non-financial support is provided, such as offices or printed materials, the basis must also be equitable, and safeguards must be provided to prevent arbitrary and/or discriminatory application of the criteria for support.

When private contributions for electoral campaigning are permitted, the legal framework must provide equal requirements concerning contestants for elected office and for groups supporting or opposing referenda and/or other ballot initiatives. Any campaign expenditure limitations also must have equal application.

Disclosure requirements, which in order to be effective must require timely and public disclosure, must have equal application. Enforcement mechanisms should be included that also provide due process protections and safeguards to ensure nondiscriminatory application.

Media:

A legal framework for democratic elections must address several issues related to the media: protections for the media to exercise freedom of expression in the electoral context; providing electoral contestants with a genuine opportunity to communicate their electoral messages to the public; and providing the electorate with accurate information upon which to make decisions about voting choices.

The first set of provisions should prohibit government officials from placing any pressures on the media to favor or harm the interests of any electoral contestant. Direct threats against owners, publishers, editors and journalists concerning personal safety and security of family or of property and concerning threats of prosecution or civil suits should also be prohibited.

The legal framework also must provide for unpaid direct access for electoral contestants to provide messages seeking electoral support via government owned or controlled media. Independent public media and privately owned media may also be required to provide unpaid access to electoral contestants as long as the provisions are not overly burdensome. Where paid political advertisements are permitted, the legal framework must require that it be done on a nondiscriminatory basis.

The legal framework also must require that government owned or controlled media provide accurate, balanced and equitable news coverage of electoral contestants (parties, candidates and groups supporting or opposing referenda and/or other ballot initiatives). It should provide guidelines on these matters for independent public media and privately owned media. The framework should also provide mechanisms to ensure effective remedies for violations of electoral rights by the media.

Where the legal framework provides campaign resources, it must do so on a non-discriminatory basis.

Honest determination of the people's will depends on the provisions for counting, tabulation and announcement of results.

Voting:

The legal framework must address a myriad of issues to ensure a genuine opportunity to exercise the right to vote on the basis of equal and universal suffrage. These issues concern conditions outside the polling sites, as well as inside it, before, during and after voting takes place. The provisions must ensure, among other things, that:

- Violence, intimidation, vote buying and other forms of coercion are prohibited in and around polling sites;
- Security protocols are provided that guarantee voting integrity, including preventing ballot box stuffing and irregularities and fraud in electronic voting;
- Access is provided to polling sites on an equal basis for all voters, including women, minorities, younger and older voters and persons with physical challenges and disabilities;
- Polling sites are to receive election personnel, ballots, voting machines and other sensitive electoral materials on an equal basis, and prevent discrimination based on likely political support for certain electoral contestants by the population assigned to the polling site;
- Voter identification and related procedures that are nondiscriminatory concerning race, color, religion, language, national origin, other status or political or other opinion, that prevent disenfranchisement of eligible voters and avert illegal voting;
- Voting procedures guarantee secrecy of the ballot; and
- Transparency mechanisms allow effective monitoring by political parties, candidates, groups supporting and opposing referenda and other ballot initiatives, domestic nonpartisan election monitors, news media and international election observers.

The legal framework must provide the highest election official at the polling site (presiding officer, president or chairperson) with the authority to maintain order at the site and take steps to gain assistance concerning security or remedying any problems concerning the voting process. Those problems could concern absence of sufficient electoral officials to meet “quorum requirements” or to conduct proceedings, insufficient ballots for voter use, failures of voting machines, lack of ink to apply to voters' fingers to prevent multiple voting or other matters.

Vote Counting, Results Tabulation and Results Announcement:

Vote counting, transmission of results, results tabulation and announcement of results all require clear and specific provisions in the legal framework for democratic elections. Honest and accurate determination of the people's will concerning who shall occupy elected office depends on these provisions. The legal framework should ensure, among other things, that:

- Standard ballots, electronic voting machines and other sensitive electoral materials are secured prior to commencing the counting process, so that the count cannot be illegally affected;
- Ballots are opened in a manner that permits verification of their validity or ruling about invalidity;
- Rules for determining ballot validity honor the clear intent of the voter;
- Ballots are placed in a manner that allows verification that they

are being credited to the proper electoral contestant, including party, candidate, position supporting or opposing a referendum or ballot initiative;

- Counts of ballots credited to each electoral contestant and verification of the count is easily conducted;
- Vote tally sheets are easily viewed and verified, posted publicly and provided to representatives of parties, candidates and groups supporting or opposing referenda and other ballot initiatives, as well as domestic nonpartisan election monitoring organizations, news media and international election observers;
- Transparency mechanisms allow effective monitoring by electoral contestants, domestic nonpartisan election monitors, news media and international election observers, which includes verifying transmission of results by any medium and accompanying transport of ballots, tally sheets and other sensitive materials to intermediate and/or final results tabulation centers;
- Results tabulation and announcement procedures are secure so that the tabulation of results cannot be illegally affected;
- Vote tabulations are credited to electoral candidates in a manner that permits verification;
- Rulings on ballot validity, including procedures for ruling on challenged or provisional ballots, are easily observed and verified;
- Tally sheets at intermediate and final counting centers record disaggregated votes, as well as aggregated results tabulations, are easily verified, publicly posted and provided to representatives of political parties, candidates, groups supporting or opposing referenda or other ballot initiatives, domestic nonpartisan election monitors, news media and international election observers; and
- Tally sheets from intermediate and final counting centers are posted on the Internet and other public places at an early date.

Framework provisions should also address how representatives of electoral contestants may raise concerns and seek to redress problems during the counting, tabulation and results announcement processes.

Complaint Mechanisms:

The legal framework for democratic elections should state for each element of the election process a complaints procedure that provides due process, equality before the law, equal protection of the law, effective remedies for violations of electoral rights and accountability for those who commit violations. Each element of the election process has its particular qualities, and the nature of due process and types of remedies will differ to some degree among the elements.

- Delimitation of election districts requires remedies that equalize sufficiently the variance among ratios of population to representative in various election districts and/or move boundary lines so as not to disempower minorities or constituencies that support a particular political opinion;
- Voter registration requires remedies that correct disenfranchisement or that prevent voting by ineligible people;
- Party, candidate and ballot measure qualification require remedies that provide ballot access should requirements be met; and
- Each other element merits designing and providing remedies that suit the problems, up to and including ordering recounts and/or new elections.

The framework must also clearly provide procedural requirements for employing electoral complaint mechanisms. These must describe filing requirements, standing requirements, burdens of proof, rules of evidence, timetable for processing complaints, available remedies and appeals procedures. The framework must direct complainants to the proper forum for filing a petition with an administrative agency, court or legislative body and provide for the possibility of judicial review wherever fundamental rights are at stake.

The legal framework also should address criminal liability for violating electoral related rights and the effect that criminal investigations and prosecutions may have on administrative complaint processes or civil law proceedings.