

# Nepal National Workshop on Human Rights in the Context of Elections

Co-organised by



Asian Forum for  
Human Rights and Development  
(FORUM-ASIA)



Informal  
Sector Service Centre  
(INSEC)

16-17 July 2014, Kathmandu, Nepal

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## Background

The most recent Constituent Assembly Elections in Nepal were held in November 2013. While several reforms were introduced by the Judiciary and Election Commission during the elections, which included the disqualification of convicted candidates, biometric voter registration and updated voter IDs, a number of human rights concerns nevertheless emerged. Among these, there were sporadic incidences of violence, as the Communist Party of Nepal – Maoist (CPN-Maoist) boycotted the elections. In addition, despite the order of the Supreme Court disqualifying candidates with criminal conviction, political parties continued to nominate persons accused of serious offenses. Media ownership, press coverage and political advertisement in relation to elections has also been a major source of concern in assessing press freedom and elections in Nepal.

A number of these issues were also the subject of the most recent annual report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, presented to the UN Human Rights Council in June 2014 on the topic of Political-Electoral Communications, with a particular focus on laws regulating political campaigning, advertising and polling; campaign spending and financing; and media coverage and independence; as well as violations of freedom of expression before, during and after electoral processes.

Earlier, in 2013, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, presented his annual report to the UN General Assembly focusing specifically on the topic of the exercise of the rights to freedom of peaceful assembly and of association in the context of elections. The Special Rapporteur underlined the importance of examining election contexts within his mandate because “the rights to freedom of peaceful assembly and of association have increasingly come under attack as incumbent or incoming regimes seek to retain or gain power at all costs” and “the ability of individuals and associations to form and operate freely is particularly at risk during those periods” (A/68/299).

These two reports by the UN Special Rapporteurs clearly demonstrate the centrality of freedoms of expression, assembly and association in elections, and that the major issues of concern relating to elections goes beyond procedural aspects such as balloting. Indeed, human rights violations, including violations of freedoms of expression, assembly and association, are often amplified during election contexts.

The said UN Special Rapporteurs' recent reports also build on a body of international human rights standards relating to elections that have emerged over the years, including in Articles 20 and 21 of the 1948 Universal Declaration of Human Rights, Articles 19, 21, 22 and 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 7 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the UN General Assembly Resolution (A/Res/46/137) on enhancing the effectiveness of the principle of periodic and genuine elections. In addition, the UN Human Rights Committee's General Comments Nos. 25 and 34 provide further elaboration respectively on the right to participate in public affairs and the right to freedom of opinion and expression, including on public and political issues.

This national workshop in Nepal brings together key civil society organisations from the different sectors relating to elections in the country – election monitoring groups, human rights advocacy groups, as well as media and corruption watchdogs – with the aim to draw out their respective areas of expertise in assessing the different aspects of elections in Nepal.

Key existing and emerging international human rights standards in relation to elections, especially the two reports by the UN Special Rapporteurs on freedom of expression and on freedoms of assembly and association, will be used as parameters for discussions at this workshop.

## **Objectives**

1. To draw out key existing and emerging international standards on elections as parameters to assess the situation of human rights in the context of elections in Nepal;
2. To identify key patterns of human rights violations and areas of concern in the context of elections in Nepal;
3. To develop a set of indicators based on international human rights standards to guide monitoring of human rights in the context of elections in Nepal; and
4. To make recommendations for changes in existing legal framework and regulations relating to elections in Nepal.

# 1966 International Covenant On Civil And Political Rights

Adopted by General Assembly resolution 2200A (XXI) on 16 December 1966,  
in New York, USA\*

## PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,  
Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## PART I

### ARTICLE 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and

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\*[<http://www2.ohchr.org/english/law/ccpr.htm>]

international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **PART II**

### **ARTICLE 2**

1. 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, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. 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 an 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 right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

### **ARTICLE 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

## **ARTICLE 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

## **ARTICLE 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **PART III**

### **ARTICLE 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

## **ARTICLE 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

## **ARTICLE 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude. 3.
  - (a) No one shall be required to perform forced or compulsory labour;
  - (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
  - (c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:
    - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
    - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
    - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
    - (iv) Any work or service which forms part of normal civil obligations.

## **ARTICLE 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **ARTICLE 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
  - (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
  - (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

## **ARTICLE 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

## **ARTICLE 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

## **ARTICLE 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

## **ARTICLE 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such: taking account of their age and the desirability of promoting their rehabilitation.
  5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non- disclosure of the unknown fact in time is wholly or partly attributable to him.
  7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## **ARTICLE 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

## **ARTICLE 16**

Everyone shall have the right to recognition everywhere as a person before the law.

## **ARTICLE 17**

1. No one shall be subjected to arbitrary unlawful interference with his privacy, family, or correspondence, or to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

## **ARTICLE 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

## **ARTICLE 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

## **ARTICLE 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### **ARTICLE 21**

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

### **ARTICLE 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

### **ARTICLE 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

## ARTICLE 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

## ARTICLE 25

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

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.*

## ARTICLE 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## ARTICLE 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## PART IV

## ARTICLE 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized

competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

#### **ARTICLE 29**

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

#### **ARTICLE 30**

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **ARTICLE 31**

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

## **ARTICLE 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

## **ARTICLE 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

## **ARTICLE 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

## **ARTICLE 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such

terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

### **ARTICLE 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

### **ARTICLE 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

### **ARTICLE 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

### **ARTICLE 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
  - (a) Twelve members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

### **ARTICLE 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
  - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

#### **ARTICLE 41**

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
  - (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
  - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;
  - (d) The Committee shall hold closed meetings when examining communications under this article;
  - (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;
  - (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
  - (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;
  - (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
    - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
    - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## ARTICLE 42

1.
  - (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
  - (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.
6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:
  - (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;
  - (b) If an amicable solution to the matter on tie basis of respect for human

rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

- (c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;
  - (d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.
8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
  9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
  10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

#### **ARTICLE 43**

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **ARTICLE 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

#### **ARTICLE 45**

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

## **PART V**

### **ARTICLE 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

### **ARTICLE 47**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## **PART VI**

### **ARTICLE 48**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

### **ARTICLE 49**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

## **ARTICLE 50**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

## **ARTICLE 51**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

## **ARTICLE 52**

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
  - (a) Signatures, ratifications and accessions under article 48;
  - (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

## **ARTICLE 53**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.



## CCPR General Comment No. 25: Article 25

(Participation in Public Affairs and the Right to Vote)

### The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service

*Adopted at the Fifty-seventh Session of the Human Rights Committee, on 12 July 1996<sup>1,2</sup>*  
*CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)*

- 1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.*
- 2. The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.*
- 3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of "every citizen". State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

<sup>1</sup> Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

<sup>2</sup> The number indicates the session at which the general comment was adopted.

*Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.*

4. *Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.*
5. *The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.*
6. *Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.*
7. *Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in*

- accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).*
8. *Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.*
  9. *Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.*
  10. *The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.*
  11. *States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.*
  12. *Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their*

- choice. States parties should indicate in their reports the manner in which the difficulties highlighted in this paragraph are dealt with.*
13. *State reports should describe the rules governing the right to vote, and the application of those rules in the period covered by the report. State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.*
  14. *In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.*
  15. *The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.*
  16. *Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.*
  17. *The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.*

18. *State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for the removal of elected office holders should be described.*
19. *In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.*
20. *An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.*
21. *Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected*

*by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.*

22. *State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.*
23. *Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.*
24. *State reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.*
25. *In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and*

*respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.*

26. *The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.*
27. *Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.*



# International Covenant on Civil and Political Rights

Human Rights Committee

102<sup>nd</sup> session

Geneva, 11-29 July 2011

## General comment No. 34

Article 19: Freedoms of opinion and expression General remarks

1. This general comment replaces general comment No. 10 (nineteenth session).
2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.<sup>1</sup> They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.
5. Taking account of the specific terms of article 19, paragraph 1, as well as the relationship of opinion and thought (article 18), a reservation to paragraph 1 would be incompatible with the object and purpose of the Covenant.<sup>2</sup> Furthermore, although freedom of opinion is not listed among those rights that may not be derogated from pursuant to the provisions of article 4 of the Covenant, it is

1 See communication No. 1173/2003, *Benbadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

2 See the Committee's general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V.

recalled that, “in those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee’s opinion cannot be made subject to lawful derogation under article 4”.<sup>3</sup> Freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency.<sup>4</sup>

6. Taking account of the relationship of freedom of expression to the other rights in the Covenant, while reservations to particular elements of article 19, paragraph 2, may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant.<sup>5</sup>
7. The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.<sup>6</sup> Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.<sup>7</sup> The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.<sup>8</sup>
8. States parties are required to ensure that the rights contained in article 19 of the Covenant are given effect to in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. It is recalled that States parties should provide the Committee, in accordance with reports submitted pursuant to article 40, with the relevant domestic legal rules, administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices relating to the rights protected by article 19, taking into account the issues discussed in the present general comment. They should also include information on remedies available if those rights are violated.

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3 See the Committee’s general comment No. 29 (2001) on derogation during a state of emergency, para. 13, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI.

4 General comment No. 29, para. 11.

5 General comment No. 24.

6 See the Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

7 See communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

8 General comment No. 31, para. 8; See communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

## Freedom of opinion

9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.<sup>9</sup> The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.<sup>10</sup>
10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.<sup>11</sup> Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

## Freedom of expression

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.<sup>12</sup> It includes political discourse,<sup>13</sup> commentary on one's own<sup>14</sup> and on public affairs,<sup>15</sup> canvassing,<sup>16</sup> discussion of human rights,<sup>17</sup> journalism,<sup>18</sup> cultural and artistic expression,<sup>19</sup> teaching,<sup>20</sup> and religious discourse.<sup>21</sup> It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be

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9 See communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

10 See communication No. 157/1983, *Mpaka-Nsusu v. Zaïre*, Views adopted on 26 March 1986; No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.

11 See communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

12 See communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

13 See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*.

14 See communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005.

15 See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.

16 Concluding observations on Japan (CCPR/C/JPN/CO/5).

17 See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

18 See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

19 See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

20 See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

21 Ibid

regarded as deeply offensive,<sup>22</sup> although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.<sup>23</sup> Means of expression include books, newspapers,<sup>24</sup> pamphlets,<sup>25</sup> posters, banners,<sup>26</sup> dress and legal submissions.<sup>27</sup> They include all forms of audio-visual as well as electronic and internet-based modes of expression.

### **Freedom of expression and the media**

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.<sup>28</sup> The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function.<sup>29</sup> The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>30</sup> The public also has a corresponding right to receive media output.<sup>31</sup>
14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.
15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

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22 Ibid.

23 See communication No. 926/2000, *Shin v. Republic of Korea*.

24 See communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007.

25 See communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006.

26 See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.

27 See communication No. 1189/2003, *Fernando v. Sri Lanka*.

28 See communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.

29 See communication No. 633/95, *Gauthier v. Canada*.

30 See the Committee's general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para. 25, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V.

31 See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

16. States parties should ensure that public broadcasting services operate in an independent manner.<sup>32</sup> In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.
17. Issues concerning the media are discussed further in the section of this general comment that addresses restrictions on freedom of expression.

### **Right of access to information**

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs<sup>33</sup> and the right of the general public to receive media output.<sup>34</sup> Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified. Pursuant to article 10 of the Covenant, a prisoner does not lose the entitlement to access to his medical records.<sup>35</sup> The Committee, in general comment No. 32 on article 14, set out the various entitlements to information that are held by those accused of a criminal offence.<sup>36</sup> Pursuant to the provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general.<sup>37</sup> Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group

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32 Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

33 See communication No. 633/95, *Gauthier v. Canada*.

34 See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

35 See communication No. 726/1996, *Zheludkov v. Ukraine*, Views adopted on 29 October 2002.

36 See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 33, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI*

37 General comment No. 31.

should be undertaken in a process of information-sharing and consultation with affected communities.<sup>38</sup>

19. To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.<sup>39</sup> The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

### **Freedom of expression and political rights**

20. ***The Committee, in general comment No. 25 on participation in public affairs and the right to vote, elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.<sup>40</sup> The attention of States parties is drawn to the guidance that general comment No. 25 provides with regard to the promotion and the protection of freedom of expression in that context.***

### **The application of article 19 (3)**

21. Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be

38 See communication No. 1457/2006, *Poma v. Peru*, Views adopted on 27 March 2009.

39 Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

40 See General comment No. 25 on article 25 of the Covenant, para. 25.

- reversed.<sup>41</sup> The Committee also recalls the provisions of article 5, paragraph 1, of the Covenant according to which “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.
22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.<sup>42</sup> Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>43</sup>
23. States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.<sup>44</sup> Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.<sup>45</sup> Journalists are frequently subjected to such threats, intimidation and attacks because of their activities.<sup>46</sup> So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers.<sup>47</sup> All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted,<sup>48</sup>

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41 See the Committee’s general comment No. 27 on article 12, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A

42 See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

43 See the Committee’s general comment No. 22, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex VI

44 See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

45 See communication No. 1353/2005, *Njaru v. Cameroon*, Views adopted on 19 March 2007.

46 See, for instance, concluding observations on Algeria (CCPR/C/DZA/CO/3); concluding observations on Costa Rica (CCPR/C/CRI/CO/5); concluding observations on Sudan (CCPR/C/SDN/CO/3).

47 See communication No. 1353/2005, *Njaru v. Cameroon*; concluding observations on Nicaragua (CCPR/C/NIC/CO/3); concluding observations on Tunisia (CCPR/C/TUN/CO/5); concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR); concluding observations on Colombia (CCPR/CO/80/COL).

48 *Ibid.* and concluding observations on Georgia (CCPR/C/GEO/CO/3).

and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.<sup>49</sup>

24. Restrictions must be provided by law. Law may include laws of parliamentary privilege<sup>50</sup> and laws of contempt of court.<sup>51</sup> Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.<sup>52</sup>
25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly<sup>53</sup> and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>54</sup>

Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

26. Laws restricting the rights enumerated in article 19, paragraph 2, including the laws referred to in paragraph 24, must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant.<sup>55</sup> Laws must not violate the non-discrimination provisions of the Covenant. Laws must not provide for penalties that are incompatible with the Covenant, such as corporal punishment.<sup>56</sup>
27. It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression.<sup>57</sup> If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.<sup>58</sup>
28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term “rights” includes human rights as recognized in the Covenant and more generally in international

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49 Concluding observations on Guyana (CCPR/C/79/Add.121).

50 See communication No. 633/95, *Gauthier v. Canada*.

51 See communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008.

52 See general comment No. 32.

53 See communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995.

54 See general comment No. 27.

55 See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 30 March 1994.

56 General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A*.

57 See communication No. 1553/2007, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006.

58 See communication No. 132/1982, *Jaona v. Madagascar*, Views adopted on 1 April 1985.

human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 (see para. 37).<sup>59</sup> Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.<sup>60</sup> The term “others” relates to other persons individually or as members of a community.<sup>61</sup> Thus, it may, for instance, refer to individual members of a community defined by its religious faith<sup>62</sup> or ethnicity.<sup>63</sup>

29. The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals.
30. Extreme care must be taken by States parties to ensure that treason laws<sup>64</sup> and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.<sup>65</sup> Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.<sup>66</sup> The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.<sup>67</sup>
31. On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place.<sup>68</sup> Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to

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59 See communication No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004.

60 Ibid.

61 See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

62 See communication No. 550/93, *Faurisson v. France*, concluding observations on Austria (CCPR/C/AUT/CO/4).

63 Concluding observations on Slovakia (CCPR/CO/78/SVK); concluding observations on Israel (CCPR/CO/78/ISR).

64 Concluding observations on Hong Kong (CCPR/C/HKG/CO/2).

65 Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

66 Concluding observations on Uzbekistan (CCPR/CO/71/UZB).

67 See communication No. 518/1992, *Sohn v. Republic of Korea*, Views adopted on 18 March 1994.

68 See communication No. 1157/2003, *Coleman v. Australia*.

be warranted in the exercise of a court's power to maintain orderly proceedings.<sup>69</sup> Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights.

32. The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination
33. Restrictions must be "necessary" for a legitimate purpose. Thus, for instance, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.<sup>70</sup> On the other hand, the Committee has considered that a State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith in a school district.<sup>71</sup>
34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".<sup>72</sup> The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.<sup>73</sup>
35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action

69 See communication No. 1373/2005, *Dissanayake v. Sri Lanka*.

70 See communication No. 359, 385/89, *Ballantyne, Davidson and McIntyre v. Canada*.

71 See communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006.

72 General comment No. 27, para. 14. See also Communications No. 1128/2002, *Marques v. Angola*; No. 1157/2003, *Coleman v. Australia*.

73 See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>74</sup>

36. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary.<sup>75</sup> In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation”<sup>76</sup> and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.<sup>77</sup>

### **Limitative scope of restrictions on freedom of expression in certain specific areas**

37. *Among restrictions on political discourse that have given the Committee cause for concern are the prohibition of door-to-door canvassing,<sup>78</sup> restrictions on the number and type of written materials that may be distributed during election campaigns,<sup>79</sup> blocking access during election periods to sources, including local and international media, of political commentary,<sup>80</sup> and limiting access of opposition parties and politicians to media outlets.<sup>81</sup> Every restriction should be compatible with paragraph 3. However, it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process.<sup>82</sup>*
38. As noted earlier in paragraphs 13 and 20, concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.<sup>83</sup> Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.<sup>84</sup> Moreover, all

74 See communication No. 926/2000, *Shin v. Republic of Korea*.

75 See communication No. 518/1992, *Sohn v. Republic of Korea*.

76 See communication No. 511/1992, *Ilmari Lämsman, et al. v. Finland*, Views adopted on 14 October 1993.

77 See communications Nos. 518/92, *Sohn v. Republic of Korea*; No. 926/2000, *Shin v. Republic of Korea*.

78 Concluding observations on Japan (CCPR/C/JPN/CO/5).

79 Ibid.

80 Concluding observations on Tunisia (CCPR/C/TUN/CO/5).

81 Concluding observations on Togo (CCPR/CO/76/TGO); concluding observations on Moldova (CCPR/CO/75/MDA).

82 See communication No. 968/2001, *Kim v. Republic of Korea*, Views adopted on 14 March 1996.

83 See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

84 Ibid.

public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.<sup>85</sup> Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty,<sup>86</sup> *desacato*,<sup>87</sup> disrespect for authority,<sup>88</sup> disrespect for flags and symbols, defamation of the head of state<sup>89</sup> and the protection of the honour of public officials,<sup>90</sup> and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.<sup>91</sup>

39. States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3.<sup>92</sup> Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3. States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations.<sup>93</sup> The criteria for the application of such conditions and licence fees should be reasonable and objective,<sup>94</sup> clear,<sup>95</sup> transparent,<sup>96</sup> non-discriminatory and otherwise in compliance with the Covenant.<sup>97</sup> Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting

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85 See communication No. 1128/2002, *Marques v. Angola*.

86 See communications Nos. 422-424/1990, *Aduayom et al. v. Togo*, Views adopted on 30 June 1994.

87 Concluding observations on the Dominican Republic (CCPR/CO/71/DOM).

88 Concluding observations on Honduras (CCPR/C/HND/CO/1).

89 See concluding observations on Zambia (CCPR/ZMB/CO/3), para. 25.

90 See concluding observations on Costa Rica (CCPR/C/CRI/CO/5), para. 11.

91 *Ibid.*, and see concluding observations on Tunisia (CCPR/C/TUN/CO/5), para. 91.

92 See concluding observations on Viet Nam (CCPR/CO/75/VNM), para. 18, and concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 23.

93 Concluding observations on Gambia (CCPR/CO/75/GMB).

94 See concluding observations on Lebanon (CCPR/CO/79/Add.78), para. 25.

95 Concluding observations on Kuwait (CCPR/CO/69/KWT); concluding observations on Ukraine (CCPR/CO/73/UKR).

96 Concluding observations on Kyrgyzstan (CCPR/CO/69/KGZ).

97 Concluding observations on Ukraine (CCPR/CO/73/UKR).

licensing authority, with the power to examine broadcasting applications and to grant licenses.<sup>98</sup>

40. The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”. The State should not have monopoly control over the media and should promote plurality of the media.<sup>99</sup> Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.
41. Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements<sup>100</sup> are not employed to the effect of impeding freedom of expression.<sup>101</sup> Furthermore, private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news.<sup>102</sup>
42. The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government<sup>103</sup> can never be considered to be a necessary restriction of freedom of expression.
43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.<sup>104</sup>
44. Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere, and general State

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98 Concluding observations on Lebanon (CCPR/CO/79/Add.78).

99 See concluding observations on Guyana (CCPR/CO/79/Add.121), para. 19; concluding observations on the Russian Federation (CCPR/CO/79/RUS); concluding observations on Viet Nam (CCPR/CO/75/VNM); concluding observations on Italy (CCPR/C/79/Add. 37).

100 See concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 22.

101 Concluding observations on Ukraine (CCPR/CO/73/UKR).

102 Concluding observations on Sri Lanka (CCPR/CO/79/LKA); and see concluding observations on Togo (CCPR/CO/76/TGO), para. 17.

103 Concluding observations on Peru (CCPR/CO/70/PER).

104 Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR).

- systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.
45. It is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings)<sup>105</sup> to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries<sup>106</sup> or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.<sup>107</sup>
46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism”<sup>108</sup> and “extremist activity”<sup>109</sup> as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.
47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.<sup>110</sup> All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements

105 Concluding observations on Uzbekistan (CCPR/CO/83/UZB); concluding observations on Morocco (CCPR/CO/82/MAR).

106 Concluding observations on Democratic People’s Republic of Korea (CCPR/CO/72/PRK).\

107 Concluding observations on Kuwait (CCPR/CO/69/KWT).

108 Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

109 Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

110 Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

that have been published in error but without malice.<sup>111</sup> In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.<sup>112</sup> States parties should consider the decriminalization of defamation<sup>113</sup> and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.<sup>114</sup>

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>115</sup>
49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.<sup>116</sup> The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

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111 Ibid.

112 Ibid.

113 Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

114 See communication No. 909/2000, *Kankanamge v. Sri Lanka*, Views adopted on 27 July 2004.

115 Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add.119). See also concluding observations on Kuwait (CCPR/CO/69/KWT).

116 So called “memory-laws”, see communication No. , No. 550/93, *Faurisson v. France*. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19.

### **The relationship between articles 19 and 20**

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.<sup>117</sup>
51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.
52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

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117 See communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000.



# General Assembly

Distr.: General  
7 August 2013  
Original: English

## Sixty-eighth session

Item 69 (b) of the provisional agenda\*

**Promotion and protection of human rights:  
human rights questions, including alternative  
approaches for improving the effective enjoyment of  
human rights and fundamental freedoms**

### **Rights to freedom of peaceful assembly and of association**

*Note by the Secretary-General*

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, submitted in accordance with Human Rights Council resolution 21/16.

### **Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association**

## Summary

The present report constitutes the first report to the General Assembly of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. It addresses concerns about the exercise of the rights to freedom of peaceful assembly and of association in the context of elections. The Special Rapporteur is deeply concerned about increasing human rights violations and abuses, which are being committed in several parts of the world against those who exercise or seek to exercise such rights in the context of elections and which indelibly mar such elections.

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\*A/68/150

## **I. Introduction**

1. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association was established by the Human Rights Council in its resolution 15/21 for an initial period of three years. The Council appointed Maina Kiai as Special Rapporteur on the rights to freedom of peaceful assembly and of association in March 2011, with a starting date of 1 May 2011. The present report is the first report submitted to the General Assembly by the Special Rapporteur, in response to the request by the Council, in its resolution 21/16, that an annual report be presented to the General Assembly. The report addresses concerns about the exercise of the rights to freedom of peaceful assembly and of association in the context of elections, and should be read in conjunction with the Special Rapporteur's thematic reports to the Human Rights Council (A/HRC/20/27 and A/HRC/23/39).
2. Every year, elections, plebiscites and referendums are conducted at various levels, including at the presidential, legislative and local levels in many countries. The high-stakes competition that characterizes most elections has seen widespread violations of human rights, including the right to life, freedom of expression, freedom of peaceful assembly and freedom of association. From the perspective of the Special Rapporteur, the rights to freedom of peaceful assembly and of association have increasingly come under attack as incumbent or incoming regimes seek to retain or gain power at all costs. The Special Rapporteur is convinced that the context of elections deserves special focus because the ability of individuals and associations to form and operate freely is particularly at risk during those periods. The Special Rapporteur is persuaded to draw this conclusion as a result of the increasing complaints he has received concerning harassment, intimidation and the undue restrictions placed on individuals, associations and their members in the run-up to or following contested elections.
3. In writing the present report, the Special Rapporteur benefited greatly from participating in a one-day expert meeting held in Geneva on 1 June 2013. The Special Rapporteur would like to thank all those who were involved in organizing the meeting, and all those who shared their experiences to inform the report, both at that meeting and in other forums.. The Special Rapporteur also took into account relevant elements of work available within the Council.<sup>11</sup> The country situations mentioned

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1 This includes the report of the Special Rapporteur on the situation of human rights in Belarus, with a focus on human rights in the electoral processes (A/68/276).

in the present report have been the subject of communications sent to Governments, as well as press releases and reports issued by special procedures mandate holders and high-level United Nations officials.

## **II. Rights to freedom of peaceful assembly and of association as integral part to free and fair elections**

### **A. *Democracy and freedom of peaceful assembly and of association***

4. Democracy, as a system through which the people participate directly or indirectly in the conduct of public affairs, has broad appeal across the globe.

Elections, referendums and plebiscites, in which people choose their representatives and express their choice of laws or policies, are held in the majority of countries in the world. As stipulated in article 21 (3) of the Universal Declaration of Human rights, democracy is a process in which “[t]he will of the people [is] to be the basis of the authority of government”. It is commonly thought of as a process with regular periodic, free and competitive elections to decide on policies directly or indirectly through chosen representatives that must be accountable to their electorate. In other words, democracy, as reflected in the electoral process, generally involves the use of clear predictable processes with uncertain outcomes, while a non-democracy can be identified by the fact that the whole electoral process is characterized by unclear and uncertain processes but with predictable outcomes. Nevertheless, the quality of elections is increasingly coming under scrutiny in order to ensure that election outcomes are representative of the will of the people. Elections confer legitimacy on Governments; if those elections are not considered to reflect the will of the people, therefore, a sense of discontent and disenfranchisement may result and sometimes cause violent conflict. In order to sustain the democratic ideal, it is necessary for regimes to uphold the rule of law, respect and protect human rights and remain vigilant and responsive to peoples’ views and opinions at all times.

5. The right to freedom of peaceful assembly and of association are pertinent to the democratic process, both during the election period and between elections. The Special Rapporteur reiterates that these rights are essential components of democracy since they empower women, men and youth to “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and

- cooperatives, and elect leaders to represent their interests and hold them accountable” (Council resolution 15/21, preamble).
6. More specifically, the rights to freedom of peaceful assembly and of association are a critical means for individuals and groups of individuals to participate in public affairs. The exercise of such rights provides avenues through which people can aggregate and voice their concerns and interests and endeavour to fashion governance that responds to their issues. For example, such rights are essential in order to campaign and participate in public rallies, form political parties, participate in voter education activities, cast votes, observe and monitor elections and hold candidates and elected officials accountable.
  7. *International law contains principles and standards by which the electoral process and outcomes can be measured. Approaching assessments by recognizing that States have accepted certain legal commitments and that the elections they conduct should meet those commitments provides uniformity and objectivity to election observation. The universality, interrelatedness and interdependence of human rights are also reinforced by States having the responsibility to ensure the exercise of all rights during the electoral process in order to achieve positive outcomes. Such an approach recognizes that a successful electoral process goes beyond the events on the day that votes are cast. The legal framework, political environment and institutional capacities before, during and after polling day, have an impact on how rights are enjoyed. In addition, the Special Rapporteur believes that an electoral process, in which widespread barriers are systematically placed on the exercise of the rights to freedom of peaceful assembly and of association, cannot be said to be either free or fair and, as such, the outcome should not be considered to be the result of “genuine” elections, as required under international law.*
  8. *The maintenance of peace during the voting process is necessary for the electorate to turn out and exercise their right to vote. Nevertheless, although important, it should not provide a justification for continuing electoral malpractices and unjustifiable restrictions on the rights to peaceful assembly and of association or other rights, for example, unlimited and uncontrolled bans on protests or demonstrations against election results. Where such rights are violated at any point during the electoral process, prompt and effective remedies should be available and accessible, presided over by impartial arbiters.*
  9. In the present report, the Special Rapporteur focuses on the role of associations broadly, including political parties, as central vehicles through

which individuals can take part in the conduct of peaceful affairs through chosen representatives. Political parties have an essential role to play “in ensuring pluralism and the proper functioning of democracy”.<sup>2</sup> The present report adopts the definition of a political party as “a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections”.<sup>3</sup> Of significance is the fact that a political party is an “association” (A/HRC/20/27, paras. 51-52), albeit a specialized one that may be regulated by separate legislation and that is subject to rules different from those of other associations. *The Special Rapporteur considers the key difference between political parties and other associations to be the ability of political parties to present candidates for elections and to subsequently form governments, should those candidates win in genuine elections. Hence, he stresses that the engagement of civil society organizations in the electoral process should not lead to their being involuntary labelled or treated as political parties simply as a result of their having participated in public life in the way in which they have chosen.*

10. *The Special Rapporteur also acknowledges that, while only a segment of civil society organizations can work directly on election-related issues, such as voter education, election observation, the reform of electoral institutions and the accountability of candidates and elected officials, the election period provides a prime opportunity for a broader range of civil society organizations to engage with would-be elected representatives, highlight their concerns and interests, with a view to getting policy responses, and in general exercise their rights to participate in public affairs. For that reason, any discussion of the rights to freedom of peaceful assembly and of association in the context of elections must be inclusive of all civil society organizations, regardless of their areas of focus.*
11. *The term “elections” as used in the present report includes those held to choose presidential, legislative and local administrative representatives, plebiscites and referendums. The electoral period does not always fit into a neat temporal delineation. Indeed, it is arguable that the end of one election period — to the extent that this is determinable — signals the beginning of the next. Some events in the election process may be capable of a definite time allocation, for example, voter education, campaign period, voting*

2 European Court of Human Rights, *United Communist Party of Turkey and Others v. Turkey*, Application No. 20/1997/804/1007, 25 May 1998, para. 41.

3 Organization for Security and Cooperation in Europe (OSCE)/Office for Democratic Institutions and Human Rights and the Venice Commission, *Guidelines on Political Party Regulation*, (Warsaw/Strasbourg, 2011), para. 9.

*day(s) and vote counting. However, other activities that are relevant to the process may be ongoing, continuing long after voting has been done, such as legislative reform and institution strengthening. By describing the scope of the present report as covering the period before, during and after elections, the Special Rapporteur seeks to convey that the context of elections is not about a specific event or a particular time period, for example, voting day — although casting one's vote is a pivotal moment in elections. The Special Rapporteur notes that elections are often highly charged contests at which much lies at stake for authorities and the electorate. In that context, States have an obligation to respect and facilitate the rights to freedom of peaceful assembly and of association throughout the entire process.*

**B. International legal framework related to the rights to freedom of peaceful assembly and of association in the context of elections**

12. In its resolution 15/21, the Human Rights Council calls upon States to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections. *In addition to the notion of democracy, the rights to freedom of peaceful assembly and of association are implicit in the right to take part in the Government of one's country, as affirmed in the Universal Declaration of Human Rights, which states in article 21 (3) that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". Similarly, article 25 of the International Covenant on Civil and Political Rights affirms every citizen's right without prohibited distinctions and unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in his country.<sup>4</sup> The Human Rights Committee recognizes that the full enjoyment of those rights depends on the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives, which requires the free exercise of the rights to peaceful*

<sup>4</sup> See also article 7 of the Convention on the Elimination of Discrimination against Women; article 29 of the Convention on the Rights of Persons with Disabilities; article 23 (1) (b) of the American Convention on Human Rights; article 13 of the African Charter on Human and Peoples' Rights; article 33 of the Arab Charter on Human Rights; and para. 25 of the Human Rights Declaration of the Association of Southeast Asian Nations.

*assembly and association, among other rights (general comment No. 25, para. 25). The General Assembly, in its resolution 59/201 declared that freedom of association and peaceful assembly were essential elements of democracy, together with the right to vote and to be elected at genuine periodic free elections, and encouraged the strengthening of political party systems and civil society organizations.*

13. *The centrality of the rights to freedom of peaceful assembly and of association in the context of elections is affirmed in various other international and regional human rights treaties<sup>5</sup> and other bodies.<sup>6</sup> Member States of the African Union in the Declaration on the Principles Governing Democratic Elections in Africa (sect. III (d)) explicitly commit themselves to safeguarding the human and civil liberties of all citizens, including the freedom of movement, assembly, association, expression, and campaigning, as well as access to the media on the part of all stakeholders, during electoral processes. The Organization for Security and Cooperation in Europe Copenhagen Document,<sup>7</sup> which outlines the commitment of member States in the field of elections, explicitly guarantees the rights of peaceful assembly and of association (paras. 9.2 and 9.3). Although other regional instruments on democracy do not explicitly refer to the right to freedom of association, they recognize that political parties and other forms of associations are vital components for the strengthening of democracy.<sup>8</sup>*
14. The variety of instruments that explicitly or implicitly recognize the ability of political parties and other forms of associations to form and operate within the context of elections or, more generally, democracy, is an indicator of consensus at least at the standard-setting level around the centrality of those rights. The Special Rapporteur's experience on the implementation of those rights is less optimistic. He notes that, in the context of elections, rights are more susceptible to restriction, and therefore urges strict adherence to international human rights standards. Although freedom must be the rule and restrictions the exception (A/HRC/20/27, para. 16, A/HRC/23/39 para. 18), the Special Rapporteur deplores the fact that, in too many instances, restrictions aim to stifle critics and do not comply with international law, that is: to be prescribed by law, and to

5 See, for example, article 7 (b) of the Convention on the Elimination of Discrimination against Women and article 29 (b) (i) of the Convention on the Rights of Persons with Disabilities.

6 Declaration on free and fair elections, adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994).

7 Available at [www.osce.org/odihr/elections/14304](http://www.osce.org/odihr/elections/14304).

8 African Charter on Democracy Elections and Governance, articles 3, 12; Inter-American Democratic Charter, articles 5, 27.

be necessary in a democratic society in the interests described in articles 21 and 22 of the International Covenant on Civil and Political Rights.<sup>9</sup>

15. The significance of equal protection of the rights to peaceful assembly and association in the context of elections for everyone is heightened in the context of elections because of the potential for the exacerbation of vulnerabilities during this period. The Special Rapporteur notes the inclination of actors in the electoral contest to exploit racial, ethnic, religious, political, national or social origin, among other distinctions explicitly prohibited in article 2 of the International Covenant on Civil and Political Rights, with a view to excluding opponents. He emphasizes that these rights are guaranteed for everyone on the basis of equality (A/HRC/20/27, para. 13), and that States therefore have the obligation to offer effective protection against discrimination. In the context of elections, any temporary measures designed to enhance the ability of marginalized groups or groups most at risk to exercise their rights, such as women, victims of discrimination because of their sexual orientation and gender identity, youth, persons belonging to minorities, indigenous peoples, non-nationals, including stateless persons, refugees or migrants, and members of religious groups, as well as activists advocating economic, social, and cultural rights, and used as a mechanism to level the playing field, do not constitute discrimination.

### **III. Freedom of peaceful assembly**

16. The right to freedom of peaceful assembly, that is, to both organize and participate in indoor and outdoor peaceful assemblies, has long proven to be a key one in the context of elections. This right enables candidates to such elections to mobilize their supporters and give resonance and visibility to their political messages. Elections are also a unique opportunity for women, men and youth from all parts of society, to express their views and aspirations, either for status quo or for change, that is to say, to voice support for the Government and ruling party, or dissent. Dissent is a legitimate part of the exercise of the right to freedom of peaceful assembly, especially in the context of elections, as it is a unique opportunity for pluralist expression through peaceful means.
17. In this regard, as mentioned during the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests, the Special Rapporteur is of the opinion that participating in peaceful protests is an alternative to violence and armed

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<sup>9</sup> For an analysis of permissible restrictions, see, inter alia, A/HRC/20/27, para. 15-17.

force as a means of expression and change which we should support. It must thus be protected, and protected robustly (see A/HRC/19/40, para. 13). The Council shares this approach and stressed in its resolution 22/10 that peaceful protests should not be viewed as a threat, and therefore encouraged all States to engage in an open, inclusive and meaningful dialogue when dealing with peaceful protests and their causes. The Council further stressed that everyone must be able to express their grievances or aspirations in a peaceful manner, including through public protests without fear of reprisals or of being intimidated, harassed, injured, sexually assaulted, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance. This is all the more true in the context of elections when tension is at its highest with considerable political, economic and social interests at stake.

18. However, in many countries, elections have been marred by human rights violations and abuses. For instance, in September 2009, in Guinea, some 50,000 peaceful demonstrators gathered in a stadium to protest against the possible candidacy of Capitain Moussa Dadis Camara for the presidential elections of January 2010. Security forces opened fire and used bayonets and knives to disperse the crowd. More than 150 persons were killed, and over a thousand injured. Many individuals were arrested on the scene, at their home or in hospitals. In the Islamic Republic of Iran, in June 2009, following the declaration of victory for President Ahmadinejad, security forces killed several protestors when they peacefully took to the streets to contest the election results. Security forces opened fire during the demonstrations and used batons and pepper spray to disperse the crowds. Several hundred people were arrested during the protests following the presidential elections of 2009. In the Russian Federation, peaceful protests against alleged fraudulent elections in the context of parliamentary elections held in December 2011 were met with excessive use of force, with over a thousand persons detained in various cities. Various acts of harassment, intimidation, arbitrary detention of several activists and members of the opposition also occurred in the context of the presidential protests on 6 May 2012. In the Bolivarian Republic of Venezuela, in the wake of the presidential elections of April 2013, peaceful demonstrations held in front of the offices of the national electoral commission in several states were met with brute force by security forces, along with arbitrary arrests. In Malaysia, security forces used indiscriminate force to repress a peaceful protest organized by the Coalition for Fair and Free Elections (Bersih), which advocates for the reform of the electoral process in that country.

19. Apart from using excessive force against peaceful protesters, in some instances, States have criminalized the participation in and organization of peaceful assemblies during election time, with a view to sanctioning or deterring those willing or intending to do so. In Ethiopia, several peaceful demonstrators and human rights defenders were charged with “crimes of outrage against the constitutional order”, and sentenced to life imprisonment for having participated in a demonstration against alleged fraud in the general elections of May 2005, in which over 190 protestors were reportedly killed by law enforcement authorities. After signing a statement admitting that their activities had been unconstitutional, they received a pardon and were freed. In the run-up to the legislative elections in Bahrain in September 2011, numerous human rights defenders and their relatives were arrested, dismissed from their jobs and subjected to intimidation and harassment for various politically motivated offences, including “participating in illegal gatherings”. Following the presidential elections in December 2010 in Belarus, hundreds of persons protesting on election night were detained, including civil society activists, journalists, and opposition leaders, including presidential candidates. A peaceful protestor was subsequently sentenced to three years and six months in a labour colony on charges of mass disorder, for his participation in peaceful protests. He was initially detained for an administrative offence, but was later charged with a criminal offence, despite the fact that the police officer who had filed his arrest warrant stated in court that he had not actually seen him during the protest. Similarly, in the Russian Federation, charges of “mass disorder” have been pressed against peaceful protestors during election time. Many demonstrators were arrested and accused, inter alia, of “public intimidation” and “public incitation”. Peaceful demonstrators in Azerbaijan have increasingly been targeted in the context of the forthcoming elections of October 2013, with several of them being arrested and/or fined. In Nepal in January 2006, four human rights defenders were arrested because of their involvement in the organization of large-scale peaceful demonstrations calling for a boycott of municipal elections scheduled for the following month.
20. The Special Rapporteur warns against the detention of peaceful demonstrators, with a view to preventing their participation in assemblies which are critical of the Government or ruling party. He is similarly concerned about restriction orders prohibiting demonstrators and defenders monitoring assemblies from remaining in, entering, or passing through a city, as occurred, for instance, in Malaysia in July 2011.

21. Fundamentally, the Special Rapporteur believes that all peaceful assemblies held during the electoral process, whether or not in support of the ruling party or the incumbent Government, should be entitled to equal treatment. Such assemblies should receive equal protection and facilitation from the State, in fulfilment of its positive obligation in this regard, irrespective of which category or group the demonstrators belong to. In this connection, the Special Rapporteur warns against the increased vulnerability of the aforementioned marginalized groups or groups most at risk from attacks, derogatory comments, stigmatization, and undue restrictions, with a view to serving political agendas, often from different parties. Some of them may also face the revocation of passports and work permits for having taken part in solidarity protests. As a consequence, peaceful assemblies organized by such groups, which may want to seize the opportunity of elections to draw attention to their respective plights, are adversely impacted. The Special Rapporteur is horrified by the aforementioned incidents in Guinea in September 2009, where many women participating in the demonstration or present in the area were stripped naked and sexually assaulted, including by gang rape, both at the stadium and in detention. In Zimbabwe, demonstrators peacefully advocating women rights were brutalized in the context of elections. In the Islamic Republic of Iran, five students were among those killed by security forces in June 2009.
22. General Assembly laws, which are conducive to the enjoyment of the right to freedom of peaceful assembly, in compliance with international human rights law, should be applied to events related to the electoral process. In particular, these laws should allow and facilitate spontaneous assemblies, bearing in mind that greater tolerance is needed in times of elections, where diverse views and opinions are expressed.
23. A central part of the positive State obligation to protect those exercising the right to freedom of peaceful assembly is to ensure protection against agents provocateurs and counterdemonstrators, whose aim is to disrupt or disperse such assemblies. Such individuals include those belonging to the State apparatus or working on its behalf. The Special Rapporteur is concerned about the State's use of agents provocateurs to disrupt assemblies, as was reportedly the case in Senegal in January 2012, prior to the first round of the presidential elections. Similarly, greater efforts should be made to allow, protect and facilitate peaceful simultaneous assemblies, and peaceful counterdemonstrations, whenever possible. In sum, all forms of peaceful assemblies should receive greater protection and facilitation from the authorities.

24. In this regard, the Special Rapporteur recalls that the right to freedom of peaceful assembly does not require the issuance of a permit to hold an assembly. If necessary, a mere prior notification, intended for large assemblies or for assemblies at which some degree of disruption is anticipated, may be required. Spontaneous peaceful assemblies, which usually occur in reaction to a specific event — such as the announcement of results — and which by definition cannot be subject to prior notification, should be more tolerated in the context of elections. In addition, the Special Rapporteur considers laws establishing authorization procedures to be even more problematic in the context of elections, as authorization may be arbitrarily denied, especially when demonstrators intend to criticize Government policies. In the Sudan, a peaceful demonstration organized by an independent gubernatorial candidate for the April 2010 elections was curbed by police forces invoking the failure of the organizers to seek permission. Several protestors were arrested and/or injured by security forces.
25. *On the contrary, elections should never be seen as a pretext for States to unduly restrict the right to freedom of peaceful assembly. As previously mentioned, blanket bans, which are intrinsically disproportionate and discriminatory, should be prohibited, and restrictions on a peaceful assembly in relation to its “time, place and manner” should be limited to the extent that such restrictions meet the aforementioned strict test of necessity and proportionality (see A/HRC/23/39, para. 59). In fact, given the importance of the rights to freedom of peaceful assembly and of association in the context of elections, the threshold for imposing such restrictions should be higher than usual: the criteria of “necessity in a democratic society” and “proportionality” should be more difficult to meet during election time. In this regard, the Special Rapporteur is dismayed that blanket bans have been used during election time, with a view to muzzling dissenting voices. In Kenya, in March 2013, following the results of the presidential elections, the police chief reportedly banned all public gatherings, including “illegal groupings” around the Supreme Court, prayer meetings, political meetings and rallies, until a petition challenging the presidential poll results was heard and decided upon. That decision was reportedly based on the fact that demonstrations may have triggered animosity and violence. When justified, “time, place and manner” restrictions which comply with international human rights norms and standards should be applied equally, once again, whether the peaceful assembly is in favour of or against the Government and the ruling party.*

26. *The Special Rapporteur further warns against imposing a state of emergency during election time, in order to temporarily suspend the rights to freedom of peaceful assembly.* Should this nevertheless occur, he recalls that, according to the Human Rights Committee, during a state of emergency, the rights to freedom of peaceful assembly and of association should not be derogated since the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of assembly, is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.<sup>10</sup>
27. The Special Rapporteur recalls that organizers of peaceful protests should not bear responsibility for the unlawful behaviour of others, including in times of elections. In Malaysia, in May 2012, the federal Government announced that it would sue the organizers of the Bersih 3.0 rally of 28 April 2012 calling for free and fair elections, in relation to property which was allegedly destroyed during the said rally.
28. It is also important to allow the unimpeded access to and use of the Internet, in particular social media, and other information and communication technology, which are essential tools, especially in times of elections, by which the right to freedom of peaceful assembly can be exercised, but also monitored and reported upon in relation to human rights violations and abuses. In the Islamic Republic of Iran, in the context of the presidential elections of 2009, access to social media was temporarily blocked across the country, since many bloggers reported on violations against peaceful protestors and foreign media were denied access. In Nepal, in relation to the aforementioned demonstration, telephone lines and mobile phones were cut off in Kathmandu and other major cities by the Nepalese authorities.
29. The Special Rapporteur finally emphasizes again the crucial role played by human rights defenders, including journalists, who monitor assemblies and who have been targeted in the context of elections. In Belarus, in December 2010, the Chair of the Belarusian Helsinki Committee, among other activists, was arrested and detained by security forces while observing a demonstration organized by an opposition candidate, which was held in front of the Government headquarters. He was taken to pre-trial detention facility before being placed in police custody. In Malaysia, media personnel covering a protest organized by Bersih were allegedly targeted by security forces, while documenting police brutality, despite clearly identifying themselves as media personnel.

10 General comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 5.

#### IV. Freedom of association

##### A. Political parties

30. *Everyone has the right to form or join a political party and conversely, no one should be compelled to belong to a political party. The Human Rights Committee, in its general comment No. 25 (para. 26), has stated that political parties and membership in parties play a significant role in the conduct of public affairs and the election process. Political parties are indeed the primary vehicles through which people can participate in the conduct of public affairs. The Special Rapporteur recognises political parties as a subset of associations included in the right to freedom of association enshrined in article 22 of the International Covenant on Civil and Political Rights.* As such, the principles and minimum standards elaborated by the Special Rapporteur in his thematic report on best practices (A/HRC/20/27) generally apply to the regulation of political parties. Nevertheless, political parties are organizations formed to carry out particular objectives, that is, presenting candidates for elections in order to be represented in political institutions and to exercise political power on any level, national or local,<sup>11</sup> and may therefore be subject to specific requirements not necessary for other civil society organizations. According to the European Court of Human Rights, it is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organizations which intervene in the political arena.<sup>12</sup>
31. *The Special Rapporteur agrees with the Human Rights Committee, in paragraph 19 of general comment No. 25, that freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected and that States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder. As the Special Rapporteur noted previously, a minimum number of individuals may be required to establish a political party, but this number should not be set at a level that would discourage people from engaging in associations (A/HRC/20/27, para. 54).* Other requirements might be in force, such as concerning geographic or ethnic representation, but the

11 European Commission for Democracy through Law, Venice Commission, Code of conduct of good practice in the field of political parties, 2009, CDL-AD(2009)021.

12 European Court of Human Rights, *Refah Partisi (The Welfare Party) and Others v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003, para. 87.

- Special Rapporteur warns against this type of measure that is ultimately discriminatory to the formation of any political party. A registration regime is not necessary for the formation or operation of political parties, but where it is in place, it should never be subject to authorities' prior approval.
32. In the light of the fact that political parties have a decision-making role in ensuring pluralism and the proper functioning of democracy, a presumption in favour of formation of political parties means that adverse decisions should be strictly justified in accordance with the standards established by article 22 of the International Covenant on Civil and Political Rights in relation to proportionality and necessity in a democratic society. As for the right to freedom of peaceful assembly, the Special Rapporteur believes that the proportionality and necessity test should be stricter in times of elections. In 2011, concerns were expressed about the case of a few Saudi citizens who submitted a request for recognition of what could have been Saudi Arabia's first political party, and who were a few days later arrested and requested to sign an undertaking that they would renounce their activities with the party. Those who refused to do so were placed in detention. The Special Rapporteur considers this to be an example of a blatant violation of the right to freedom of association. By all means, political parties whose applications have been rejected should be provided the opportunity to seek remedy before an independent and impartial court (A/HRC/20/27, paras. 60-61).
  33. Political parties are entitled to a level playing field in order to compete fairly in the electoral contest. A level playing field does not mean that all parties should have the same treatment in every case; rather, they should receive equitable treatment based on reasonable and objective criteria. All parties complying with international human rights norms and standards are entitled to equality of opportunity. As such, at a minimum, no political party should be discriminated against, unfairly advantaged or disadvantaged by the State. In the present report, the Special Rapporteur emphasizes equality of opportunity for political parties in respect of their ability to access funding and to exercise their rights to freedom of expression, including through peaceful demonstrations.
  34. In his second thematic report (A/HRC/23/39), the Special Rapporteur identified the ability of associations to access financial resources as an integral element of the right to freedom of association. The question of funding has far-reaching consequences on the right to freedom of association for political parties in the context of elections. Funding ensures that political parties are able to function on a day-to-day basis, to participate in the

political arena, to represent a plurality of views, interests and perspectives, thus strengthening democracy. Funding may also have perverse effects on democratic potential, requiring certain regulation. The Special Rapporteur shares the view of the Human Rights Committee, in general comment No. 25 (para. 19) that reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.

35. Some overarching principles could be drawn upon to guide the development and operation of political party financing rules. Public financing of political parties is often used as an avenue to provide equality of opportunity to all parties and guarantee competitive participation of diverse ideas and views. Public funding principally benefits parties that are unable to otherwise raise private funds for any number of reasons, including because they are smaller parties, or their ideology does not appeal to a majority of would-be donors, or those that represent marginalized groups, such as women and youth. Hence, public funding should not be used to interfere with a party's independence and further or create overdependency on State resources.<sup>13</sup>
36. More broadly, party resources should be differentiated from public resources. Public resources should not be used to tilt the electoral playing field in a party's favour and in particular the incumbent party or its candidates. This principle extends to the use of State institutions, such as police forces, the judiciary, the prosecutorial authority, law enforcement agencies and others, which should be impartial when controlling or limiting the activities of political parties, such as by initiating politically motivated court cases against rival candidates, in effect, preventing them from engaging in campaign activities.
37. Pluralism is a hallmark of democracy with political parties as catalysts for debate and dialogue in democratic societies, such debate forming the basis of the voter's choice of representatives. The European Court of Human Rights considers that there can be no democracy without pluralism. It is for that reason that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.<sup>14</sup> In another landmark decision, the Court found a violation of

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13 OSCE/Office for Democratic Institutions and Human Rights and the Venice Commission, *Guidelines on Political Party Regulation*, 2010, paras. 176-177.

14 European Court of Human Rights, *Handyside v. United Kingdom*, para. 49.

freedom of association stating that mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture cannot be said to constitute a threat to "democratic society", even though it may provoke tensions. It further stated that the emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas.<sup>15</sup>

38. Political parties thus, have the freedom to choose and pursue ideologies, even if these are unpopular with the authorities or the public in general, including the ability to call for a boycott of elections, without fearing retaliation for doing so. The freedom of political parties to expression and opinion, particularly through electoral campaigns, including the right to seek, receive and impart information, is as such, essential to the integrity of elections. The Special Rapporteur recalls that, in its resolution 12/16, the Human Rights Council made clear that, in principle, no restriction is permissible with regard, inter alia, to: discussion of Government policies and political debate; reporting on human rights, Government activities and corruption in Government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups. The Special Rapporteur emphasizes that, only when a political party or any of its candidates uses violence or advocates for violence or national, racial or religious hatred constituting incitement to discrimination, hostility or violence (art. 20, International Covenant on Civil and Political Rights, also reflected in art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination),<sup>16</sup> or when it carries out activities or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law (art. 5, International Covenant on Civil and Political Rights), can it be lawfully prohibited.
39. ***Central to the freedom of expression of political parties is the opportunity for them to have equal access to the media, particularly where the latter is State-owned or controlled. Legislation should provide a clear framework for the implementation of equal access to media, including during the campaign period. For example, all parties presenting candidates for elections are entitled to coverage by public media, and in this regard, the allocation of free media time ensures that all political parties, including small parties, are able***

15 European Court of Human Rights, *Ouranio Toxo v. Greece*, Application No. 74989/01, 20 October 2005, para. 40.

16 See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13584&LangID=E>.

disseminate their views and ideas.<sup>17</sup> The allocation of media time before an election should be equal, on the basis of the principles on equality before the law and non-discrimination. Denying specific parties' access to public media or providing biased coverage based on, for example, the unacceptability of the party or candidate's views is incompatible with the rights to freedom of association and expression. Attention should be paid to the distinction between access to the media as a political party and access to media as State officials due to the potential for unfair advantage that arises out of incumbent political parties using media coverage of official duties as a campaign platform.

40. Since the inception of his mandate, the Special Rapporteur has received numerous allegations to the effect that, during electoral periods, political leaders and supporters, particularly from the opposition, face heightened risks. Prior to, during and after an election, those who voice or have voiced dissent are in many countries subject to, inter alia, harassment, intimidation, corruption attempts, reprisals, arbitrary arrests and imprisonment, solely on account of their political opinions or beliefs. In this respect, the Special Rapporteur is disturbed about the case of an opposition leader from Belarus who was subject, in 2011, to a harsh sentencing, after he participated in a rally protesting the outcome of the presidential elections on 19 December 2011. In the Islamic Republic of Iran, concern was expressed in relation to former presidential candidates who staged a rally in solidarity with protesters in Egypt, for which they had sought permission from the authorities, and who have been kept largely "incommunicado" in their homes since February 2011.
41. Political parties and their members unduly restricted from exercising their right to free association should have recourse to prompt and effective remedies. The Special Rapporteur again stresses that States have an obligation to provide independent and impartial institutions, including electoral management bodies and media regulatory authorities, in addition to an independent judiciary, to ensure that electoral processes are not exploited, thereby creating an uneven playing field for any political party. In order to be effective, the regulatory body should be independent from executive powers, be empowered and have adequate capacity to formulate, monitor and enforce regulations. These are the key conditions for ensuring the respect of the right to freedom of association in the context of elections.

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17 OSCE/Office for Democratic Institutions and Human Rights and the Venice Commission, *Guidelines on Political Party Regulation*, 2011, para. 147.

**B. Civil society organizations**

42. *Civil society organizations have also an important role to play in the context of elections. The role of civil society in contributing to and sustaining a robust democracy cannot be underestimated. In different capacities, organizations undertake various activities to advocate for the concerns and interests of their beneficiaries, to contribute to ensuring the integrity of the electoral process, to further contribute to the achievement, protection and strengthening of democratic goals and standards, and to keeping authorities accountable to the electorate. Among other things, civil society organizations promote political participation, undertake voter education, campaign for good governance reforms, provide vehicles for the expression of different interests, but also act as platforms that cut across tribal, ethnic, linguistic and other barriers, and catalyse public debate on issues that affect them.*
43. The Special Rapporteur stresses that the right to freedom of association necessarily entails the freedom of associations to decide and engage in activities of their own choosing and this extends to those wishing to engage in election-related activities. Thus, among other liberties, associations have the freedom to advocate for electoral and broader policy reforms; to discuss issues of public concern and contribute to public debate; to monitor and observe election processes; to report on human rights violations and electoral fraud; to initiate polls and surveys, such as those conducted during the voting process; to freely access the media, including new media, such as the Internet; to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or online; to build coalitions and networks with other organizations, including from abroad; to engage in fundraising activities; to engage in election observation, voter education and the inspection of voters' rolls; to interact with international and regional human rights bodies; and to provide any forms of technical assistance and international cooperation.
44. Civil society organizations are inherently different from political parties, the ultimate objective of which is to promote candidates who will run for elections with the aim to govern. Thus, different regulations and restrictions are applicable to the former. In line with this, associations should not be compelled to register as political parties and conversely, they should not be denied registration as associations because they carry out what the authorities consider to be "political" activities. It is a source of serious concern that the term "political" has been interpreted in many countries in such a broad manner as to cover all sorts of advocacy activities; civic education; research; and more generally, activities aimed at influencing

public policy or public opinion. It is clear that this interpretation is solely motivated by the need to deter any forms of criticism. In this regard, concern was expressed about the situation in the Russian Federation, where a human rights organization was the subject of an inspection from the Prosecutor's General Office, which claimed that the organization had engaged in "political activity" by "purposefully influencing the image of the electoral commissions and other State organs, through participation in the electoral process", after some members of the organization alleged irregularities during the December 2011 elections. The Special Rapporteur recalls that the right to freedom of association is itself a civil and political right facilitating the participation of all in decision-making of public affairs. Freedom of association provides individuals with unique opportunities to express their political opinions and to engage in cultural, economic and social activities. In fact, associations accused of engaging in "political" activities are often those that seek to keep Governments accountable, through good governance and rule of law initiatives, such as anti-corruption measures, human rights campaigns, institutional reforms and similar measures designed to strengthen democracy. The Special Rapporteur is of the view that labelling associations as "political", and on that basis associating them with opposition parties or preventing them from operating, is largely intended to silence voices that are critical of Government policies and practices.

45. *Although civil society organizations play an essential role during election time, freedom of association is, in many countries, restricted before, during and after elections.* As noted by the Special Rapporteur on the situation of human rights defenders, acts of intimidation against civic activists often start long before the beginning of election campaigns (A/HRC/13/22 para. 56). Restrictions placed on unregistered associations preventing them from taking part in activities related to the electoral process is one way of obstructing the work of independent voices. As the Special Rapporteur has stated in previous reports, the right to freedom of association applies equally to associations that are not registered (A/HRC/20/27, para. 56). Because of their marginalization, women, youth, minorities, indigenous groups or persons with disabilities may form or join unregistered associations for the advancement of their interests. States should play an active role in removing barriers that keep these marginalized and disempowered groups from participating in public life and exercising their rights in the context of elections. This is vital to ensure that their voices are heard and their causes taken into account in the policies of the next Government.

46. *The freedom of associations to engage in activities related to the electoral process should therefore be guaranteed to all associations, whether they are apolitical in their means and operations, partially or totally supportive of the Government or express criticism of Government policies. Hence, no associations should be compelled to express support for any electoral candidate.* Nevertheless, it is important for any organization which voluntarily supports a particular candidate or a party in an election to be transparent in declaring its motivation, as its support may impact on elections' results. The Special Rapporteur is of the view that the strength of a democracy can be gauged by the extent to which diverse views and differing opinions are accommodated and even encouraged in public debate.
47. The right to freedom of association is an essential component of democracy that empowers men and women and is therefore particularly important where individuals may espouse minority or dissenting religious or political beliefs (Council resolution 15/21, preamble). As such, no restrictions should be placed on associations, solely because they do not share the same views as those in authority.
48. *Governments in many countries are increasingly imposing restrictions on civil society's ability to engage in the establishment of transparent, accountable and fair democratic machinery and also from undertaking activities such as election monitoring and voter mobilization.* Barriers include the prohibition for certain groups to register as associations; the prohibition from carrying out some activities where a restrictive list of authorized activities is not provided by the legal framework; the obligation to adopt negative labels; the denial of accreditations to associations to observe and monitor elections; or even the imposition of sanctions or threats of sanctions for engaging in activities related to the electoral process. In the Russian Federation, the implementation of the 2012 Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents, the compliance of which with international standards is analysed in depth in the Special Rapporteur's second thematic report to the Human Rights Council (A/HRC/23/39), has led to audits and inspection campaigns against numerous civic organizations that have conducted "political activities" and have failed to register as a "foreign agent". One of them, Golos Association for the defence of the rights of voters, whose Internet website was hacked in the run-up to the parliamentary elections, was, in April 2013, the first organization to be penalized under the new law.

49. As described in previous reports by the Special Rapporteur, any restrictions must be permitted by international law, and thus meet the strict requirements of international human rights law. In the context of elections, the Special Rapporteur believes that the test threshold should be raised to a higher level. It is therefore, not sufficient for a State to invoke the protection of the integrity of the election process, the need to ensure non-partisan and impartial elections, the need to preserve peace or security to limit these rights, insofar as the context of elections is a critical time when individuals have a say about the fate of their country. In this regard, the Human Rights Committee stated that the reference to “democratic society” in the context of article 22, indicates in the Committee’s opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of a democratic society.<sup>18</sup>
50. In some cases, State interference does not occur when an association is formed, but while an association is carrying out its activities. Often, restrictions occur when authorities are faced with minority or dissenting views, or even when authorities fear being held accountable for their failure to respect human rights. In Zimbabwe, the offices of the Election Support Network, a coalition of 31 non-governmental organizations formed in 2000 to promote free and fair elections, were arbitrarily searched, on the grounds that the organization allegedly had “subversive material, documents, gadgets or recordings and had contravened the Immigration Act”. These searches have been perceived by civil society actors as an attempt to intimidate and silence their voices in the context of the 2013 referendum and elections.
51. *It is disturbing that in the context of elections, some States resort to intimidation, harassment, civil and criminal defamation, or threats against associations’ leaders who aim to express their opinions, grievances and aspirations. The Special Rapporteur expresses grave concerns about the following situations where international human rights norms and standards related to freedom of association were violated.* In Malaysia, one of the leaders of the Coalition for Fair and Free Elections who has monitored the 2013 elections in the country, had been, on various occasions, the target of severe and sustained acts of harassment, intimidation and smear campaign describing her as “an enemy who tried to smear the nation’s

<sup>18</sup> Human Rights Committee, *Boris Zvozskov et al v. Belarus* (2001), CCPR/C/88/D/1039/2001, para. 7.2.

name”. In Nicaragua, human rights defenders active in associations, who expressed concerns over a decision of the Constitutional Court allowing for the re-election of the President were reportedly subjected to death threats, assaults and acts of intimidation. In Rwanda, a regional umbrella organization working on human rights issues in the country reportedly experienced threats and intimidation after it published a controversial report on legislative elections.

52. In other cases, civic activists faced arbitrary detention and long prison terms after unfair trials. In Belarus, where multiple home and office raids, arrests, trials and detention of numerous human rights defenders active in civic associations took place as a result of their legitimate human rights activities during the presidential elections in December 2010, including the sentencing of the Chairperson of the Human Rights Centre “Viasna” to four and one-half years in detention. In the Islamic Republic of Iran, a prominent lawyer was sentenced in 2011 to 11 years of imprisonment, which was later reduced to a six-year prison term, and a 10-year ban on practising as a lawyer for “propaganda against the State”, “collusion and gathering with the aim of acting against national security” and “membership of the Defenders of Human Rights Centre”. The accusations brought against the human rights lawyer were allegedly based on interviews she had had with media in relation to her clients, who had been imprisoned after the June 2009 presidential election in the Islamic Republic of Iran.
53. ***Activities that involve monitoring and observation of the conduct of election processes by international groups may also be subject to undue restrictions. In this context, it is worth recalling that the protection of State sovereignty against external interferences is not listed as a legitimate interest in article 22 of the International Covenant on Civil and Political Rights. The Special Rapporteur underscores the fact that States cannot refer to additional grounds, even those provided by domestic legislation, to restrict the right to freedom of association.*** Hence, restrictive measures imposed under this guise unduly limit associations in their free operations. Governments that exclude independent international observers from electoral processes by enacting legislation to this effect, by making the process of registering as an election monitor burdensome, or by inviting only friendly observation groups that will not be critical in their monitoring, thus diluting or countering any criticism by independent impartial groups, do not guarantee the right to freedom of association. The Special Rapporteur recognizes that elections constitute a significant event in the life of a nation and should be protected from foreign interference. Nevertheless, he also recognizes

the need to establish clear, specific and objective criteria that would enable independent and impartial election observation by all monitors, including from abroad. In this regard, blanket restrictions on international election observers groups are inherently disproportionate and thus incompatible with international law standards.

54. In the run-up to elections or following contested elections, there may also be instances of Governments' blocking funding for civil society organizations, including those with mandates that are closely related to the conduct of elections. For instance, in the run-up to the 2013 elections, the Government of the Bolivarian Republic of Venezuela adopted the law against organized crime and terrorist financing, which restricts funding of "foundations, civic associations, non-profit associations, as well as associations having political ends or groups of individuals who run for elections". The Special Rapporteur, in his second thematic report (A/HRC/23/39), established access to funding for civil society organizations as an integral part of the right to freedom of association. He stated that any constraints on associations' ability to access foreign funding should be necessary in a democratic society and that common justifications offered by States, such as counter-terrorism measures, protection of State sovereignty, enhancement of aid effectiveness, and the improvement of transparency and accountability of civil society, often do not meet this strict standard.
55. Cases of arbitrary termination, suspension or closure of associations as a result of activities carried out in the context of elections are another source of concerns. In early April 2012, the Government of Swaziland deregistered the Trade Union Congress of Swaziland and declared it illegal, after some leaders of the organization called for the boycott of the 2013 elections. Such a drastic decision does not comply with international norms and standards pertaining to freedom of association, which make clear that termination, suspension or closure of associations are only possible by a court judgement based on clear and imminent danger when an association resorts to violence, or aims at the attainment of its objective by violence or by instigating discrimination, hostility or violence, or is aimed at the destruction of the rights and freedoms enshrined in international human rights law.

## **V. Conclusions and Recommendations**

56. **The Special Rapporteur wishes to underscore the fact that electoral periods are a unique moment in the life of a nation to confirm, and even strengthen, democratic principles, such as non-discrimination, gender**

equality, pluralism of views and parity. Democracy is a singular way of allowing for effective popular participation in decision-making processes at both national and local levels. He stresses that electoral periods are such an important time to build democratic, responsive and accountable institutions and that very strict and clear safeguards should be put in place by States to prevent undue interference in public freedoms, in particular in the rights to freedom of peaceful assembly and of association. Further, in times of elections, States should make greater efforts to facilitate and protect the exercise of these core rights, which should be enjoyed by everyone, especially by members of groups at risk. In effect, genuine elections cannot be achieved if the rights to freedom of peaceful assembly and of association are curtailed.

57. The Special Rapporteur is deeply concerned about the increase in human rights violations and abuses in several parts of the world, committed against those who exercise or seek to exercise the rights to freedom of peaceful assembly and of association in the context of elections, which indelibly stain such elections. In the light of this, he wishes to make the following recommendations, which should be read in conjunction with those already formulated in his two thematic reports presented at the Human Rights Council in 2012 (A/HRC/20/27, para. 84-100) and 2013 (A/HRC/23/39, para. 81-83), some of which are reiterated here.
58. The Special Rapporteur calls upon States in times of elections:
  - (a) To recognize that the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems, as they allow for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected;
  - (b) To ensure that the rights to freedom of peaceful assembly and of association are enjoyed by everyone, any registered or unregistered entities, including women, those victims of discrimination because of their sexual orientation and gender identity, youth, persons belonging to minorities, indigenous peoples, non-nationals, including stateless persons, refugees or migrants, and members of religious groups, as well as activists advocating economic, social, and cultural rights;
  - (c) To ensure that no one is criminalized for exercising the rights to freedom of peaceful assembly and of association, nor is subject to threats or use of violence, harassment, persecution, intimidation or reprisals;

- (d) To greater facilitate and protect the exercise of the rights to freedom of peaceful assembly and of association, and in this regard, be particularly vigilant in relation to the specific needs of the aforementioned groups which are at greater risk of attacks and stigmatization of all types;
  - (e) To ensure that an enabling framework is provided for political parties to be formed — regardless of their political ideology — and to enjoy the level playing field, in particular in relation to their ability to access funding, and to exercise their rights to freedom of expression, including through peaceful demonstrations and access to the media; To increase the threshold for imposing legitimate restrictions on the rights to freedom of peaceful assembly and of association, that is, to ensure that the strict test of necessity and proportionality in a democratic society, coupled with the principle of non-discrimination, is made particularly difficult to meet;
  - (f) To ensure that a well detailed and timely written explanation for the imposition of any restriction is provided, and that such restrictions can promptly be the subject of an independent and impartial judicial review;
  - (g) To provide individuals exercising their rights to freedom of peaceful assembly and of association with the protection offered by the right to freedom of expression;
  - (h) To allow unimpeded access to and use of information and communication technology through which the right to freedom of peaceful assembly and of association can be exercised;
  - (i) To ensure that those who violate and/or abuse the rights of individuals to freedom of association and of peaceful assembly are held fully accountable by an independent and democratic oversight body and by the courts of law;
  - (j) To ensure that victims of violations and abuses of the rights to freedom of peaceful assembly and of association have the right to a timely and effective remedy and obtain redress.
59. The Special Rapporteur calls upon national human rights institutions complying with the Paris Principles to play a key role in monitoring and publicly reporting on the fulfilment by the States of the abovementioned recommendations.
60. The Special Rapporteur calls upon election observers to place particular emphasis on the enjoyment of the rights to freedom of peaceful assembly and of association when determining whether an election was genuine.
61. The Special Rapporteur calls upon international and regional human

rights mechanisms, including special procedures, treaty bodies and the universal periodic review, to pay specific attention to the issue of elections as a context where the rights of freedom of peaceful assembly and association are more likely to be curtailed.

62. The Special Rapporteur again encourages the Human Rights Committee to consider developing general comments on articles 21 and 22 of the International Covenant on Civil and Political Rights, with a particular focus on the enjoyment of both rights in the context of elections.
63. The Special Rapporteur calls upon the General Assembly and the Human Rights Council to address thoroughly the issue of human rights violations and abuses in the context of elections.
64. The Special Rapporteur calls upon the diplomatic community and other relevant stakeholders to publicly denounce violations and abuses committed against those exercising or seeking to exercise their rights to freedom of peaceful assembly and of association in the context of elections, and to provide support to these victims.

# Advance Unedited Version

Distr.: General  
30 May 2014  
Original: English

## Human Rights Council

Twenty sixth session

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue**

### Summary

The present report focuses on the realization of the right to freedom of opinion and expression in electoral contexts, paying particular attention to the establishment and enforcement of legal instruments regulating political communications. It starts by detailing the human rights framework applicable to the question of freedom of opinion and expression in political communications and electoral processes. It describes common violations of the right to freedom of opinion and expression in electoral periods. It finally provides recommendations on the alignment of national legal frameworks to the most relevant international human rights standards, emphasizing the importance of promoting pluralism, transparency and accountability.

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## **I. Introduction**

1. The present report focuses on the realization of the right to freedom of opinion and expression in electoral contexts, paying particular attention to the establishment and enforcement of legal instruments regulating political communications.
2. The free flow of ideas is incontestably a core requirement for the promotion of democratic spaces. Ensuring an open space for the multiple voices of politicians, press, minorities or citizens in general is a permanent challenge for entities tasked with overseeing electoral processes. The recognized need to establish and enforce regulations on political campaigning is inevitably accompanied by the concern that, depending on their application, such regulations may be used to obstruct or even impede the natural flow of ideas. How to ensure all voices have a space in the public debate, including newly established groups? How to avoid having the most powerful groups in a society take unfair advantage of their political or economic powers to exclude dissident voices from the debate?
3. A quick overview of recent electoral processes in all regions of the world can easily identify numerous structural, legal and practical barriers which impede the equitable enjoyment of the right to freedom of expression during electoral processes. In some situations politically dominant groups directly attack and intimidate voices of dissent and criticism which are crucial for the promotion of democratic debate – journalists, activists and political leaders are violently attacked, harassed through multiple legal procedures or arbitrarily detained. In others, economic and political imbalances permit some groups to dominate the public debate to a point where divergent ideas are often excluded from public debates. In these very different contexts, freedom of expression can be affected by both the absence of regulations for political communications and campaigning, as well as by the adoption of inadequate norms that disproportionately restrict political communications, and jeopardize public debate.
4. This report will analyze some common challenges in the establishment and enforcement of legal instruments regulating communications in electoral processes. It will begin by describing the human rights framework applicable to the question of freedom of opinion and expression in political communications and electoral processes. It will analyze in more depth the main concerns regarding possible violations of free expression in this context. The Special Rapporteur will then propose some key principles that can guide the establishment and implementation of national legal frameworks regulating political communications.
5. Common concerns relating to the realization of the right to freedom of opinion and expression studied by the Special Rapporteur in his recent reports are all relevant to the regulation of communications during electoral processes;

the responsibility of States to “prohibit” incitement of hatred, hostility, discrimination and violence,<sup>1</sup> for example, is particularly relevant in electoral periods. Unfortunately, one can observe today in all regions of the world, specially during political and economic crises, candidates making use of a language of hatred and hostility while campaigning, targeting, *inter alia*, women, racial, linguistic or religious minorities, homosexuals and foreign migrant workers. The protection of journalists from violence<sup>2</sup> is central to ensuring that the press exercises its crucial role informing the public about candidates, their platforms and the ongoing debates. Unfortunately, attacks against the press often increase during electoral periods. The full realizing of the right to access information,<sup>3</sup> is another crucial element in the promotion of free and fair democratic elections. As further detailed below, informed political debates require transparency, with respect to the conduct of political organizations, the financing and promotion of political campaigns, and the ownership of media groups.

## II. Activities of the Special Rapporteur

6. During the reporting period, the Special Rapporteur continued to participate in national and international events relating to the right to freedom of opinion and expression. In October 2013, he presented his report to the UN General Assembly (A/68/362), in which he addressed the right to access information held by public bodies, emphasizing its relation with the right to truth. In 2013, he also undertook missions to Montenegro from 11 to 17 June, to the former Yugoslav Republic of Macedonia from 18 to 21 June and to Italy, from 11 to 18 November. His preliminary findings on these visits are detailed in the three additional reports to the 27th session of the Human Rights Council.
7. The Special Rapporteur regrets never having received a response from the Government of Indonesia to his repeated requests for a new date to visit the country, after the Government asked for postponing his visit previously scheduled for January 2013. He also expresses disappointment that the Government of Pakistan did not provide a date for his visit to the country, despite having invited the mandate holder to visit in early 2012. The following States had never responded to requests for visits by the Special Rapporteur: Islamic Republic of Iran (visit requested in February 2010); Sri Lanka (visit requested in June 2009 and 2012); Thailand (visit requested in 2012); Uganda (visit requested in May 2011); and the Bolivarian Republic of Venezuela (visit requested in 2003 and in 2009).

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1 A/67/357.

2 A/HRC/20/17

3 A/HRC/68/362

8. The Special Rapporteur attended a number of international events where topics studied in his previous reports were debated. In particular, he contributed to various seminars addressing freedom of expression and privacy in digital communications. In September, he participated in a side event to the 25th Session of the Human Rights Council focusing on this topic. In October, he participated in a hearing at Inter-American Commission on Human Rights on mass surveillance in the Americas and to the Council of Europe Conference of Ministers responsible for Media and Information Society in Belgrade, Serbia. Since November, he participates to a High level panel on the Future of Global Internet Cooperation. This panel gathers representatives of Government, civil society and industry aiming to propose frameworks for Internet cooperation and a roadmap to address Internet governance challenges. In February 2014 he participated in an expert seminar on privacy in the digital age organized in Geneva by Austria, Brazil, Germany, Lichtenstein, Mexico, Norway and Switzerland.
9. For the preparation of this report, the Special Rapporteur reviewed studies on communications in electoral processes. He also organized a sequence of regional expert meetings, gathering electoral authorities, researchers, journalists, activists and representatives of international organizations working on matters related to communications in electoral process in various regions. The consultations took place in: Bangkok, (co-hosted by the Southeast Asian Press Alliance and Forum Asia), Johannesburg (co-hosted by the University of Pretoria), Guatemala City, (co-hosted by Instituto DEMOS), Madrid (co-hosted by Fundación Cultura de Paz and the Complutense University), Rio de Janeiro (co-hosted by the Ford Foundation) and Washington DC (co-hosted by Open Society Foundation).

### **III. Freedom of expression and communication in electoral processes**

10. The right to freedom of opinion and expression is a central pillar of democratic societies; a guarantor of free and fair electoral processes, and meaningful and representative public and political discourse. It is during times of political change that the right to freedom of expression is most essential, ensuring that a well-informed and empowered public is free to exercise their civil and political rights. Providing the conditions for free and open political communication is an essential element of ensuring fair and democratic electoral processes.
11. In the context of elections and political communications, dedicated attention is to be afforded to the free expression rights of main actors: the voters, who depend on the right to freedom of expression to receive full and accurate information, and express their political affiliation without fear; candidates and

- political organizations, who need to exercise their right through campaigning and communicating their political messages freely without interference or attacks; and the media, which relies on the right to freedom of expression to play its essential democratic role of informing the public, scrutinizing political parties and platforms, and provide checks and balances on the electoral process.
12. Common and continuing challenges to the promotion and protection of freedom of expression that persist in all aspects of society – censorship, violence against journalist, speech that incites hatred, discrimination, and political violence – increase in both frequency and severity during electoral processes. Ensuring an open public debate where all the main stakeholders in an electoral process – namely the voters, the political leaders and groups, and the media – can freely share information and opinions is a permanent challenge for democratic societies. In some cases, inadequate regulation of communications can unduly restrict the freedom of the media or of political actors. In other situations, the political debate is dominated by powerful political and economic groups that take advantage of poorly regulated and enforced legal frameworks.
  13. International human rights standards do not provide detailed models for regulating political communications. However, some core principles can be identified: efforts must be deployed to promote the pluralism of the media and ensure a plural political debate, ensure transparency in the promotion and financing of political campaigns, and guarantee accountability and fair enforcement of political regulations to prevent those in power from taking advantage of domestic regulatory regimes to dominate and manipulate public debate.
  14. States must take measures to eliminate the structural, legal and practical barriers to the enjoyment of the right to freedom of expression. At a fundamental, structural level, economic power enables political influence to be concentrated in, and exercised by, small segments of society, undermining the democratic ideal. Those who own and finance media organizations and outlets are often able to use their economic power and influence to enhance the visibility of certain political candidates or groups, and impede the communications and expressions of others. This is particularly the case where national legislative frameworks do not sufficiently provide for free, direct access by political candidates to publicly- or privately-owned media outlets for campaigning purposes. *Even when such provisions are in place, many media organizations are able to use the unequal provision of airtime, partisan editorial commentary, or the facilitation of paid political advertising to promote one political candidate or group over another.* The situation is exacerbated when media ownership is obscured by complex corporate structures and there is no public transparency as to the

corporate and private interests entwined with media coverage. Especially in circumstances in which a State's media ownership is concentrated in only a handful of corporate entities, this can threaten the ability of all political entities to freely and effectively express their positions and platforms, and impede individuals from receiving information about their electoral choices on an equal and impartial basis.

15. Freedom of opinion and expression in electoral processes is also threatened when economic power is exerted over the political process through campaign financing and paid political advertising. Wealthy societal segments and corporate interest lobbies can directly exert political influence through exploiting unregulated political finance structures, and opportunities for paid political advertising. In many States neither the donor nor the recipient is required publicly to disclose financial contributions. Wealthy groups and candidates are also disproportionately advantaged when there are no restrictions in place as to how political campaigns can use and disperse campaign funds.
16. The over- or under-regulation of electoral processes may also threaten the enjoyment of the right to freedom of opinion and expression. Legal barriers to the free flow of communication and expression during electoral processes include thematic restrictions on political expression and discourse (which often include prohibitions against criticism of incumbent politicians or political groups), regulation of the content of print and online media sources, and limitations on protests and demonstrations during electoral processes. Lacunae in legal frameworks also erode free expression and communication in political discourses; failures to articulate regulatory frameworks related to equal direct access to publicly-owned media outlets, polling, campaign financing, and paid political advertising create conditions that may unfairly disadvantage particular political candidates or groups, undermining the equal and free flow of ideas and communications that is an essential prerequisite to a truly democratic electoral process.
17. *In addition to the structural and legal threats to free expression rights in electoral processes, States are also actively restricting the practical enjoyment of the right to freedom of opinion and expression in political communications. Such measures include multiple forms of censorship, such as the restriction to particular websites and social media sites, to sources of political commentary, including local and international media, or even to internet services more broadly; the harassment of the media; violence against and imprisonment of journalists, activists and bloggers; direct attacks on dissident political groups; and measures to impede public demonstrations and other forms of valid political expression. These common violations of freedom of expression rights persist outside electoral processes as*

*well, but are often more frequent or acute during moments of political change or upheaval, and are especially damaging during such times.*

#### **IV. International human rights framework**

18. The right to freedom of opinion and expression, articulated in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, is fundamentally interrelated with article 25 of the Covenant, the right to participation in government through free and fair elections. *During electoral processes and in the context of political communication, the equal and unimpeded exchange of contrasting ideas is a crucial prerequisite to ensuring that the voting public can make informed choices, and thus a basic pillar of any democratic system. In the absence of protections to ensure the freedom to express, communicate, publish and discuss political and electoral issues, genuine and effective political participation cannot be realized.*
19. In its General Comment No. 34 on the right to freedom of opinion and expression,<sup>4</sup> the Human Rights Committee noted:  
“The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.”<sup>5</sup>
20. This finding builds on General Comment 25 on the right to participate in public affairs (article 25 of the ICCPR), which stipulates that States must take positive measures to protect and promote the freedom of expression in the context of political and electoral processes in order to ensure the full realization of article 25.<sup>6</sup> The General Assembly, in its resolution 59/201, declared that freedom of association and peaceful assembly were essential elements of democracy, together with the right to vote and to be elected at genuine periodic free elections, and encouraged the strengthening of political party systems and civil society organizations.
21. ***Both the right to free expression and the right to political participation are enshrined in numerous other regional and international human rights instruments.***<sup>7</sup>

4 United Nations Human Rights Committee (HRC), CCPR General Comment No. 34 : Article 19 (Freedoms of Opinion and Expression), 12 September 2011, CCPR/C/GC/34, .

5 Ibid, at para. 13.

6 United Nations Human Rights Committee (HRC), CCPR General Comment No. 25 : Article 40, 27 August 1996, CCPR/C/21/Rev.1/Add.7, paras 8,12.

7 African Charter on Human and Peoples’ Rights (art. 9), available from <http://www.achpr.org/instruments/achpr/#a9> , the American Convention on Human Rights (art. 13), available from [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf) ; and the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 10), available from [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

*Importantly, their critical relationship and mutual dependency is also born out in a number of human rights texts. In Europe, Article 3, Protocol 1 to the European Convention on Human Rights stipulates that contracting parties must “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”*

The European Court of Human Rights has continually emphasized that the fundamental importance of freedom of political expression rests in large part on the importance of an informed electorate to the functioning of a genuine democracy, and “freedom of political debate is at the very core of the concept of a democratic society”.<sup>8</sup> Free and impartial media are key to ensuring the necessary vibrant political debate that underpins democratic elections and political processes. The Court has noted:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”<sup>9</sup>

22. The press is also recognized as playing a crucial role in informing the public about matters of public interest and acting as a ‘public watchdog’:  
“it is ... incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’”.<sup>10</sup>

*Accordingly, all political parties and candidates should have access to the media in a fair and impartial way. As articulated in the Outcome Document of the Copenhagen Meeting of the Conference on Security and Cooperation in Europe, States must “ensure that the will of the people serves as the basis of the authority of government” by, among other means, ensuring that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory*

8 *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, at para. 42, available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57523>

9 *Castells v. Spain*, Judgment of 23 April 1992, Series A no. 236, para. 43, available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57772>.

10 Ibid. at para. 43; *Thorgeirson v. Iceland*, Judgment of 25 June 1992, Series A no. 239, para. 63, available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57795> ; *The Observer and Guardian v. UK* (Spycatcher case), Judgment of 26 Nov. 1991, Series A no. 216, para. 59(b) available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705>; *The Sunday Times v. UK (II)* (companion Spycatcher case), Judgment of 26 Nov. 1991, Series A no. 217, para. 65, available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57708>.

*basis for all political groupings and individuals wishing to participate in the electoral process.*<sup>11</sup>

23. The Inter-American Court on Human Rights has equally emphasized that free expression rights are the cornerstone for the debate during electoral processes, because they act  
“as an essential instrument for the formation of public opinion among the electorate, strengthen the political contest between the different candidates and parties taking part in the elections, and are an authentic mechanism for analyzing the political platforms proposed by the different candidates.”<sup>12</sup>
24. Accordingly, the Inter-American Court has said, restrictions on political expression during electoral processes undermine the right to freedom of opinion and expression: “everyone must be allowed to question and investigate the competence and suitability of the candidates, and also to disagree with and compare proposals, ideas and opinions, so that the electorate may form its opinion in order to vote.”<sup>13</sup>
25. In a joint statement with the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, the Special Rapporteur reiterated the positions of both the European and Inter- American Courts, emphasising that free and fair elections are possibly only where the electorate is well-informed and has access to pluralistic and sufficient information, and that only a diverse media environment can ensure that all viewpoints and political perspectives are aired during election campaigns.<sup>14</sup>
26. Similar wording is also found in the Windhoek Declaration on Promoting Independent and Pluralistic Media, which recognises that “independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation.”
27. The importance of ensuring access to the media as part of the electoral process is also well-established in a number of regional human rights instruments.

11 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 7.8, available from <http://www.osce.org/odihr/elections/14304?download=true>, reprinted in Appendix I and in 29 Int’l Legal Materials 1305, 1308. See also The Charter of Paris, signed on 21 Nov. 1990 by the CSCE heads of state, endorsing democracy and reaffirming the principles set forth in the Copenhagen Document available from <http://www.osce.org/mc/39516?download=true>; the Document of the Moscow Meeting on the Human Dimension (3 Oct. 1991) available from <http://www.osce.org/odihr/elections/14310?download=true>.

12 Case of Ricardo Canese v. Paraguay. Judgment of 31 August 2004, I/A Court H. R., Series C No. 111. paras. 88-90, available from [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf).

13 Ibid., at para. 90.

14 Organization of American States, *International Mechanisms for Promoting Freedom of Expression*, (2009), available from <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=744&IID=1>.

The South African Development Community Principles and Guidelines on Elections, for example, reiterates that, in the conduct of democratic elections, all political parties should have access to state media (Principle 2.1.5). The same principle is enshrined in the African Charter on Democracy Elections and Governance, article 17 of which recognizes the importance of enabling political candidates and parties access to State-controlled media during elections. The Declaration on Principles of Freedom of Expression in Africa also affirms that “... the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods” (article 6).

29. The need for a vibrant and critical debate, absent any restrictions on forms or content of political expression, has been explored in depth by the European Court on Human Rights, which has emphasized that “[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.”<sup>15</sup> The state authorities may adopt, “in their capacity as guarantors of public order” penalties for defamation that are proportionate to the injury but only where the accusations are “devoid of foundation or formulated in bad faith.”<sup>16</sup> The reference to public order suggests that Government discretion to restrict potentially defamatory statements against the government should be limited to situations in which public order is threatened:

“While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.”<sup>17</sup>

30. United Nations human rights mechanisms have also considered the permissible limitations upon speech in the context of electoral processes. The Committee for the Elimination of Racial Discrimination has noted that “the fundamental right to freedom of expression does not protect the disseminate of ideas of racial superiority or incitement to racial hatred.” In a recent review, the Committee underlined that

“the fundamental right of freedom of expression should not subtract from the principles of equality and non-discrimination as the exercise of the right to freedom of expression carries with it special responsibilities, among which is

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15 Supra note 9, at para. 46.

16 Id.

17 Supra note 9, at para. 42.

the obligation not to disseminate ideas on racial superiority or hatred.”<sup>18</sup>

31. The Committee recommended that the State, inter alia, reinforce the mandate of the Authority which regulates the media to ensure that racist statements are prosecuted and victims granted reparations; ensure that the media do not stigmatize, stereotype or negatively target non-citizens and ethnic minorities; invite the media to strictly respect the Rome Charter in order to avoid racist, discriminatory or biased language; and raise awareness among media professionals of their responsibility not to disseminate prejudice and avoid reporting in a way that stigmatizes communities subject to historical discrimination.
32. Additionally, in another review, it encouraged the State to thoroughly investigate and prosecute, where appropriate, the use during election campaigns of statements by politicians that incite racial hatred against persons of minority ethnic origin.<sup>19</sup>

## **V. Common concerns regarding the right to freedom of opinion and expression in electoral processes**

33. The enjoyment of the right to freedom of opinion and expression in electoral processes can be endangered through numerous overlapping legal and practical State measures. This section identifies some of the primary threats to freedom of opinion and expression as it pertains to political and electoral communication affecting politicians, the press and society at large.

### **A. Direct attacks against journalists, activists and political candidates and groups**

34. Violence against, and harassment of, the press during electoral and political processes remains a common form of impeding the free expression of political ideas in many countries. Throughout his mandate, the Special Rapporteur has received numerous communications alleging serious violence against reporters, journalists, bloggers, TV reporters and writers in the lead up to, during and in the aftermath of elections.<sup>20</sup> Attacks against the media function both as a specific means of deterring targeted journalists from investigating and reporting on a particular issue or candidate, and a means of more generally deterring the media from reporting freely and impartially on political issues. In this context,

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18 United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, (4 April 2012), CERD/C/ITA/CO/16- 18

19 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Austria, Adopted by the Committee at its Eighty-First Session (6-13 August 2012)*, (23 October 2012), CERD/C/AUT/CO/18-20

20 See, for example, A/HRC/14/23.

violence against the media is one of the most destructive forms of free expression violations in electoral processes.

35. In the course of his mandate, the Special Rapporteur has addressed, through communication and public statement, reports of violence against or harassment of journalists in Belarus, where, it was reported that in the lead up to December 2010 presidential elections, journalists had their equipment seized and photographs deleted;<sup>21</sup> and in Iran, where, as at May 2013, 40 journalists had been reportedly imprisoned as a means of silencing free speech and debate ahead of June 2013 elections.<sup>22</sup>
36. *The State is not the only perpetrator of violence against journalists during elections, however it has a permanent responsibility to ensure safety to all journalists in all periods. In some countries, media organizations, independent editors and journalists receive threats and intimidation from militant groups or political parties demanding coverage to their messages. In many cases the State fails to take sufficient measures to protect journalists from such harassment, and responds by fining or otherwise punishing the media for broadcasting messages by banned organizations, despite the media being forced to do so under threat.*<sup>23</sup>
37. *Attacks on journalists, activists and political candidate and groups also occur in the context of measures to limit the enjoyment of the freedoms to associate and assemble during electoral processes.* The prohibition of protests and demonstrations, and the harassment and intimidation of demonstrators during electoral processes remains a common means of impeding the free expression of political ideas and the free conduct of public political debates. Such restrictions may take the form of harsh penalties for protesters who fail to comply with articulated requirements<sup>24</sup>. In some countries, suppression of the right to peacefully assemble in the lead up to elections takes the form of arbitrary arrest of demonstrators. Such actions deter the exercise of free expression and assembly by activists, opposition supporters and civil society groups. Requirements that protests

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21 Communication BLR 1/2010, 22/12/10 JUA.

22 *Iran: UN experts concerned at barring of women presidential candidates and freedom restrictions*, 29 May 2013; available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13373&LangID=E>

23 See, for example, European Union Election Observation Mission, *Final report of the EU Election Observation Mission 2013*, (July 2013) , available from [http://www.eucom.eu/files/pressreleases/english/eu-eom-pakistan-2013-final-report\\_en.pdf](http://www.eucom.eu/files/pressreleases/english/eu-eom-pakistan-2013-final-report_en.pdf).

24 *UN Experts Urge Azerbaijan to Recognize and Enable the Role of Rights Defenders in Run Up To Elections*, (4 October 2013), where in Azerbaijan amendments to the law on freedom of assembly in November 2012 saw the imposition of harsh fines on protesters and introduced a prison sentence of two years available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13829&LangID=E>.

receive prior State approval can also impede the free exercise of rights by creating the conditions for bribery and manipulation.

## **B. Regulatory and legal measures that restrict or undermine freedom of expression**

38. Restrictions on political expression take a variety of forms – from defamation and slander laws, to blanket bans on critical expression relating to incumbent politicians, to the prohibition of whole media sources, outlets and websites – and impact not only the individuals or groups which might run afoul of them, but the media outlets or intermediaries that publish restricted or what is considered to be illegal political expression.
39. *Violations of the right to freedom of expression during electoral processes often take the form of State interference in media content. The adoption of laws to control or regulate political speech immediately before and during elections is an important concern in this regard.* For example, a series of legislative measures in Azerbaijan, including the criminalisation of “online slander or insults”, reportedly had the effect of restraining the role of the media in the lead up to the October 2013 elections.<sup>25</sup> Violations of the right to freedom of expression also arise more broadly when existing laws are selectively interpreted or enforced by the State to crackdown on specific forms of media content. Laws that are overly broad in scope and incorporate insufficient accountability mechanisms and protections against abuse are vulnerable to selective interpretation and enforcement.
40. *Recent reports testify that States also seek to restrain free expression during elections by prohibiting access to certain media sources and outlets, for example with the blocking of online websites and blogs. Only in 2013, civil society reported restrictions to critical newspapers distribution networks, the blocking of opposition websites and Facebook and the blocking of YouTube in the run up to four different elections.* The Special Rapporteur publicly joined other experts indicating their concerns at reports of harassment of the human rights defenders and attempts to silence media outlets and websites in Malaysia before elections in scheduled to take place in May 2013.<sup>26</sup> Last March 2014, the Special Rapporteur voiced his serious concerns over Government measures taken to restrict access to Youtube and Twitter before elections in Turkey.<sup>27</sup>

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25 Id.

26 *Malaysia: UN Rights Experts Call for the Protection of NGOs Working for Free and Fair Elections*, (7 June 2012), available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12226&LangID=E>.

27 *Turkey: First Twitter, now YouTube- UN Rights Experts Concerned at Attempts to Restrict Access Before Elections*, \*28 March 2014), available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14454&LangID=E>.

### C. Absence of pluralistic political and media environments

41. The effective functioning of a vibrant democratic political system rests on the realization by the State of its responsibility to ensure an environment in which a diverse range of political opinions and ideas can be freely and openly expressed and debated. The realization of the right to freedom of expression during electoral processes thus depends on the promotion of the independence and diversity of media and of the pluralism of political candidates and groups by which political ideas can be tested, analyzed and communicated to the voters.
42. The media play a fundamental and critical role in guaranteeing and facilitating free expression during electoral processes; as the conduit between the voters and their political representatives, the media provide a platform for the transmission of political ideas, educate voters about candidates and their affiliations, and about the election process itself, scrutinize political promises and test their strength and veracity, and ensure accountability in the electoral process by reflecting the mood of the populace, conducting polls, examining election procedures and identifying undue influence in the electoral process. The only way to ensure that each of the essential functions are conducted in an equal and unimpeded manner is to provide the media with an independent space to publish freely, without fear of retribution or attack.
43. *A pluralistic electoral process is also undermined by the unregulated financing of, and spending by, political campaigns. As the Global Commission on Elections, Democracy and Security (a joint initiative of the Kofi Annan Foundation and the International Institute for Democracy and Electoral Assistance) recognized in 2012, “uncontrolled political finance threatens to hollow out democracy and rob it of its unique strengths.”*<sup>28</sup> In many countries, the absence of regulations controlling campaign financing and spending creates the conditions for wealthy individuals and groups to exert influence and power over political candidates and groups, and provides an unequal advantage to wealthy political participants. Furthermore, groups of organized criminals are able to exploit unregulated and unenforced political financing regimes to buy political influence, and even protection.
44. Unregulated campaign financing practices have recently been recognized by some authorities as a key contributor to political corruption.<sup>29</sup> Countries

28 Global Commission on Elections, Democracy, and Security, *Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide*, (September 2012), p3., available from <http://www.idea.int/publications/deepening-democracy/loader.cfm?csModule=security/getfile&pageid=54594>.

29 See, for example, Dr. Ngozi Okonjo-Iweala. “Don’t Trivialise Corruption, Tackle It – Dr. Ngozi Okonjo-Iweala at TEDxEuston” 19 Jan 2014, available from: <http://www.modernghana.com/news/516652/1/dont-trivialise-corruption-tackle-it-dr-ngozi-okon.html>

such as Switzerland and Sweden have received criticism for the absence of national regulation of political financing, and political party financing systems in Denmark, Germany and the United Kingdom have also been called into question by transparency advocates.<sup>30</sup> The Council of Europe Group of States against Corruption evaluations on Andorra, Denmark and Malta<sup>31</sup> identified as a concern the legal gaps allowing anonymous party and campaign financing in contravention of its transparency recommendations.

45. A lack of laws regulating political financing and requiring full disclosure of information on the functioning of political organizations can also raise the suggestion or appearance of corruption, causing public mistrust in the political process. Research shows that in the vast majority of European countries, more than 50 per cent of people believe political parties to be ‘corrupt’ or ‘extremely corrupt’ because of illicit financing practices. Perception of widespread political corruption as a result of the failure to regulate political financing often precipitate demonstrations and unrest in the lead up to elections.<sup>32</sup>

## **VI. Towards a legal framework that protects freedom of expression in electoral processes**

46. The State has a duty to provide a regulatory environment that facilitates a diverse range of political positions and ensures that voters have access to comprehensive, accurate and reliable information about all aspects of the electoral process. This may require the imposition of regulations that stipulate restrictions on campaigning, advertising, polling, spending and financing. Such restrictions must be designed to achieve the objective of providing a pluralistic and fair playing field upon which political groups can communicate their ideas, and must have at their heart the protection and promotion of freedom of opinion and expression.
47. This section attempts to canvass in broad terms the pillars of an equitable legal framework that would ensure the protection of the freedom of opinion and expression during electoral processes. It recognizes, however, that a plurality of political systems exists and does not attempt to prescribe, in absolute terms,

30 Transparency International, “Money, Politics, Power: Corruption Risks in Europe,” (2011), available from <http://www.transparency.org/enis/report>, p 13.

31 Council of Europe Groups of States Against Corruption, *Interim Compliance Report on Denmark* (14-16 May 2012 ), available from [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2012\)11\\_Interim\\_Denmark\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2012)11_Interim_Denmark_EN.pdf); Council of Europe Group of States Against Corruption, *Second Compliance Report on Malta*, (2-6 December 2013) available from [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2013\)22\\_Second\\_Malta\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2013)22_Second_Malta_EN.pdf) ; Council of Europe Group of States Against Corruption, *Compliance Report on Andorra* (14- 18 October 2013) available from [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2013\)12\\_Andorra\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2013)12_Andorra_EN.pdf).

32 Supra note 30.

how States should design their legal systems. It simply suggests the types of regulatory frameworks that are most conducive to protecting human rights in the context of political communications and electoral processes.

## **A. Promoting plurality**

### **i. Political campaigning and expression**

48. States should take general measures to encourage a diverse and pluralistic political process that is hospitable to ideologies from across the political spectrum. An important element of achieving this is ensuring that all political candidates parties have access to the media for campaigning and advertising purposes. Public campaigning is the central means that political parties and candidates employ to express their opinions and platforms, and to communicate their message to the voters. Political campaigns generally employ a diverse range of mediums, from pamphlets, posters and direct mail outs, to address through radio, television, online and print media. Access by all political candidates and parties to all campaigning mediums is an essential to ensuring an equal and pluralistic electoral process that facilitates the free flow of information and ideas.
49. *One important element of political campaigning during electoral processes is the provision to all parties and candidates of direct access to media outlets for allotted times. While the media plays an essential role in facilitating political campaigns and providing scrutiny and analysis of political positions, direct access to broadcast media enables parties to speak in their own voice. The vast majority of established democracies have put in place regulations stipulating that all candidates are able to directly access publicly-owned broadcast media services for specific times on an equal basis. In some cases, these provisions also extend to access to privately-owned broadcasters. The order of direct access is generally determined either on the basis of the previous performance of a given party or candidate, or through a ballot process. Media guidelines issued by the UN Transitional Authority in Cambodia (UNTAC)<sup>33</sup> include the principle of fair access to media outlets for all parties contesting the election, noting that it was a central concern.<sup>34</sup>*
50. *It is essential to the protection of freedom of expression during electoral processes that political parties and candidates are free to express ideas and communicate about any issue that they see fit. Unregulated expression and access to information are at their most crucial during times of political change, and any restrictions upon political expression can seriously threaten the democratic process. The European Court of Human Rights has previously spoken out against restraints on political*

33 UN Transitional Authority in Cambodia (UNTAC), Media Guidelines for Cambodia (1992), pream. para. 4

34 Id. See especially Guidelines 2, 4, 7-10.

*speech, particularly prior restraints.*<sup>35</sup> Accordingly, campaign speech should not be regulated or restrained, unless it falls within a well-recognized understanding of restricted expression recognized under international human rights law. The United Nations Technical Team on the Malawi Referendum has noted that in order to ensure free political expression during electoral processes any restrictions on expression must be exceptional, and “should not be so vague or broadly defined as to leave an overly wide margin of discretion to the authorities responsible for enforcing the law, since uncertainty over legal boundaries has a dampening effect on the exercise of this right [to freedom of expression] and may encourage discrimination in ... [the restrictions’] application.”<sup>36</sup>

51. Another way that political parties and candidates seek to express their platforms and garner votes is by paying for political advertising. The regulation of political advertising is a contentious issue. Whereas political advertising can be an important means by which political parties, particularly those with less public visibility, can educate voters, unlimited and unregulated paid political advertising increases dependence on campaign finance and gives an unfair advantage to well-financed political candidates.
52. ***States have taken a variety of approaches to paid political advertising. In some countries paid political advertising is a central pillar of political processes and is not strictly regulated.***<sup>37</sup> Other States, particularly those with a strong history of public broadcasting, have an outright prohibition of paid campaign advertising on radio and television.<sup>38</sup> Some legal frameworks have taken a middle ground, putting in place financial limits on paid advertising spending, paired with rules around equitable distribution of pricing, timing, duration, and scheduling of advertising.<sup>39</sup> In other situations, it is the electoral authority is mandated to allocate electoral publicity channeling public funds to different contenders in proportion to previous elections results, with a basic minimum support assured for new parties.<sup>40</sup>

35 See Supra note 8 at para 42 for an example where the European Court of Human Rights (ECHR) has ruled that, “freedom of political debate is at the very core of the concept a democratic society...”

36 *Report of the UN Technical Team on the Conduct of a Free and Fair Referendum on the Issue of a One Party/Multiparty System in Malawi*, (15-21 Nov. 1992), para. 29.

37 See for an example within the context of the United States, Center for Law and Democracy, “Regulation of Paid Political Advertising: A Survey”, (March 2012), pg 1, available from <http://www.law-democracy.org/wp-content/uploads/2012/03/Elections-and-Broadcasting-Final.pdf>

38 See for an example within the context of the United Kingdom, France, Ireland and Belgium, Center for Law and Democracy, “Regulation of Paid Political Advertising: A Survey”, (March 2012), pg 3, available from <http://www.law-democracy.org/wp-content/uploads/2012/03/Elections-and-Broadcasting-Final.pdf>

39 See for an example within the context of Canada, Poland, and Barbados,, Center for Law and Democracy, “Regulation of Paid Political Advertising: A Survey”, (March 2012), pg 4, available from <http://www.law-democracy.org/wp-content/uploads/2012/03/Elections-and-Broadcasting-Final.pdf>

40 This would be the case of Mexico.

53. *Those who support unregulated paid political advertising often argue that it is an essential guarantor of freedom of expression in political and electoral processes. However, where paid political advertising presents an unfair advantage to certain political parties over others, and increases reliance on campaign financing, it may in create unequal conditions for electoral processes. The European Court of Human Rights has recently recognized this, stating that the prohibition of paid political advertising was a justifiable limitation of the right to freedom of opinion and expression because it could prevent against “powerful financial groups with advantageous access to influential media... obtaining] competitive advantages in the area of paid advertising and thereby curtailing] a free and pluralist debate, of which the State remains the ultimate guarantor.”<sup>41</sup>*
54. As such, States should consider whether unrestricted paid political advertising may destabilize the playing field and impede the equal participation of certain parties or candidates in political campaigns. In all circumstances, paid political advertising should always be identified as such, and should not be disguised as news or editorial coverage.
55. The ability of a political party to generate funds to support the various costs related to political communication and campaigning is an additional determining factor in whether a party is able to participate fully in elections, and thus a central pillar of ensuring plurality in political and electoral processes. A political party may be indirectly prevented from participating fully in an election if it is unable to raise financing through diverse sources. Poorly regulated political finance has the potential to undermine the integrity of elections by enabling individuals or groups to exert undue influence on political candidates or parties, and may facilitate vote buying or bribery. Equally, restrictions that limit how a political party may disburse funds raise may also impede full and free participation in political and electoral processes. Unlimited political spending benefits wealthier candidates and parties and undermines political equality.

**ii. Media diversity and independence**

56. *Pluralistic electoral processes depend on the existence of a diverse range of media sources to convey ideas and educate the voters. States have the obligation to guarantee the right to access information and this entails, among other things, promoting the independence and diversity of media.* The media provide a platform for candidates to express their platforms and messages, analyse proposed policies, scrutinize the political process and ensure its integrity, and hold candidates and incumbents to account. A level electoral playing field

41 *Case of Animal Defenders International v The United Kingdom*, (22 April 2013), Application no. 48876/08, at [111], available from <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119244>.

is impossible without a free, pluralistic and unrestricted media. To this end, national legal frameworks should begin from the fundamental premise that the media must be free from political influence and should not be restricted or regulated, particularly during electoral processes. Self-regulation is arguably the most effective means of ensuring that the media live up to their own ethical standards while remaining free from the influence of the State.

57. *However, the media must be encouraged to put in place mechanisms to ensure that all media actors adhere to the highest ethical standards in objective reporting, and guarantee equal coverage of political parties in a way that facilitates broad voter education and ensures all parties along the political spectrum are heard.*
58. *Where media are State-owned, national legal frameworks should ensure that all political parties have access to it and are treated fairly and equitably by it. When paid political advertising is allowed, private media outlets should be required to charge the same rates to all parties and candidates without discrimination.<sup>42</sup> The incumbent government or candidates should not be given preferential or disproportionately large media coverage.*
59. State-owned or public media broadcasters do bear an extra responsibility to ensure that the political platforms of all candidates and parties from across the political spectrum are given coverage. Furthermore, public media sources have an important role in ensuring critical analysis and the availability of countervailing viewpoints. Several national courts have ruled that State-run media have a responsibility to publish replies by Government critics to governments statements on controversial issues.<sup>43</sup> The Supreme Court of India, for example, recognized the right of reply to political statements in the columns of a government-owned publication. The Court held that a public sector agency publishing an in-house journal, owing to its status as an instrument of government, had a duty of fairness to its readers, demanding “that both viewpoints were placed before its readers, however limited be their number, to enable them to draw their own conclusions.”<sup>44</sup> The media guidelines issued by the UN Transitional Authority in Cambodia also stated the duty of balance and impartiality in detail. Guideline 8 provides: “Media outlets should give parties, groups or individuals whose views have been misrepresented or

42 International Electoral Standards *Guidelines for reviewing the legal framework of elections*, International Institute for Democracy and Electoral Assistance, 2002 available from <http://www.idea.int/publications/ies/upload/10.%20Media%20access%20and%20freedom%20of%20expression.pdf>.

43 Article 19, “Guidelines for Election Broadcasting in Transitional Democracies”, (August 1994), available from <http://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf>.

44 *Manubhai Shah v. Life Insurance Corp. of India*, (22 July 1992), 3 SCC 637, available from <http://judis.nic.in/supremecourt/imgst.aspx?filename=12354>.

maligned by a publication or broadcast the “right of response” in the same media outlet.”

60. Any regulation requiring impartiality should only extend to licensed broadcasters, and should not purport to restrict the content of the print or online media sources, which should be available as a means of communicating all political viewpoints. Self-regulation is the most appropriate means of ensuring that the media are able to fulfill their important duty to facilitate the free flow of ideas and communications across the political spectrum. The media must be empowered to publish any and all political communications and campaign speech, including that containing criticism of an incumbent government or candidate.<sup>45</sup> In a broad sense, media should not be made liable for disseminating, without endorsement, unlawful statements, or restrained from publishing such statements; this principle is of particularly importance during electoral processes given the imperative for timely dissemination of information. Imposing liability on media promote self-censorship by privately-owned media and de facto government censorship of government-controlled media.<sup>46</sup>

## **B. Ensuring transparency**

61. Critically, any regulatory framework pertaining to electoral processes must have as a key objective the achievement of transparency in all facets of political life and discourse. A transparent political process is open to scrutiny by the voters and the media, and enables all players in the process to be held accountable, from political candidates, to public broadcasters, to electoral authorities. This is the most effective means of ensuring that opinions and ideas can be freely and fully expressed, communicated, debated and promoted during electoral processes.

### **i. Political financing**

62. *Transparency of political financing is a critical prerequisite of any effective democratic processes, and a key means of ensuring the equitable protection of free expression rights. Political finance may come from either private financing (in the form of individual campaign contributions, or those from the private sector) or public financing (where the government contributes). Increasingly, States are focusing on regulating political finance to ensure transparency and attempt to achieve an equal playing field for political parties.<sup>47</sup> There is a general regulatory*

45 Supra note 34.

46 Supra note 45, at pg 58.

47 Organisation for Economic Co-Operation and Development, “Transparency and Integrity in Political Finance,” 2012 available from <http://www.oecd.org/about/membersandpartners/publicaffairs/Transparency%20and%20Integrity%20in%20Political%20Finance.pdf>.

*trend toward the restriction of private financing and the prohibition of donations from foreign states or companies, public authorities and anonymous persons.* This is particularly the case given the rise of third party financing, where an individual, or more often group or corporate entity, campaigns for or against a political party to which it is ostensibly unrelated.<sup>48</sup> Whereas third party financing can be an important means for private sector groups or civil society organizations to promote their chosen candidates or parties, it can also make it difficult for the voting public to know what interests are exerting influence on particular political parties and candidates.

63. *At the same time, many States are moving towards increased public funding for political parties to promote a level playing field and reduce dependence on private funding. In some countries this takes the form of a direct transfer of money without restrictions upon its use; in others public financing includes free access to specific state services such as transport, media or government property, or tax exemptions on contributions made to political parties.*<sup>49</sup>
64. Transparency and accountability around political financing are key to ensuring fairness and integrity of elections. The Global Commission on Elections, Democracy and Security identified the regulation of uncontrolled, undisclosed or opaque political finance as one of five major challenges that must be overcome to conduct elections with integrity.<sup>50</sup> Increasingly, States are setting limits on how parties may spend their funds in order to reduce the costs of elections and minimize the potential for undue influence of donors on political candidates. Many States also require the disclosure of expenditure reports of parties and candidates in order to promote public scrutiny and informed voting by citizens. Political finance reporting should be comprehensive, timely, available to the public, and subject to stringent sanctions for inadequate disclosure or timeliness.
65. Political finance is a key concern when considering protecting and promoting the freedom of opinion and expression in electoral and political processes. Restraining campaign spending and creating an equal playing field for political parties and candidates is key to ensuring citizens have access to a diverse range of opinions and political choices. At the same time, the provision of financial support to a political party may in itself be an act of political expression. A careful balance must therefore be struck by each State, reflecting local political values and legal frameworks, while at the same time conforming with international human rights norms. This would require, at a minimum, that States ensure that

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48 Id.

49 Id.

50 Supra note 28.

there is independent monitoring and oversight of political financing, and that all efforts are made to ensure that organized crime is prohibited from using campaign financing as a means to gain political influence.

**ii. Media ownership and influence**

66. An essential area of transparency during electoral processes relates to the ownership of and influence exerted over the media. The increasing consolidation of media outlets in the hands of fewer and fewer companies is of serious concern in the context of political communication. Given the critical public service role played by the media, its monopolization undermines the diversity of opinions, raises the risks that information will be controlled or censored, and creates opportunities for bribery, manipulation or exploitation by powerful political or social groups. Furthermore, with increasing frequency national media sources are – in part or in full – foreign owned. While foreign ownership of media outlets does not in itself undermine the ability of media sources to promote freedom of opinion and expression, it obfuscates the influence structures and may create mistrust in the voting public.
67. Transparency of media ownership enables readers, viewers and voters to understand the structures of influence that underpin the campaign, advertising and editorial content that so often determines their political choices. States should find a way, either through regulatory policy or industry-led self-regulation processes, to promote greater transparency in media ownership and influence. The public has a right to know the identities of the corporate entities and individuals that influence the media sources upon which they rely for information during electoral processes. However, transparency of private media ownership should not be used as a means of de facto media ownership or licensing.
68. States should ensure that, in addition to promoting diversity of media ownership and making financing and influence structures transparent, they should educate the public about the importance of understanding how media outlets are financed, and encourage critical thinking about how editorial content is developed and how it might reflect the persuasions or biases of media owners

**C. Advancing accountability**

69. The only way for States to ensure that freedom of opinion and expression is freely enjoyed and protected during electoral processes is to ensure that mechanisms are in place to monitor, record, address and provide redress for violations of free expression rights.
  - i. Redress for attacks against journalists, activists and political candidates**
70. Harassment of, violence, or threats against journalists, bloggers or other members of the media, activists or political candidates or parties must be prohibited by

law and subject to criminal penalties. Equally, as the Human Rights Council recognized in its 2012 resolution on the safety of journalists,<sup>51</sup> States must ensure accountability through the conduct of impartial, speedy and effective investigations into such acts and bring to justice those responsible, as well as ensuring that victims have access to appropriate remedies. Accountability mechanisms are the only way to ensure that such attacks do not occur with impunity, undermining not only the free expression rights of those involved, but the integrity of the electoral process. States should also ensure that legal frameworks protect the rights to peaceful assembly and association during electoral processes, and should eliminate any practical barriers to the conduct of protests and demonstrations.

## ii. Electoral commissions

71. *In many States, electoral commissions are endowed with a range of responsibilities that are an essential guarantee against violations of the right to freedom of expression during electoral processes, including election monitoring, the regulation of political funding, the dissemination of direct access to public broadcasting media, and the monitoring of political speech.* However, electoral commissions are often badly resourced and lack the necessary regulatory mandate and enforcement powers to fulfill their responsibilities and guarantee accountability and transparency in the electoral process. In order to ensure that electoral commissions are integral in a free, fair and accountable democratic process, States should ensure they are given sufficient financial and human resources, and enforcement powers, to carry out their duties effectively and efficiently.

## iii. Polling

72. Opinion polls can be an important source of accountability, by providing information for voters, educating them about the political landscape and contextualizing the electoral process. However, some argue that opinion polls may also operate to influence the voting pattern of electorates on the basis of a small and non-representative segment of society. When opinion polls are conducted by corporate media entities, there are also concerns that they may allow the private sector to exert influence on the outcome of electoral processes.
73. Concerns on the possible manipulation of opinion polls to influence electoral processes lead some States to restrict the dissemination of poll results in short periods leading up to an election, in general the period ranges from 24 to 36 hours. This restriction is sometimes justified by the limited capacity of verification of the methodology used by the polling agency before the election takes place. In order to ensure transparency and avoid misuse of polling some

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51 A/HRC/RES/21/12.

countries have adopted requirements on the public disclosure of the methodology implemented in polling exercises.

74. Exit polling, where voters are surveyed upon exiting a polling booth, are also considered risky when their results are reported contemporaneously with votes being counted. Thus, many countries impede the publication of exit polls until the conclusion of the voting period.

## **VII. Conclusions and Recommendations**

75. Freedom of expression plays a central role in ensuring that political processes are open, free, and fair, thus guaranteeing a functioning and effective democracy. The right to participate in public life cannot be fully realized without ensuring the right to freedom of opinion and expression in all its dimensions. Free elections become impossible if candidates and political groups are unable to freely promote their ideas or if the media cannot operate with safety and independence.
76. During electoral processes, States must ensure that the right to freedom of expression is guaranteed to political candidates and their supporters, opposition groups, political lobbies, and the whole spectrum of media actors, from news media to bloggers, commentators and analysts. Political communications must be unhindered by restrictions that hamper the fluid exchange of opinions, whether such restrictions come in the form of explicit prohibitions of certain political positions, or limitations that indirectly chill the expression of political groups such as controls of media content or on public demonstrations. At the same time, an absence of a regulatory framework to control political financing and spending, or to ensure accountability and redress for rights violations, also undermines the ability of voters, political groups and the media to exercise the right to freedom of expression during electoral processes.
77. The call for an open political debate should not be misunderstood as a call for unregulated political campaigns. The adequate regulation of political communications is crucial to ensure a just and equitable space for public dialogue and access to information. In a democratic society, elections must never be ruled by the market logic with those having greater access to financial support controlling the public debate through their disproportional access to publicity and media.
78. Examples around the world indicate that regulations of political and electoral communications can both enhance and undermine the enjoyment of free expression rights during political processes. Therefore, States must carefully evaluate the impact of each norm and ensure an equitable balance is struck between providing for a structural environment that will enhance freedom of

expression while not hindering the independent role of the media or the content of political expression. To ensure the adequate translation of norms into practice, it is critical that judicial entities and electoral authorities tasked with overseeing respect for the right to freedom of expression in electoral process are totally independent and sufficiently resourced to timely and effectively implement their mandates. States should also take measures to prevent speech that constitutes incitement to hatred, hostility, discrimination and violence.

79. Whereas the international human rights framework does not establish specific prescriptions for national regulations of political and electoral communications, it does provide very clear guiding principles that should frame the establishment, and implementation of all regulations. This report emphasizes that, besides promoting an adequate environment for the work of the media, States should seek to ensure the fulfillment of three key tenants in order to ensure the protection and promotion of the freedom of expression during electoral processes: pluralism, transparency and accountability.
80. In conclusion, the Special Rapporteur provides the following recommendations:
1. **Promote pluralism**
81. In order to secure a diverse and pluralistic political process which is hospitable to candidates and parties from across the political spectrum, States should:
- (a) Remove any regulation of or restriction upon political speech and expression, outside of restrictions that fall within well-recognized understandings of the permissible limitations to expression recognized under international human rights law;
  - (b) Remove any restrictions or regulations that might place the media under political influence or compromise the vital role of the media as public watchdog. Take appropriate action, consistent with relevant human rights standards, to promote media diversity and prevent undue media dominance or concentration.
  - (c) Put in place measures to ensure that all political candidates and parties have direct access to State-owned broadcast media services for specific times on an equal basis, which access is determined either on the basis of the previous performance of a given party or candidate, or through a ballot process, and are treated fairly and equitably by them;
  - (d) Permanently assess the impact of private financing of political communication in the promotion a plural debate. Consider adopting ceilings for donations to political campaigns in order to prevent financial imbalances destabilizing the playing field and disproportionately limiting the participation of certain parties or candidates in political campaigns.

## 2. **Ensure transparency**

82. The obligations to promote the enjoyment of the right to freedom of opinion and expression requires that States guarantee transparency of all aspects of political and electoral processes, and should particularly put in place measures to:
- (a) Enact regulations requiring the submission of periodic financial reports of parties, political organizations and candidates, entailing full disclosure of all resources collected (in monetary form or in kind), including their origin and all expenditure, in order to promote public scrutiny and informed voting by citizens. Political finance reporting should be comprehensive, timely, available to the public, and subject to stringent sanctions for inadequate disclosure or timeliness;
  - (b) Put in place measures to ensure that, in all circumstances, paid political advertising is identified as such, and not disguised as news or editorial coverage, and that the origin of its financial backing is evident;
  - (c) Ensure that the implementation of political financing regulations is overseen, monitored and enforced by electoral authorities, the judiciary, and other independent bodies;
  - (d) Take measures to prevent those involving in criminal activity from using campaign financing as a means to gain political influence.
  - (e) Promote transparency of media ownership making public the identity of their owners, and how it might reflect their persuasions or biases.
  - (f) Ensure that there is sufficient transparency around the means and methodology of opinion polling. Consider limiting the dissemination of polling results between 24 and 36 hours proceeding voting;

## 3. **Ensure accountability**

83. Accountability mechanisms are a crucial means of ensuring that regulatory frameworks are enforced and abuses of power are rectified. Impunity is a root cause for the lack of safety faced by journalists. In the context of promoting free expression during electoral processes, States should:
- (a) Ensure that electoral authorities or independent oversight bodies are given sufficient financial and human resources, and enforcement powers, to carry out their duties effectively making all political entities accountable for irregularities including all forms of abuse of political and economic powers;
  - (b) Guarantee the safety of journalists and media workers. Legislative and policy measures must be adopted to prevent all attacks against journalists and eradicate impunity in episodes of violence and intimidation.
  - (c) Call journalists and media to seek the highest standards of professionalism and ethics through the promotion of self-regulation.

**CENTRE FOR HUMAN RIGHTS**  
Geneva



**PROFESSIONAL TRAINING SERIES No. 2**

# **Human Rights and Elections**

*A Handbook on the  
Legal, Technical and Human Rights Aspects of Elections*



**UNITED NATIONS**  
New York and Geneva, 1994

#### NOTE

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HR/P/PT/2

ISSN 1020-1688

Special emphasis should be given to measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable. In this context, assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance.

*Vienna Declaration and Programme of Action  
(Part II, para. 67)*

## FOREWORD

The United Nations Centre for Human Rights is pleased to offer this handbook on human rights and elections as the second in its series of professional training publications. This publication is unique in its comprehensive presentation of standards and issues relating to the conduct of free and fair elections. As such, we hope that it will prove to be a useful and practical tool for Governments, non-governmental organizations, teachers and individuals involved in elections.

The Centre for Human Rights has been involved in electoral assistance, through its programme of advisory services and technical assistance, since 1990. Since that time, the Centre has provided electoral assistance to Romania (1990-1992), Albania (1991), Lesotho (1991-1993), Eritrea (1992), Angola (1992), Cambodia (1992), Malawi (1992-1993) and South Africa (1993). In addition, the Centre has prepared guidelines for analysis of electoral laws and procedures, developed draft guidelines for human rights assessment of requests for electoral assistance, and carried out a number of public information activities relating to human rights and elections.

The Centre's interest in elections is based upon the realization that elections themselves are human rights events: first, because they give voice to the political will of the people involved; and secondly, because, to be truly free and fair consistent with international standards, they must be conducted in an atmosphere which is respectful of basic human rights. It should be seen as axiomatic that free and fair elections involve far more than ballot boxes, voter registers and campaign posters.

Electoral assistance activities for the Centre represent a single point on a continuum of the democratization process, and the Centre is prepared to follow up its involvement in elections with other forms of assistance which may be crucial to post-electoral democratic consolidation and a sustainable democratization process. Thus, in following up its electoral assistance activities with countries, the Centre takes the opportunity to inform those States of further assistance for democratic transition available under the programme of advisory services and technical assistance.

The Centre enjoys close substantial cooperation with the United Nations Electoral Assistance Unit and the United Nations Development Programme in this area, and its role in electoral assistance has been enhanced by those relationships. Electoral assistance, for the United Nations, is a truly system-wide endeavour, tapping the complementary expertise and capacities of several organs of the United Nations family.

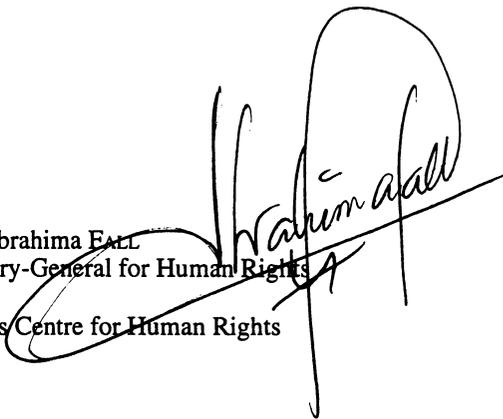
The recent increase in demand for electoral assistance from the United Nations has been reflected both in requests from States themselves and in the recommendations of the World Conference on Human Rights, which, in the Vienna Declaration and Programme of Action, called for assistance to be provided at the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections. The publication of this handbook is one means by which the Centre seeks to respond to this clear demand from the international community.

This handbook was prepared by the staff of the Centre for Human Rights and has benefited from review and commentary by a number of our partners in the electoral field. Useful comments on earlier drafts were received from both the Electoral Assistance Unit and the United Nations Development Programme. In addition, the Centre organized a meeting of experts to review the handbook at Geneva from 28 to 30 April 1993. Experts in human rights and elections from each of the world's regions and from some leading non-governmental organizations in the field offered valuable recommendations which further guided the drafting process. The Centre is accordingly grateful for the input of each of those experts, including Mr. Fakhruddin Ahmed (Bangladesh); Mr. Felipe Gonzalez-Roura (Argentina); Mr. Alioune Badarra

Sene (Senegal); Mr. Mirsolov Sevlieski (Bulgaria); Mr. Anders Johnson (Inter-Parliamentary Union); and Mr. Malamine Kourouma (International Commission of Jurists).

Ibrahima FALL  
Assistant Secretary-General for Human Rights

United Nations Centre for Human Rights

A large, stylized handwritten signature in black ink, which appears to read 'Ibrahima Fall', is written over the typed name and title. The signature is fluid and cursive, with a large loop at the top and a long vertical stroke extending downwards.

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## ABBREVIATIONS

OAU	Organization of African Unity
UNDP	United Nations Development Programme
UNITAR	United Nations Institute for Training and Research

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

## INTERNATIONAL INSTRUMENTS

cited in the present handbook

### ABBREVIATION

*Compilation*    *Human Rights: A Compilation of International Instruments*, vol. I (2 parts), *Universal Instruments* (United Nations publication, Sales No. E.94.XIV.1); vol. II, *Regional Instruments* (to be issued).

### Source

#### UNIVERSAL INSTRUMENTS

##### *International Bill of Human Rights:*

Universal Declaration of Human Rights

General Assembly resolution 217 A (III) of 10 December 1948; *Compilation*, vol. I, p. 1.

International Covenant on Economic, Social and Cultural Rights

General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; *Compilation*, vol. I, p. 8.

International Covenant on Civil and Political Rights

General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; *Compilation*, vol. I, p. 20.

Optional Protocol to the International Covenant on Civil and Political Rights

General Assembly resolution 2200 A (XXI) of 16 December 1966, annex; *Compilation*, vol. I, p. 41.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

General Assembly resolution 44/128 of 15 December 1989, annex; *Compilation*, vol. I, p. 46.

Convention on the Political Rights of Women

General Assembly resolution 640 (VII) of 20 December 1952, annex; *Compilation*, vol. I, p. 164.

Declaration on the Granting of Independence to Colonial Countries and Peoples

General Assembly resolution 1514 (XV) of 14 December 1960; *Compilation*, vol. I, p. 55.

Source

International Convention on the Elimination of All Forms of Racial Discrimination	General Assembly resolution 2106 A (XX) of 21 December 1965, annex; <i>Compilation</i> , vol. I, p. 66.
Declaration on the Elimination of Discrimination against Women	General Assembly resolution 2263 (XXII) of 7 November 1967; <i>Compilation</i> , vol. I, p. 145.
Proclamation of Teheran	<i>Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968</i> (United Nations publication, Sales No. E.68.XIV.2), chap. II; <i>Compilation</i> , vol. I, p. 51.
Declaration on Social Progress and Development	General Assembly resolution 2542 (XXIV) of 11 December 1969; <i>Compilation</i> , vol. I, p. 497.
International Convention on the Suppression and Punishment of the Crime of Apartheid	General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; <i>Compilation</i> , vol. I, p. 80.
Code of Conduct for Law Enforcement Officials	General Assembly resolution 34/169 of 17 December 1979, annex; <i>Compilation</i> , vol. I, p. 312.
Convention on the Elimination of All Forms of Discrimination against Women	General Assembly resolution 34/180 of 18 December 1979, annex; <i>Compilation</i> , vol. I, p. 150.
Vienna Declaration and Programme of Action	Adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF.157/24 (Part I), chap. III).

REGIONAL INSTRUMENTS

Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	United Nations, <i>Treaty Series</i> , vol. 213, p. 221; <i>Compilation</i> , vol. II.
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| Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) | United Nations, <i>Treaty Series</i> , vol. 213, p. 221; <i>Compilation</i> , vol. II.  |
| American Convention on Human Rights (''Pact of San José, Costa Rica'') (San José, 22 November 1969)                 | United Nations, <i>Treaty Series</i> , vol. 1144, p. 123; <i>Compilation</i> , vol. II. |
| African Charter on Human and Peoples' Rights (Nairobi, 26 June 1981)  | OAU, document CAB/LEG/67/3/Rev.5; <i>Compilation</i> , vol. II.                         |

## INTRODUCTION

1. Taking part in the conduct of public affairs is a basic human right increasingly prized by people throughout the world. Humankind, at different times in its history and with varying degrees of success, has sought ways of involving individuals in community decisions. Today, taking part in government is recognized as a basic human right in every region of the world.

2. Universally, the right to take part in government is proclaimed and guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and is recognized in many other treaties and declarations. Regionally, the African, European and American human rights systems have recognized this fundamental right, with reinforcement from meetings such as the Arusha Conference on popular participation in Africa in February 1990. The recently intensified worldwide struggle of people for free and fair elections—often at great personal risk—demonstrates how important this right has become to individuals everywhere. Countries and peoples across the globe have recognized that free and fair elections are a crucial point on the continuum of democratization and an imperative means of giving voice to the will of the people, which is the basis of governmental authority itself.

3. Of course, democracy involves more than periodic elections. In 1991, the Secretary-General of the United Nations stated in this regard:

Elections in and of themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratization of societies and the realization of the right to take part in the governance of one's country as enunciated in major international human rights instruments. It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country.<sup>1</sup>

4. In addition to being a human right in itself, the right of citizens to take part in the conduct of public affairs, particularly through elections, requires, to be exercised meaningfully, the enjoyment of a number of other internationally protected rights. Among these are the rights to freedom of opinion, expression and association,

and the rights to peaceful assembly and freedom from fear and intimidation. All these rights, including the right to take part in government, must be open to equal enjoyment without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Finally, a democratic Government—with the assurance of free and fair elections—is itself an essential element in the full enjoyment of a wide range of human rights. In 1991, the General Assembly of the United Nations stressed that

periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.<sup>2</sup>

5. Furthermore, the requirements of political democracy cannot be isolated from other important factors in the life of a country. Support for democratization processes must go much further. In 1990, the Secretary-General of the United Nations cautioned:

... we cannot be unmindful of the fact that, while democracy is a necessary condition for the recognition of basic human rights, it is not in itself sufficient to ensure the actual enjoyment of those rights. Indeed, genuine political democracy has little chance to survive, and stability is bound to prove elusive, without social justice. Such justice to be consolidated needs the help of those who can rightly encourage it, though too often, they abandon it just after it has been brought about.<sup>3</sup>

6. In order to hold free and fair elections, countries sometimes seek international assistance in fulfilling international human rights standards, and in establishing and strengthening the necessary legal, technical and physical infrastructures. This handbook will explore the basic international human rights principles relating to free and fair elections and the right to take part in government. It will describe how the United Nations, including the Centre for Human Rights, helps countries in applying those principles to the legal, technical and human rights aspects of elections.

<sup>2</sup> General Assembly resolution 46/137 of 17 December 1991, para. 3.

<sup>3</sup> See the statement by the Secretary-General at the Paris meeting of the Conference on Security and Cooperation in Europe, Press Release SG/SM/1155 (19 November 1990).

## I. UNITED NATIONS INVOLVEMENT IN ELECTIONS: AN OVERVIEW

7. The United Nations, through its various subsidiary bodies, has been involved in the conduct of national elections, plebiscites and referenda since its inception. United Nations activity in the field of elections began with the official observation of the Korean elections of 1948. Since then, such activity has continued unabated as a fundamental component of the Organization's decolonization, conflict-resolution and human rights programmes.

8. The beneficiaries of these efforts have included the peoples of some 30 Trust and Non-Self-Governing Territories, from Togoland in 1956 to the Palau Trust Territory of the Pacific Islands in 1990. They have also included independent States involved in international conflicts, and others seeking to resolve internal strife democratically and to broaden human rights. Thus various levels of United Nations involvement have contributed to the free and fair conduct of popular consultations in Namibia (1989), Nicaragua (1990), Haiti (1990), Cambodia (1991-1993), Angola (1992), Romania (1990-1992), Albania (1991), Lesotho (1991-1992), Malawi (1993) and a host of other countries and territories.

9. With the end of the cold war and the emergence of a global trend towards democratization, renewed interest in standards for free and fair elections has become evident. Against this background, the international community has increased its efforts to enhance the effectiveness of the principle of free and fair elections and to provide assistance to countries seeking to conduct them.

10. In order to facilitate the United Nations' increasing involvement in elections, the Secretary-General, pursuant to General Assembly resolution 46/137, designated the Under-Secretary-General, Department of Political Affairs, to be the focal point for electoral assistance. The Electoral Assistance Unit (EAU) was established in order to assist the focal point with the coordination of all United Nations electoral activities. EAU plays a central role in the processing of requests for assistance, and all requests for electoral assistance are channelled through it. When such a request is received, EAU, in conjunction with the United Nations Development Programme (UNDP), the United Nations Centre for Human Rights and other relevant United Nations actors, will usually conduct a needs-assessment mission to determine the type of assistance required and provide support for the initial stages of project development. As soon as a project or mission becomes operational, implementation becomes the full responsibility of the relevant implementing organizations, although EAU support and coordination within the system continues throughout the process.

11. United Nations involvement in elections begins, in most cases, with a formal request by a Government

for assistance. The request will be followed by the fielding of a needs-assessment mission to the country concerned. That mission will carefully examine, in consultation with the Government, political parties, non-governmental organizations and others, all relevant infrastructural, legal, political, material, financial and human rights needs associated with the conduct of elections. The report emanating from the mission will form the basis for United Nations involvement.

12. The varying levels of United Nations involvement in elections can be divided into several categories.<sup>4</sup> The first is United Nations organization and conduct of elections. In this situation, the United Nations organizes virtually every aspect of the electoral process. The second category is United Nations supervision of elections. This includes the certification of a Special Representative of the Secretary-General confirming the validity of certain crucial aspects of the electoral process. The third type of United Nations involvement is a verification mission in which the electoral process is organized and administered by a national organ and the United Nations is asked to give its opinion as to the freedom and fairness of the electoral process.

13. These three types of United Nations involvement are usually undertaken in the context of large-scale peace-keeping missions. All are undertaken only in exceptional circumstances which meet certain strict criteria for United Nations involvement. In particular, all the following five elements must be present:

- (a) A formal request has been received from the State concerned;
- (b) Broad public support exists for United Nations involvement;
- (c) Sufficient advance time remains for comprehensive United Nations involvement;
- (d) There exists a clear international dimension to the situation;
- (e) A favourable decision has been rendered by an authoritative body of the United Nations (i.e. the General Assembly or the Security Council).<sup>5</sup>

14. In cases where some of these criteria have not been fulfilled, especially in cases where the missing criterion is the absence of sufficient lead time to undertake a comprehensive mission, the United Nations may decide to respond in one of two ways. The first is to organize a mission to follow the electoral process closely and report to the Secretary-General on its results. In some cases, the Centre for Human Rights or EAU may

<sup>4</sup> See the report of the Secretary-General, A/47/668 and Corr.1, para. 63.

<sup>5</sup> *Ibid.*, para. 53.

provide specialized staff to assist in the mission. The second response is to coordinate and support international observers affiliated with other organizations. Neither of these responses can be categorized as a comprehensive supervisory mission and they do not include any express pronouncement on the freedom and fairness of the electoral process. They do, however, provide a certain level of United Nations presence that can strengthen public confidence in the electoral process and enhance the quality of the electoral exercise.<sup>6</sup>

15. Another type of United Nations involvement is technical assistance with the material, infrastructural, legal and human rights aspects of elections. The provision of technical assistance clearly falls within the existing mandates of UNDP, the Centre for Human Rights and the United Nations Department for Development Support and Management Services. As a result, no new mandate is required for cases involving exclusively technical assistance. Advisory services and technical assistance in the legal, technical and human rights aspects of democratic elections do not include any United Nations involvement in the conduct of elections, nor do they have an observation component. As such, they can often be granted swiftly at a Government's request, without the need for consideration by a political decision-making body of the United Nations.

16. Thus UNDP, the Centre for Human Rights and the United Nations Department for Development Support and Management Services provide advice and assistance on a wide variety of electoral matters, includ-

ing advice on crucial issues of human rights, organization of registration processes, identification of citizens through more adequate documentation, computerization of electoral rolls, strengthening of the operation of electoral administration, establishment of institutions for handling adjudications and grievances, electronic electoral data processing, vote-counting technologies, legal and logistic assistance, civic and voter education, radio communications and public information. Finally, if needed, large-scale technical cooperation programmes can be implemented for these purposes.

17. United Nations human rights standards relating to elections are broad in nature and thus may be achieved through a wide variety of political systems. United Nations electoral assistance does not seek to impose any given political model. Rather, it is based upon a realization that there is no single political system or electoral methodology which is appropriate for all peoples and States. While comparative examples provide useful guidance for the construction of democratic institutions that both respond to domestic concerns and conform to international human rights norms, the best formulation for each jurisdiction will ultimately be that shaped by the particular needs, aspirations and historical realities of the people involved, taken within the framework of international standards.

18. Finally, United Nations activity in these areas is conducted in conformity with the basic principles of the sovereign equality of States and respect for their territorial integrity and political independence, as enunciated in the Charter of the United Nations. Accordingly, assistance activities are carried out only where requested by the national authorities and supported by the people of the country concerned.

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<sup>6</sup> Ibid., paras. 61-62.

## II. UNITED NATIONS HUMAN RIGHTS STANDARDS REGARDING ELECTIONS IN GENERAL

### A. Basic standards

19. International standards on elections involve three central rights: the right to take part in government; the right to vote and to be elected; and the right to equal access to public service. The Universal Declaration of Human Rights further states that the will of the people shall be the basis of the authority of government. The relevant standards read as follows:

#### Universal Declaration of Human Rights

##### Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### International Covenant on Civil and Political Rights

##### Article 25

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

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

20. Annex I to this handbook sets out the texts of the basic international human rights standards relating to elections.

21. United Nations human rights bodies have given more precision to these international norms. In 1962, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted the Draft General Principles on Freedom and Non-discrimination on the Matter of Political Rights,<sup>7</sup> which shed some light on the meaning of the terms used in the Universal Declaration. Most recently, in 1989, the Commission on Human Rights adopted a Framework for Future Efforts at Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.<sup>8</sup>

<sup>7</sup> See annex II below.

<sup>8</sup> See annex III below.

### B. Non-discrimination

22. Both the Universal Declaration of Human Rights (art. 2) and the International Covenant on Civil and Political Rights (art. 2) provide that the enjoyment of the rights listed shall be without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

23. Other international declarations and treaties provide for the equal enjoyment by women of these rights, and outlaw discrimination on the basis of race.<sup>9</sup>

### C. Self-determination

24. The notion of democratic elections may be said to be rooted in the fundamental concept of self-determination. This basic right is recognized in the Charter of the United Nations (Art. 1, para. 2) and in article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Charter further emphasizes the importance of self-determination in regard to Non-Self-Governing and Trust Territories (Arts. 73 (b) and 76 (b)). Thus, while elections are not the sole means that peoples have employed in the expression and exercise of their right to self-determination, their historical role in that regard is clear.

### D. Political participation

25. A number of international instruments, while not specifically mentioning elections, do reflect the principal concerns underlying the concept of democratic elections. These are expressed variously as the right of peoples freely to determine their political status;<sup>10</sup> the right of all elements of society to active participation in defining and achieving development goals;<sup>11</sup> and the right of all people to participate in the political life of their country.<sup>12</sup> The role of these rights in the achieve-

<sup>9</sup> See annex I.B below.

<sup>10</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, art. 2; International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, common art. 1.

<sup>11</sup> Declaration on Social Progress and Development, art. 5 (c).

<sup>12</sup> This right of participation is enshrined in the Universal Declaration of Human Rights and in the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. It is repeated, in essence, in article 5 of the Proclamation of Teheran; article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination; article II (c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid; and article 7 of the Convention on the Elimination of All Forms of Discrimination against Women.

ment of independence by colonial countries is framed in the Declaration on the Granting of Independence to Colonial Countries and Peoples (art. 5), which provides that the freely expressed will and desire of the people shall guide the transfer of governmental power to them.<sup>13</sup>

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<sup>13</sup> Excerpts from the relevant international instruments appear in annex I below.

#### **E. Other basic human rights**

26. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other international human rights instruments protect a number of basic human rights the enjoyment of which is crucial to a meaningful electoral process. Of particular importance for periods of elections are freedom of expression, of information, of assembly, of association and of movement, as well as general freedom from intimidation. Each of these is addressed in chapter III below.

### III. INTERNATIONAL CRITERIA REVIEWED IN DETAIL

27. International human rights standards contain a number of fundamental criteria for free and fair elections. This chapter will review those criteria in detail.

#### A. Free elections

##### 1. *The will of the people*

28. The Universal Declaration of Human Rights provides that everyone has the right to take part in the government of his country, directly or through *freely chosen* representatives (art. 21). The International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights state that, by virtue of their right to self-determination, all peoples have the right *freely* to determine their political status (common art. 1). This right is echoed in the Declaration on the Granting of Independence to Colonial Countries and Peoples (art. 5), which also provides that the *freely* expressed will and desire of the people is to guide the transfer of power to them.

29. The Charter of the United Nations reflects identical concerns, particularly in regard to Trust and Non-Self-Governing Territories. The Charter mandates assistance to peoples in Non-Self-Governing Territories in the development of *free* political institutions (Art. 73 (b)). As regards Trust Territories, the Charter established as a basic objective of the Trusteeship System the promotion of self-government in such Territories, based, *inter alia*, upon the *freely* expressed wishes of the peoples concerned (Art. 76 (b)). While expressly addressing Trust and Non-Self-Governing Territories, these notions of freedom have survived as guiding principles in the work of the Organization in the field of elections, which is now principally directed to assisting independent States.

##### 2. *Assuring freedom*

30. International instruments for the promotion and protection of human rights within the United Nations system are thus replete with admonitions that popular political participation must be “free”. While such instruments do not (indeed, could not) describe a particular methodology for ensuring such freedom, its essence is clear. To be free, participation in elections must be conducted in an atmosphere characterized by the absence of intimidation and the presence of a wide range of fundamental human rights. To that end, obstacles to full participation must be removed and the citizenry must be confident that no personal harm will befall them as a result of their participation. The particular formula for assuring such an atmosphere is set out, article by article, in the International Bill of Human Rights.

##### 3. *Prerequisite rights*

31. While each of the rights enunciated in the Universal Declaration, and elaborated upon in the two International Covenants, will contribute to the required atmosphere, some of those rights take on additional importance for election purposes. Worthy of individual mention in this regard are the rights to free opinion, free expression, information, assembly and association, independent judicial procedures, and protection from discrimination. Political propaganda, voter education activities, political meetings and rallies, and partisan organizations are all common elements of the electoral process, and each must operate without unreasonable interference for the conduct of elections to be free.

32. Similarly, judicial procedures must be insulated from corruption and partisan influence if they are to accommodate the necessary electoral functions of hearing petitions, objections and complaints. Furthermore, elections cannot be fair if equal participation is not assured through non-discriminatory measures. Finally, laws in force which might have the effect of discouraging political participation should be repealed or suspended. The prevailing atmosphere should be one of respect for human rights and fundamental freedoms, and should be characterized by an absence of intimidating factors. Respect for a wide range of human rights, as enumerated in the Universal Declaration and the two International Covenants, is crucial to the conduct of free and fair elections.

##### (a) *Freedom of opinion*

33. The rights to free opinion, free expression and information are protected by article 19 of the International Covenant on Civil and Political Rights, which reads:

###### *Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

34. The right to freedom of opinion is guaranteed in paragraph 1 of article 19. This right is absolute and cannot be restricted or interfered with in any manner.<sup>14</sup> The unconditional freedom to hold a political opinion is imperative in the context of elections, since the authentic assertion of popular will is impossible in an environment where such freedom is absent or restricted in any way.

(b) *Freedom of expression and information*

35. The rights to freedom of expression and information are guaranteed in paragraph 2 of article 19. In terms of content, every form of subjective idea or opinion capable of transmission is protected by this article. Furthermore, while the scope of the article is not confined to one medium of expression (it includes cultural, artistic and other forms of expression), its importance for political expression should be evident.<sup>15</sup> The electoral process is a mechanism whose very purpose is the expression of the political will of the people. The right to express partisan ideas must, therefore, be firmly guarded during election periods.

36. The right to freedom of expression is, however, partially limited by paragraph 3 of article 19. Nevertheless, in order to avail itself of the limiting factors enumerated in paragraph 3, a State cannot merely assert that it was necessary to restrict freedom of expression for reasons of national security or for any of the other specified reasons.<sup>16</sup> In other words, the limitations were not included in the article to provide States with an excuse for placing restrictions upon free expression. Any impediment to free expression must be provided by law and be necessary in order to protect one of the purposes cited in the article. In reviewing such cases, the Human Rights Committee has held that a State under review must provide concrete evidence, including details of alleged charges and copies of court proceedings, that there was indeed a genuine and serious threat to national security or public order.<sup>17</sup> Limitations on a State's ability to avail itself of paragraph 3 are of paramount importance in the context of elections, where the dissemination of all information must be permitted to the maximum extent possible in order to ensure that the electorate is fully informed. Without a well-informed electorate, it is impossible to guarantee that elections genuinely reflect the will of the people.

<sup>14</sup> See United Nations Centre for Human Rights and UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (Sales No. E.91.XIV.1), p. 109, commentary on article 19 of the International Covenant on Civil and Political Rights.

<sup>15</sup> See the decision of the Human Rights Committee in *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (359/1989 and 385/1989) (CCPR/C/47/D/359/1989 and 385/1989/Rev.1).

<sup>16</sup> See *Alba Piarrarola v. Uruguay* (44/1979), *Human Rights Committee, Selected Decisions under the Optional Protocol, International Covenant on Civil and Political Rights (Second to Sixteenth Sessions)* (United Nations publication, Sales No. E.84.XIV.2) (hereinafter referred to as *Selected Decisions . . .*, vol. 1), p. 79, para. 15.

<sup>17</sup> *Ibid.*

37. With regard to protection of public morals, States are afforded a bigger margin of discretion. This is due to the absence of any universally applicable common standard.<sup>18</sup> However, this should not pose a threat during election periods, since peaceful political participation, in any fair reading, cannot be said to jeopardize public morals.

38. Especially important, however, is a State's increased power to regulate expression when the activity or expression in question seeks to destroy other rights recognized in the International Covenant on Civil and Political Rights.<sup>19</sup> For example, it is permissible for States to regulate speech advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>20</sup> It is similarly permissible for States to regulate the activities of political parties whose policies conflict with any of the human rights enumerated in the Covenant.<sup>21</sup> Restraints upon activities of this nature are, in fact, vital during an election period in order to ensure that the political environment is free of any forces that may seek to intimidate the electorate or any political actors, or to violate the fundamental rights of any group.

39. In short, unless all persons feel free to express themselves and are, in fact, able to disseminate, without fear, all legitimate political information into the national dialogue, there can be no guarantee that elections are a true manifestation of the will of the people.

40. The requirements of freedom of expression and information will, of course, have important implications for fair media access and responsible media use as well. These implications are discussed in section D.5 (An informed choice) and chapter IV, section I (Media access and regulation), below.

(c) *Freedom of assembly*

41. The right of peaceful assembly is guaranteed by article 21 of the International Covenant on Civil and Political Rights, which reads:

*Article 21*

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

<sup>18</sup> See *Leo Hertzberg et al. v. Finland* (61/1979), *Selected Decisions . . .*, vol. 1, p. 124.

<sup>19</sup> See article 5, para. 1, of the Covenant.

<sup>20</sup> Article 20, para. 2, of the International Covenant on Civil and Political Rights requires that any expression of this nature be prohibited by law. See *J. R. T. and the W. G. Party v. Canada* (104/1981), *Selected Decisions of the Human Rights Committee under the Optional Protocol, International Covenant on Civil and Political Rights, Volume 2, Seventeenth to Thirty-second Sessions (October 1982-April 1988)* (United Nations publication, Sales No. E.89.XIV.1) (hereinafter referred to as *Selected Decisions . . .*, vol. 2), p. 25.

<sup>21</sup> See *M. A. v. Italy* (117/1981), *Selected Decisions . . .*, vol. 2, p. 31.

42. In order to merit the protection of article 21, an assembly must be peaceful. As long as an assembly is conducted in a non-violent manner, it may be disrupted only in accordance with the strict limitations cited in the article. Once again, there must be a genuine need in order for a State to avail itself of the permissible restrictions. In addition, the restrictions are allowed only if they are "in conformity" with the law. In other words, no agent of the State may arbitrarily interfere with a peaceful assembly. Rather, he must be authorized by law to do so, and the laws in question must respect the international standards set out above.

43. Any restrictions on the right of assembly may not go beyond the need to protect the public interests listed and the least restrictive means must be employed.<sup>22</sup> Furthermore, it should be noted that State authorities have a duty to protect the demonstrators themselves. The right of assembly must be respected, since public demonstrations and political rallies are an integral part of the election process and provide an effective mechanism for the public dissemination of political information.

(d) *Freedom of association*

44. Article 22 of the International Covenant on Civil and Political Rights guarantees the right to freedom of association with others. This right has a broad scope and clearly includes the right to form and participate in political organizations. The right to freedom of association is very closely related to the right to freedom of assembly recognized in article 21 of the Covenant. Accordingly, paragraph 2 of article 22 permits the same categories of limitations as do articles 19 and 21 (national security, public safety, public order (*ordre public*), the protection of public health or morals, or the protection of the rights and freedoms of others). Article 22 also requires procedural safeguards similar to those required in article 21, namely that any restrictions be prescribed by law and be necessary in a democratic society for the protection of public interests.<sup>23</sup>

45. In addition, the scope of article 22 is limited by article 5.<sup>24</sup> In other words, the right to freedom of association cannot be interpreted as including any activity that would infringe upon any of the other rights cited in the Covenant. As with the right to freedom of assembly, it is vital that the right to freedom of association be respected, since the ability to form and join political

<sup>22</sup> See *Manual on Human Rights Reporting* . . . (see footnote 14 above), pp. 110-111, commentary on article 21 of the International Covenant on Civil and Political Rights.

<sup>23</sup> *Ibid.*, p. 111, commentary on article 22 of the International Covenant on Civil and Political Rights.

<sup>24</sup> Article 5, para. 1, of the Covenant reads:

"1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

See *M. A. v. Italy* (117/1981), *Selected Decisions* . . . , vol. 2, p. 33, para. 13.3.

organizations is one of the most important means by which people can participate in the democratic process.

(e) *Independent judiciary*

46. Related to the protection of these prerequisite rights is the importance of a fully functioning, independent judiciary. The judiciary is the principal national body charged with the protection of the rule of law, both during and between election periods. Additionally, in order to ensure the existence of effective avenues through which people can express objections and complaints regarding the election process, it is necessary to guarantee a judiciary that is totally unconstrained by any partisan influence or control. The following are some of the basic principles on the independence of the judiciary:

(a) Judicial independence must be guaranteed in the Constitution or other law of the country;

(b) Judicial impartiality must be guaranteed without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect;

(c) The judiciary must have exclusive authority to determine competence to adjudicate;

(d) Judicial decisions shall not be subject to revision. This principle should be without prejudice to judicial review of lower court decisions and mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law;

(e) The judiciary must be entitled and required to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected;

(f) States are required to provide adequate resources to enable proper functioning of the judiciary.<sup>25</sup>

47. These principles provide a safety mechanism ensuring that the rule of law, rather than any politician or external body, controls the conduct of elections. A judiciary functioning under these principles serves both the important cause of peaceful dispute resolution and that of protecting the process from bias or fraud. The judicial role, of course, complements, and does not replace, the function of independent electoral bodies.

(f) *Principle of non-discrimination*

48. Finally, the principle of non-discrimination must be respected so that all persons are ensured equal access to participation in the election process. The right to freedom from discrimination is guaranteed by the Universal Declaration of Human Rights (arts. 2 and 7). The right is further defined by articles 2 (1), 3 and 26 of the International Covenant on Civil and Political Rights, which read:

<sup>25</sup> See the Basic Principles on the Independence of the Judiciary, *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2. The Basic Principles were endorsed by the General Assembly in resolutions 40/32 and 40/146 of 29 November and 13 December 1985, respectively.

#### Article 2

1. 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, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

49. Under article 26 of the Covenant, a State has both a positive duty legally to prevent discrimination and a negative duty to refrain from discriminating. There are no enumerated limitations on these principles. Certain types of positive measures are, however, permissible if they are of a remedial nature, implemented in order to correct past discrimination.<sup>26</sup>

50. Impermissible discrimination can never be rationalized even if it is proposed in order to protect national security.<sup>27</sup> In fact, a law that does not meet international standards for equal protection cannot be justified even if the law would be otherwise justifiable were it not for the discriminatory element.<sup>28</sup> In addition, article 26 requires equal protection under the law in all areas where a State party legislates regardless of whether or not the legislation involves areas expressly protected in the Covenant.<sup>29</sup>

51. During an election period, the importance of an atmosphere free from discrimination cannot be overstated. All persons must be afforded equal access to all electoral events. Furthermore, an environment in which discrimination is tolerated facilitates intimidation and

manipulation of the electorate. Neither of these can be permitted if elections are to be free.

#### (g) States of emergency<sup>30</sup>

52. Periods of democratic transition often follow national emergencies, both declared and unofficial. Because emergency or other exceptional legislation restricting fundamental rights will be generally inconsistent with the conduct of free elections, States preparing for elections should carefully review such laws with a view to their repeal or suspension during the campaign period. Indeed, any law in force that restricts ordinary enjoyment of free expression, information, assembly, association, etc. must be seen as incompatible with the conduct of free and fair elections.

53. In every case, States should adopt legislation that carefully and clearly defines the extent to which the constitutional order may be altered in the event of an emergency situation. States of emergency should be declared only in conformity with the law and be authorized only in the event of a public emergency which threatens the life of the nation, where measures compatible with the Constitution and laws in force are plainly inadequate to address the situation.

54. Relevant international standards further require that a state of emergency be officially proclaimed before any exceptional measures are put into place. Any such measures must be strictly required by the exigencies of the situation, and must not be inconsistent with other requirements under international law. Nor may such measures discriminate solely on the basis of race, colour, sex, language, religion or social origin.

55. Additionally, under the international standards, no derogation is permissible with regard to the right to life; the prohibition on torture and other cruel, inhuman or degrading treatment or punishment; the prohibition on slavery, the slave trade, and practices similar to slavery; or the prohibition on imprisonment for failure to fulfil a contractual obligation.

56. Nor, even during states of emergency, may anyone be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed. Nor may a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender must benefit from the lighter penalty.

57. Also non-derogable is the right of everyone to be recognized as a person before the law. Finally, the right of everyone to freedom of thought, conscience and religion may not be derogated from. Each of these prin-

<sup>26</sup> In the *Rubén D. Stalla Costa v. Uruguay* case (198/1985) (*Selected Decisions* . . . , vol. 2, p. 221), the Human Rights Committee held that an act giving preference for public service positions to persons whose employment was terminated by the former military Government did not violate article 25 (c) of the Covenant, because of its remedial nature.

<sup>27</sup> For measures which shall not be considered discriminatory, see Principle XI of the Draft General Principles on Freedom and Non-discrimination in the Matter of Political Rights (see annex II below).

<sup>28</sup> See *S. Aumeeruddy-Ciffra et al. v. Mauritius* (35/1978), *Selected Decisions* . . . , vol. 1, p. 67. This communication involved a Mauritian immigration statute that applied to alien husbands of Mauritian women but not to alien wives of Mauritian men. The Government of Mauritius had tried to justify the statute on national security grounds, basically asserting that alien men were more likely than alien women to be a threat to national security. Violations of articles 2 (1), 3 and 26 of the Covenant were found.

<sup>29</sup> See *S. W. M. Broeks v. the Netherlands* (172/1984), *Selected Decisions* . . . , vol. 2, p. 196; *L. G. Danning v. the Netherlands* (180/1984), *ibid.*, p. 205; and *F. H. Zwaan-de Vries v. the Netherlands* (182/1984), *ibid.*, p. 209.

<sup>30</sup> See the draft guidelines for the development of legislation on states of emergency, submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-third session (E/CN.4/Sub.2/1991/28/Rev.1, annex I).

ciples should find expression in the highest law of the country.

58. In addition, consideration should be given to the informative work of the United Nations Special Rapporteur on human rights and states of emergency. Among the recommendations made by the Special Rapporteur are the following: an independent and fully functioning judiciary must be protected; nothing done pursuant to a state of emergency should diminish the jurisdiction of the courts to review the legality of the state of emergency or their jurisdiction over legal actions to protect any rights whose effectiveness is not affected by the declaration of emergency. Furthermore, existing national legislatures may not be dissolved during a state of emergency and all members of the legislature must enjoy the privileges and immunities necessary for the exercise of their mandates.

59. Also, according to the work of the Special Rapporteur, when the state of emergency has terminated, all possible efforts should be made to restore to those whose rights have been adversely affected by measures taken pursuant to the emergency full enjoyment of their rights, including the right to participate in the political process and compensation for injuries suffered.

60. Moreover, no person should be subject to any form of discrimination by reason of his or her involvement in any activity or expression which was rendered illegal by the state of emergency. In addition, nothing done pursuant to the declaration of emergency should restrict the right of a person who considers that he or she has suffered a violation of a legally recognized right during the state of emergency to seek redress before the courts once the emergency has ceased. This includes the right to a prompt decision on his or her claim. In every case, States should be vigilant to ensure that no lingering negative effects on political participation survive the termination of the state of emergency.

#### 4. Secret ballot

61. A long-recognized mechanism for insulating the voting process from intimidation is that of the secret ballot. The requirement that elections be held by secret ballot originates in the Universal Declaration of Human Rights, which provides that elections "shall be held by secret vote or by equivalent free voting procedures" (art. 21, para. 3). The International Covenant on Civil and Political Rights goes further by requiring, conclusively, that elections shall be held "by secret ballot" (art. 25 (b)). This standard derives from the international community's conviction that, to be truly free, procedures must guarantee that the content of one's vote be absolutely privileged. This requirement involves everything from the design of ballots and voting compartments to legal provisions establishing that no one shall be compelled by any legal or governmental authority to disclose the content of his or her vote.<sup>31</sup> The secrecy of the ballot

<sup>31</sup> See Principle VI of the Draft General Principles on Freedom and Non-discrimination in the Matter of Political Rights (see annex II below).

should also be the focus of voter-education efforts, so that the public will be confident in these protections.

#### 5. The essence of free elections

62. The ultimate indication of whether elections are "free" is the extent to which they facilitate the full expression of the political will of the people concerned. It is, after all, this will which, according to the Universal Declaration (art. 21, para. 3), is the very basis of legitimate governmental authority.

#### B. Fair elections

63. The requirement that elections be fair is also an easily identifiable international norm. Any measures which could have the effect of circumscribing or frustrating the will of the people would, of course, violate the Universal Declaration of Human Rights (art. 21, para. 3) and render elections unfair.

##### 1. Equal, universal and non-discriminatory suffrage

64. The element of fairness has found direct expression in a broad selection of human rights instruments promulgated since the Universal Declaration of Human Rights. Many of these provisions focus on who must be permitted to participate in elections. Accordingly, both the Universal Declaration (arts. 2 and 21 (3)) and the International Covenant on Civil and Political Rights (arts. 2 and 25 (b)) provide that suffrage must be non-discriminatory, equal and universal. Universal suffrage requires that the broadest reasonable pool of voters is guaranteed participatory rights. According to the 1962 Draft General Principles on Freedom and Non-discrimination on the Matter of Political Rights adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>32</sup> when elections or consultations are held by direct vote, there shall be a general election roll, and every eligible national shall be included in that roll (Principle V (c)).

65. Reasonable requirements are usually limited to minimum age, nationality and mental capacity. The work of the Human Rights Committee provides a good deal of guidance on the limits of reasonable restrictions. In the course of their deliberations, as mandated by the International Covenant on Civil and Political Rights, members of the Committee have noted that the following limitations on voting rights are not permissible:

- (a) economic requirements, based on receipt of public assistance, ownership of property, or income;<sup>33</sup>
- (b) excessive residency requirements;<sup>34</sup>
- (c) restrictions on voting by naturalized citizens;<sup>35</sup>

<sup>32</sup> See annex II below.

<sup>33</sup> See CCPR/C/SR.161 (1979) and corrigendum; and CCPR/C/SR.251 (1980) and corrigendum.

<sup>34</sup> The Committee expressly found a seven-year residency requirement to be excessive (see CCPR/C/SR.265 (1981) and corrigendum).

<sup>35</sup> See CCPR/C/SR.597 (1985) and corrigendum.

(d) language requirements;<sup>36</sup>

(e) literacy requirements;<sup>37</sup>

(f) excessive limitations on the voting rights of convicted criminals.<sup>38</sup>

In addition, while limitations are allowed for persons convicted of electoral offences, such restrictions must be limited in time.<sup>39</sup>

## 2. Non-discrimination and positive measures

66. The International Convention on the Elimination of All Forms of Racial Discrimination prohibits any racial discrimination affecting the right to vote or to stand for election, and expressly calls for universal and equal suffrage (art. 5 (c)). Three other instruments prohibit discrimination against women, or their exclusion from the political process. These are the Declaration on the Elimination of Discrimination against Women (art. 4), the Convention on the Elimination of All Forms of Discrimination against Women (art. 7) and the Convention on the Political Rights of Women (arts. I-III). Finally, as regards fair and equal access to participation, the International Convention on the Suppression and Punishment of the Crime of Apartheid prohibits legislative and other measures calculated to prevent a racial group or groups from participation in the political life of the country (art. II (c)).

67. Certain measures of a positive nature taken in relation to elections are not considered discriminatory if they fulfil special requirements. In Principle XI of the 1962 Draft General Principles,<sup>40</sup> the Sub-Commission on Prevention of Discrimination and Protection of Minorities stated that the following measures prescribed by law or regulation would not be considered discriminatory:

(a) reasonable requirements for the exercise of the right to vote or the right of access to elective public office;

(b) reasonable qualifications for appointment to public office which stem from the nature of the duties of the office;

(c) measures establishing a reasonable period which must elapse before naturalized persons may exercise their political rights, provided that they are combined with a liberal naturalization policy;

...

In addition, Principle XI permits special measures taken to ensure: (a) the adequate representation of an element of the population of a country whose members are prevented by political, economic, religious, social, historical or cultural conditions from enjoying equality with the rest of the population in the matter of political rights; (b) the balanced representation of the different elements of the population of a country. All such measures are to be continued only for as long as there is need for them, and only to the extent that they are necessary.

<sup>36</sup> See CCPR/C/SR.161 (1979) and corrigendum.

<sup>37</sup> See CCPR/C/SR.118 (1978) and corrigendum.

<sup>38</sup> See CCPR/C/SR.711 (1987) and corrigendum.

<sup>39</sup> See CCPR/C/SR.724 (1987) and corrigendum.

<sup>40</sup> See annex II below.

## 3. One person, one vote

68. Universal suffrage is, of course, only one element of fairness. Another is the concept of equal suffrage. This is the idea traditionally expressed as 'one person, one vote'. Constituency delimitation, registration or polling procedures designed to dilute or discount the votes of particular individuals, groups or geographic areas are unacceptable in the light of the international norm of equality of suffrage. In short, each vote must carry equal weight in order to satisfy the element of fairness.

69. The 1962 Draft General Principles<sup>41</sup> expressly provide that each vote shall have the same weight and that electoral districts shall be established on an equitable basis, to ensure that the results accurately and completely reflect the will of all the voters (Principle V (a) and (b)).

## 4. Legal and technical assurances

70. Lastly, ensuring the fairness of elections requires a number of technical and legal measures designed effectively to protect the process from bias, fraud or manipulation. Such measures include, *inter alia*, provisions for objective administration structures, for outlawing and punishing corrupt practices, for the presence of observers and for fair media access by all parties and candidates. Further examples are provided in chapter IV below.

## C. Periodicity and the electoral time-frame

### 1. Periodicity

71. The requirement that elections be held periodically is expressly stated in both the Universal Declaration of Human Rights (art. 21, para. 3) and the International Covenant on Civil and Political Rights (art. 25 (b)). The importance of this provision should not be minimized. Once-only elections (for instance, at the time of a country's gaining independence, or of its transition from an authoritarian regime) will not suffice for international human rights purposes. Rather, this provision makes clear the requirement of a sustained democratic order, continually answerable to the will of the people.

72. While no particular schedule of periodicity is set by the instruments, general limitations on discretion are discernible. At the very least, elections must be held often enough to ensure that governmental authority continues to reflect the will of the people, which, as already noted, is the basis of governmental legitimacy.

### 2. Postponing elections

73. Postponement of scheduled elections necessitated by public emergency may be permitted in certain limited circumstances, but only if and to the extent

<sup>41</sup> *Ibid.*

strictly required by the exigencies of the situation (see paras. 52 *et seq.* on states of emergency). Any such extraordinary measures must comply with all the rigid international standards for such derogations and must not threaten democracy itself.<sup>42</sup> Indeed, the Universal Declaration itself proclaims that any limitations on the rights and freedoms contained therein must be for the purpose of "meeting the just requirements of morality, public order and the general welfare in a democratic society"\* (art. 29, para. 2). Accordingly, the interruption of periodicity will, in all but the most exceptional circumstances, violate international standards.

74. The Human Rights Committee has made several rulings concerning the compatibility of certain security measures with the International Covenant on Civil and Political Rights, particularly under article 25, which proscribes "unreasonable restrictions" on the enjoyment of political rights. In *Jorge Landinelli Silva et al. v. Uruguay* (34/1978), the Committee saw no grounds for the contention that such measures were necessary to restore peace and order and stated that "the Government . . . has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom".<sup>43</sup>

### 3. The electoral calendar

75. Each time elections are scheduled, the dates set out in the electoral calendar for each phase of the process must allow adequate time for effective campaigning and public information efforts, for voters to inform themselves, and for the necessary administrative, legal, training and logistic arrangements to be made. The electoral calendar should itself be publicized as part of civic information activities, in the interests of transparency and of securing public understanding and confidence in the process.

## D. Genuine elections

### 1. Genuine procedures

76. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide that elections must be "genuine". In effect, this concept incorporates each of the other elements discussed in this handbook. The *travaux préparatoires* of the Covenant indicate that the framers of the instrument saw this requirement as comprising two broad elements. The first was procedural, and included the guarantees of periodicity, equality and universality of suffrage, and secrecy of the ballot.<sup>44</sup> The second was outcome-oriented, and defined genuine elections as those which reflected the free expression of the will of the electors.<sup>45</sup>

<sup>42</sup> See article 4 of the International Covenant on Civil and Political Rights.

<sup>43</sup> *Selected Decisions* . . . , vol. 1, p. 66, para. 8.4.

<sup>44</sup> See, for example, *Official Records of the General Assembly, Sixteenth Session, Third Committee*, 1096th and 1097th meetings.

<sup>45</sup> *Ibid.*, 1096th meeting.

### 2. Genuine effects

77. Thus genuine elections are those which reveal and give effect to the freely expressed will of the people. Sham elections designed temporarily to quell internal dissent or to distract international scrutiny obviously do not meet international standards. Nor do restricted elections, which do not include the nation's principal policy-making offices. Rather, elections must be calculated to bring about the transfer of power to prevailing candidates in accordance with a prearranged formula which is acceptable to the people, whether by plurality, majority or super-majority. It is for the people themselves, through elected or representative transitional bodies, to determine whether this will be accomplished through a majoritarian framework (so-called single-member constituency or "first past the post" systems), through proportional representation (party-list voting), or through some other election system.

78. The transfer of power to the winners must be both committed to by the ruling and opposing parties and the subject of legal provisions for its implementation. In other words, elections must be subject only to the rule of law, and not to the whim of the existing Government or of any single party. It is also important to note that the elected authorities must be able in fact to exercise the power conferred on them by law.

### 3. A real choice

79. Genuine elections also offer an actual choice to the electorate. While this presupposes no particular political system, real popular input must be institutionally accommodated. Both the Universal Declaration and the International Covenant on Civil and Political Rights prohibit discrimination on the basis of "political or other opinion" in the enjoyment of the right to take part in government, the right of freedom of association and the right of assembly. Political pluralism is seen today as an essential element in providing a real choice to the electors, and the Human Rights Committee gives importance to this in its consideration of reports submitted by States parties to the Covenant.

80. Already in 1962, the Draft General Principles on Freedom and Non-discrimination in the Matter of Political Rights adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>46</sup> had stated (Principle VIII):

(a) Every voter shall be free to vote for the candidate or list of candidates he prefers in any election to public office, and shall not be compelled to vote for any specified candidate or list of candidates.

...

(d) Full freedom shall be ensured for the peaceful expression of political opposition, and also for the organization and free functioning of political parties and the right to present candidates for election.

81. Political pluralism also requires that parties be able to function effectively. To that end, legal protection for their full participation should be in place and electoral legislation should provide for fair and transparent

<sup>46</sup> See annex II below.

funding of political campaigns (which may include some form of public financing).

#### 4. Equal access to public service

82. A system which respects certain related political rights offers the best framework for ensuring that voters are presented with a real choice. In particular, international standards for unrestricted access to public service serve these ends. The Universal Declaration provides that everyone has the right to equal access to public service (art. 21). Unreasonable restrictions on candidature would be inconsistent with this right, while at the same time interfering with the people's right to choose. The International Covenant on Civil and Political Rights elaborates further on this standard, providing that every citizen has the right to be elected to public office and to have access, on general terms of equality, to public service in his country (art. 25 (b) and (c)).

83. The rights to access to public service and to stand for election, like the right to vote, do not tolerate discrimination based upon race, gender, religion or other such arbitrary classifications. Certain requirements for public office are allowed by the Covenant, but these are limited to reasonable bases, such as minimum age and mental capacity. Records of discussions held during the drafting of these provisions are clear on this interpretation.<sup>47</sup>

84. Racial restrictions on access to public service are prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (c)) and by the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. II (c)). Gender discrimination in this regard is prohibited by the Declaration on the Elimination of Discrimination against Women (art. 4 (a) and (c)), the Convention on the Elimination of All Forms of Discrimination against Women (art. 7 (a) and (b)) and the Convention on the Political Rights of Women (arts. II and III). The combined application of the above provisions establishes the broadest reasonable pool of candidates for election, thereby yielding assurances of genuine choice for voters and of the individual rights of candidates to stand for election and to enter public service.

85. The Human Rights Committee has recognized that some countries have permissible legislative penalties depriving violators of certain political rights. However, in *Alba Pietrarovia v. Uruguay* (44/1979), the Committee made reference to the principle of proportionality in examining the degree of deprivation and stated that a measure as harsh as the deprivation of all political rights for a period of 15 years would have to be specifically justified.<sup>48</sup>

86. The Committee has also examined the scope of the right to specific representation in *Grand Chief Don-*

*ald Marshall, et al. (Mikmaq people) v. Canada* (205/1986).<sup>49</sup> In its decision, the Committee stated that article 25 (a) of the International Covenant on Civil and Political Rights could not be interpreted as providing for an unconditional right to choose the modalities of participation in the conduct of public affairs, and that "It is for the legal and constitutional system of the State party to provide for the modalities of such participation".<sup>50</sup> This is a useful general principle with regard to political participation, indicating the importance of respect for the legal principles of a particular State. It should be noted, however, that this case involved a constitutional process, and not elections as such. With regard to elections, far more international guidance has evolved.

#### 5. An informed choice

87. Implicit in the concept of free choice is that of an informed choice. As has been seen, if elections are to be genuine, they must reflect the political will of the people. Voters can neither formulate nor express that will without access to information about the candidates, the parties and the process. Well-organized, non-partisan voter information programmes and unhindered distribution of political propaganda are therefore critical elements of genuine elections.

88. Non-partisan civic education should aim to inform voters as to the "who, what, when, where and how" of registration and voting. It should also help to inform the public on issues such as why they should participate, and what guarantees are in place to protect their right to participate confidently in the process.

89. Voter information should be accessible to all members of society, regardless of their language or level of literacy. As such, voter education materials should be multimedia and multilingual, and culturally appropriate for various social groups.

90. Civic education activities should also include specially targeted training for certain professional groups, in order to prepare them for their respective roles in the electoral process. These may include such groups as registration and polling officials, police and security personnel, the media, political parties, etc.

91. Access to the mass media should also be guaranteed to political parties and candidates, and such access should be fairly distributed. Fair media access implies not only allocation of broadcast time or print space to all parties and candidates, but also fairness in the placement or timing of such access (i.e. prime-time versus late-night broadcasts, or front-page versus back-page publication).

92. In addition, use of the media for campaign purposes should be responsible in terms of content, such that no party makes statements which are false, slander-

<sup>47</sup> See, for example, the summary records of the 363rd to 367th meetings of the Commission on Human Rights, held at its ninth session, in 1953 (E/CN.4/SR.363-E/CN.4/SR.367).

<sup>48</sup> *Selected Decisions* . . . , vol. 1, p. 79, para. 16.

<sup>49</sup> See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex IX, sect. A.

<sup>50</sup> *Ibid.*, paras. 5.4-5.5.

ous or racist, or which constitute incitement to violence. Nor should unrealistic or disingenuous promises be made, nor false expectations be fostered by partisan use of the mass media. Further information on media access and regulation is provided in chapter IV below.

#### 6. *Legal and technical issues*

93. Finally, it is important to note that securing the genuine quality of elections goes beyond merely declaring a policy of broad access to public office and announcing adherence to international standards. It also necessitates a number of technical and legal measures at the level of practical implementation. Many of these issues are highlighted in chapter IV below. This is an area where advisory services and technical assistance can play a vital role.

### E. Other requirements

#### 1. *The role of police and security forces*

94. Police and security forces play a dual role in an election setting. Effective administration of justice during an election period requires a balancing between, on the one hand, the need for electoral security and maintenance of order, and, on the other hand, the importance of non-interference with rights and the existence of an environment free of intimidation. The Code of Conduct for Law Enforcement Officials adopted by the General Assembly in 1979 imposes a duty of service to the community upon all officers of the law (art. 1). This notion necessarily requires that security forces strive to ensure that all citizens benefit from elections that are administratively sound and free of any disruptive forces which seek to undermine the free expression of popular will.

95. Similarly, the Code of Conduct provides that "law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons" (art. 2). This includes not only the human right to take part in elections, but all human rights. Police agencies that do not respect fundamental human rights have the potential to create an intimidating atmosphere that will inhibit the electorate and thereby subvert the genuineness of the election's outcome.

96. In addition, the Code of Conduct requires law enforcement officials to "rigorously oppose and combat" any act of corruption (art. 7). This clearly includes a duty to prevent attempts at election fraud, personation,

bribery, intimidation or any other acts that may frustrate the authenticity of election results. The Code also provides that law enforcement officials "shall not commit any act of corruption" (art. 7). This is of extreme importance given the negative historical role that police and security forces have played in the election process in some countries. In order to ensure that security forces remain impartial, the role of police in providing security for elections should be subordinate to that of the polling officers.

97. In every case, any police presence at places of registration or polling should be discreet, professional and disciplined. In general, this requires that police and security personnel be posted in the minimum number necessary to ensure security in a given location. They should never be positioned in such a way as to impede legitimate access, intimidate voters or discourage them from participating.

#### 2. *The role of observers*

98. The Framework for Future Efforts at Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, adopted by the Commission on Human Rights in 1989,<sup>51</sup> states: "National institutions should ensure universal and equal suffrage, as well as impartial administration" (sect. III). This may require that the host country "invite observers or seek advisory services. Either or both may be available from regional organizations or from the United Nations system" (sect. IV). The use of election observers can provide an effective means of verifying the genuineness of the election outcome. In addition, the presence of observers will decrease the likelihood of intimidation or fraud. Furthermore, neutral, objective observers can instill confidence in the electorate and thereby increase not only their willingness to participate in the process, but also their ability freely to express their political will in the ballot booth without fear of reprisal.

99. In order to maximize the benefits that non-partisan observers can contribute, they should be legally afforded free movement and access to all electoral events and should be protected from harm and from interference with their official duties. In addition, it is important that there be a sufficient number of observers to ensure that their presence is widely known about and recognized by the electorate.

<sup>51</sup> See annex III below.

#### IV. COMMON ELEMENTS OF ELECTORAL LAWS AND PROCEDURES

100. The approach of the United Nations in providing advisory services and technical assistance for democratic elections is best characterized as practical. The goal of such cooperation is to assist States in conducting elections which are free and fair, which occur in an atmosphere respectful of human rights norms and which are accepted as legitimate by all sectors of society. To these ends, advisory services and technical assistance focus on the detail of legal, technical and human rights aspects of democratic elections. These basic elements are set out in the national constitutions and legislation of most States, ensuring that elections are conducted under the rule of law. They include the following areas for attention.

##### A. Election administration

101. Provisions of the law should ensure that an objective, unbiased, independent and effective administrative structure is in place. This entails careful attention to provisions for appointment, remuneration, duties, powers, qualifications and reporting structure of electoral staff. At all levels, staff must be insulated from bias and political pressure. A single line of ultimate authority should be established. These concerns remain important regardless of the type of administration selected. Thus some States will adopt a hierarchy headed by a Chief Electoral Officer, while others will opt for an Electoral Commission with fair partisan representation, recognized neutrality, or a combination of both.

102. Whatever the structure, legal guarantees should be in place to insulate electoral administration from bias or corruption. Adequate advance training is imperative for all election officials. All electoral activities, including the decision-making process, the legal process and the organization of events, should be conducted in a wholly transparent manner.

##### B. Constituency delimitation

103. The process of identification of electoral districts and boundaries should respect the international norm of equal suffrage. Such delimitation should not be designed to dilute or discount the votes of any particular groups or areas.

104. Fair constituency-delimitation procedures will take into account a range of information, including available census data, territorial integrity, geographical distribution, topography, and so on. Polling stations should be distributed so as to guarantee equal access within each constituency.

##### C. Registration of electors

105. If advance registration of voters is proposed, the process must be carefully constructed to ensure fairness and effectiveness of provisions concerning elector qualifications, residence requirements, election lists and registers, and the means provided for challenging those documents. Election lists should be available to interested parties. If no registration is to take place in advance of polling, alternative measures for preventing double-voting (for example, the use of indelible ink) and voting by unqualified persons must be put in place.

106. Disqualifying factors must not represent impermissible discrimination and should be limited, so as to provide the maximum reasonable enfranchisement of the people. Procedures should accommodate broad participation and should not create unnecessary technical barriers to participation by otherwise qualified persons. For instance, advance registration should be allowed for those who will reach the minimum voting age by election day, but after the close of registration. Suspension of registration should occur as closely as possible to election day, so as to provide the greatest opportunity for electors to register.

##### D. Nominations, parties and candidates

107. Electoral laws and procedures should guard against unfair advantage being bestowed upon Government-supported candidates. Provisions concerning candidate qualifications must be clear and must not discriminate against women or particular racial or ethnic groups. Disqualifications should be subject to independent review.

108. Political parties should not face unreasonable restrictions on participation or campaigning. There should be protection under the law for party names and symbols. Procedures for designation of party agents, for nomination time and place requirements and for campaign financing should be clearly established by law. In addition, the electoral calendar should provide adequate time for campaigning and public information efforts.

##### E. Polling, tabulation and reporting

109. To be successfully conducted, free and fair elections should be guided by detailed provisions regarding the form of ballots, the design of ballot boxes and voting compartments, and the manner of polling. These provisions should protect the process from fraudulent practices and respect the secrecy of the vote.

110. Ballots should be worded with absolute clarity and be identical in all languages. Ballot form should also take into account various levels of literacy in the country. Proxy and absentee voting provisions should be designed to encourage the broadest possible participation, without compromising electoral security. Voters with special needs, including the disabled, the elderly, students, conscripts, workers (including migrant workers out of the country), foreign-service personnel and prisoners who have retained voting rights, should be accommodated.

111. Sufficient quantities of voting materials must be available at each polling place. Polling personnel will require clear guidance in admitting and identifying qualified voters. Permissible questions to be put to voters at polling places should be expressly set out by statute, to prevent voter intimidation, abuse of discretion, or discriminatory application. The attendance of observers should be provided for.

112. Counting should be open to official observation by concerned parties. All issued, unissued and damaged ballot papers must be systematically accounted for. The processes for counting votes, verification, reporting of results and retention of official materials must be secure and fair. Re-count procedures should be available in case of questionable results. Finally, alternative, independent verification procedures, such as parallel vote tabulation, can be a valuable measure contributing to public confidence in, and acceptance of, the outcome of polling.

#### **F. Complaints, petitions and appeals**

113. The right to challenge election results and for aggrieved parties to seek redress should be provided by law. The petition process should set out the scope of available review, procedures for its initiation and the powers of the independent judicial body charged with such review. Multiple levels of review, where appropriate, should be described as well.

114. The effect of irregularities on the outcome of elections must be established by law. Anyone alleging a denial of their individual voting or other political rights must have access to independent review and redress.

#### **G. Respect for fundamental human rights**

115. Guarantees of free speech, opinion, information, assembly, movement and association take on greater significance during elections. The prevailing atmosphere should be one of respect for human rights and fundamental freedoms and be characterized by an absence of intimidating factors.

116. Laws in force which might have the effect of discouraging political participation should be repealed or suspended. Emergency or other exceptional legislation restricting fundamental rights should be repealed or suspended. Exceptional measures must not be imposed un-

less strictly required by the exigencies of the situation, and must not be calculated to corrupt or unnecessarily delay the political process.

117. Respect for a wide range of human rights, as enumerated in the Universal Declaration of Human Rights and in the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, is crucial to the conduct of free and fair elections.

#### **H. Offences, penalties and maintenance of order**

118. The national electoral law must also protect the political process from corruption, official misfeasance, obstruction, undue influence, personation, bribery, treating, intimidation and all other forms of illegal and corrupt practice. Prosecutions, procedures and penalties must respect international standards for human rights in the administration of justice.

119. Decisions regarding the maintenance of peace and order at polling places should be made by balancing concern for security against the potential intimidating effect of a police, security or military presence. Polling officers should be delegated the authority to maintain order at polling places. Civil and criminal liability should be imposed for acts of misfeasance, nonfeasance and malfeasance by election officials.

#### **I. Media access and regulation**

120. Arrangements for fair media access by candidates and parties are an important focus of electoral law. This is especially evident where the major information media are government-controlled. Media regulations should provide for safeguards against political censorship, unfair government advantage and unequal access during the campaign period.

121. Fair media access implies not only equality of time and space allotted, but also attention to the hour of broadcasting (i.e. prime-time versus late broadcasting) and the placement of printed advertisements (i.e. front page versus back page). Fair media use implies responsibility on the part of all persons or parties delivering messages or imparting information via the mass media (i.e. truthfulness, professionalism and abstaining from false promises or the building of false expectations).

122. A valuable mechanism for assuring fair and responsible broadcasting during election periods is an independent body charged with monitoring political broadcasts, broadcast civic education programmes and allocation of time to various political parties, as well as receiving and acting upon complaints regarding media access, fairness and responsibility. This function might be discharged by representative transitional bodies, by the electoral administration, or by a separately constituted media commission.

123. Securing responsible electoral broadcasting and publication in the media can, in part, be served by agreement on a code of conduct for the media. Such

codes may be preferable as a method of media regulation (i.e. self-regulation) to legislative or governmental action, which might raise the issue of impermissible censorship and interference with the human rights of freedom of information and expression.

#### **J. Public information and voter education**

124. Funding and administration should be provided for objective, non-partisan voter education and information campaigns. Such civic education is especially critical for populations with little or no experience with democratic elections. The public should be well informed as to where, when and how to vote, as well as to why voting is important. They must be confident in the integrity of the process and in their right to participate in it.

125. Literature should be widely available and should be published in the various national languages to help ensure the meaningful participation of all eligible voters. Multimedia methods should be employed to provide effective civic education to people with various levels of literacy. Voter education campaigns should extend throughout the territory of the country, including to rural and outlying areas.

#### **K. Observation and verification**

126. The observation and verification of election preparations, voting and counting by representatives of political parties and candidates should be widely provided for in election legislation. In addition, the presence of non-partisan election observers from national non-governmental organizations and international organizations can help secure public confidence in the electoral process.

127. If observers are to be invited, their presence must be expressly permitted by the electoral laws and procedures, and their role should be clearly described in

public information materials. Whether drawn from the United Nations system, from regional intergovernmental organizations, from non-governmental organizations or from official missions from other States, observers should be afforded free movement and access and be protected from harm or interference with their official duties.

128. It is important to allow for a sufficient number of observers to ensure their presence at an adequate number of polling places and election events. Effective, independent coordination of observer activities enhances their positive value. The meaningful involvement of observers also requires their presence from the beginning of the process, their adequate training and measures to ensure that they are informed as to the local culture.

#### **L. Legal authority and structure**

129. Guarantees for the fundamental right of periodic free and fair elections with universal, equal and non-discriminatory suffrage and secret balloting, and for the right to be elected and to have access to the public service on equal terms, should be enshrined in the Constitution or other high organic law of the State.

130. The legal authority for the rights of free expression, opinion, information, assembly and association should also rest in the highest law of the land. Statutory language should be clear, concise and adequately specific, in order to forestall potential abuse of discretion, discriminatory application, or impingement upon the rights of free expression or full participation. Such language should also be gender-neutral, to encourage participation by women, and should be translated into the languages of all voting groups.

131. Subsidiary legislation, including clear and detailed regulations and administrative instructions, should also be promulgated and should respect these general requirements.

## CONCLUSION

132. While this handbook is by no means an exhaustive compendium of electoral issues, it does provide some notion of the fundamental elements of modern democratic elections and the complexity of their conduct. United Nations advisory services and technical assistance, including those provided by the Centre for Human Rights, UNDP, the Electoral Assistance Unit and other United Nations agencies, draw upon the experience of the Organization's staff, collections of electoral laws from various jurisdictions, rosters of experts and a network of non-governmental organizations and institutions to assist Governments in the legal, technical and human rights aspects of assuring the basic right of free and fair elections. At the same time, the United Nations remains cognizant of the fact that periods of elections often provide unique opportunities for countries to consider broader issues of democracy and human rights, and accordingly stands ready to assist in that process.

## ANNEXES

### Annex I

#### INTERNATIONAL HUMAN RIGHTS STANDARDS RELATING TO ELECTIONS

##### A. The right to take part in government

###### 1. UNIVERSAL DECLARATION OF HUMAN RIGHTS

###### Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

###### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

###### 2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

###### Article 25

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

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

###### Article 2

1. 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, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. 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 an 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 right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

##### B. Equality and non-discrimination

###### 1. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

###### Article 5

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

...

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

...

###### 2. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

###### Article 7

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

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

3. CONVENTION ON THE POLITICAL RIGHTS OF WOMEN

*Article I*

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

*Article II*

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

*Article III*

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

**C. The right to self-determination**

1. CHARTER OF THE UNITED NATIONS

*Article 1*

The Purposes of the United Nations are:

...

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion; ...

...

*Article 73*

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

...

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular

circumstances of each territory and its peoples and their varying stages of advancement;

...

*Article 76*

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

...

(b) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to encourage recognition of the interdependence of the peoples of the world; ...

...

2. DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES

*Article 2*

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 5*

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

3. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS  
*and* INTERNATIONAL COVENANT ON ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

*Common article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

...

## Annex II

### DRAFT GENERAL PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS<sup>a</sup>

#### PREAMBLE

Whereas the peoples of the world in the Charter of the United Nations have proclaimed their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom,

Whereas the Charter sets forth, as one of the purposes of the United Nations, the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights, further elaborating the principle of non-discrimination, proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind, including political opinion, and provides that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs,

Whereas, since the interests of the many are often disregarded when political power is in the hands of the few, the right of everyone to take part in the government of his country is the condition indispensable for the effective enjoyment by all of other human rights, including economic, social and cultural rights,

Whereas the exercise of political rights is directly linked to the existence of freedom of opinion and expression and freedom of peaceful assembly and association,

Whereas these rights can only be effectively guaranteed in a world in which the principles of the Charter, especially the principle of self-determination, and the principles enshrined in the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, shall have full application,

Now therefore the following general principles are proclaimed to ensure recognition of the right of everyone to take part in the government of his country and of other related political rights, and to prevent discrimination in the enjoyment of these rights:

#### I. *The right of all peoples to self-determination*

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.

#### II. *Political rights of nationals*

(a) Every national of a country is entitled within that country to full and equal political rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(b) No one shall be denied nationality, or deprived of nationality, as a means of denying him or depriving him of political rights.

(c) The age, length of residence and other conditions prescribed by law for the exercise of any particular political right shall be the same for all nationals of a country or inhabitants of a political unit, as the case may be.

<sup>a</sup> Annexed to resolution 1 (XIV) adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its fourteenth session, in 1962; see the report of the fourteenth session (E/CN.4/830-E/CN.4/Sub.2/218), para. 159.

#### III. *Freedom of opinion and association*

Freedom of opinion and expression and freedom of peaceful assembly and association are essential to the enjoyment of political rights. These freedoms, and the access to the facilities and means for their exercise, shall be ensured to all persons at all times.

#### IV. *Universality of suffrage*

Every national is entitled to vote in any national election, referendum or plebiscite held in his country, and in any such public consultation held in the political or administrative unit thereof in which he resides. The right to vote shall not be dependent upon literacy or any other educational qualifications.

#### V. *Equality of suffrage*

(a) Every national is entitled to vote in any election, or other public consultation for which he is eligible, on equal terms, and each vote shall have the same weight.

(b) When voting is conducted on the basis of electoral districts, the said districts shall be established on an equitable basis such as would make the results most accurately and completely reflect the will of all the voters.

(c) For any election or public consultation held by direct vote there shall be one general election roll, and every eligible national shall be included in that roll.

#### VI. *Secrecy of the vote*

(a) Every voter shall be able to vote in such a manner as not to involve disclosure of how he has voted or intends to vote.

(b) No voter shall be compelled to state, in any legal proceeding or otherwise, how he voted, or intends to vote, and no one shall attempt to obtain from any voter, directly or otherwise, information as to how he has voted or intends to vote.

#### VII. *Periodicity of elections*

Elections to all elective public offices shall be held at reasonable intervals, in order to ensure that the will of the people shall at all times be the basis of the authority of government.

#### VIII. *Genuine character of elections and other public consultations*

(a) Every voter shall be free to vote for the candidate or list of candidates he prefers in any election to public office, and shall not be compelled to vote for any specified candidate or list of candidates.

(b) Every voter shall be free to vote for or against any proposal submitted to a plebiscite, referendum, or other public consultation.

(c) The conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be supervised by authorities whose independence and impartiality are ensured and whose decisions are subject to appeal to the judicial authorities or other independent and impartial bodies.

(d) Full freedom shall be ensured for the peaceful expression of political opposition, and also for the organization and free functioning of political parties and the right to present candidates for election.

IX. *Access to elective public office*

(a) Every national shall be eligible on equal terms for election to any elective public office in his country or in any political or administrative unit thereof in which he resides.

(b) The extent to which this principle shall be applied to those whose election might result in a conflict between their duties or personal interests and the interests of the community as a whole shall be determined by law.

X. *Access to non-elective public office*

(a) Every national shall be eligible on equal terms to hold any non-elective public office in his country, or any political or administrative unit thereof in which he resides.

(b) The extent to which this principle shall be applied to those whose appointment or assignment to a non-elective public office might result in a conflict between their duties or personal interests and the interests of the community as a whole shall be determined by law.

(c) All appointments to the career civil service of a country shall be made on an objective and impartial basis.

XI. *Measures which shall not be considered discriminatory*

The following measures prescribed by law or regulation shall not be considered discriminatory:

(a) reasonable requirements for the exercise of the right to vote or the right of access to elective public office;

(b) reasonable qualifications for appointment to public office which stem from the nature of the duties of the office;

(c) measures establishing a reasonable period which must elapse before naturalized persons may exercise their political rights, provided that they are combined with a liberal naturalization policy;

(d) special measures taken to ensure:

(i) the adequate representation of an element of the population of a country whose members are in fact prevented by political, economic, religious, social, historical or cultural conditions from enjoying equality with the rest of the population in the matter of political rights;

(ii) the balanced representation of the different elements of the population of a country;

provided that such measures are continued only so long as there is need for them, and only to the extent that they are necessary.

XII. *Limitations*

The rights and freedoms proclaimed above shall in no case be exercised contrary to the purposes and principles of the United Nations. They shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of public order (*ordre public*), morality and the general welfare in a democratic society. Any limitation which may be imposed shall be consistent with the purposes and principles of the United Nations.

XIII. *Constitutional guarantee*

The rights and freedoms proclaimed above can best be guaranteed by embodiment in constitutions or other fundamental laws none of which should be subject to repeal or alteration by ordinary legislative procedure.

XIV. *Recourse to independent tribunals*

Any denial or violation of these rights and freedoms shall entitle the aggrieved person or persons to recourse to independent and impartial tribunals.

XV. *Application of principles*

These principles shall apply to all independent countries and to countries which are under alien domination.

### Annex III

#### ENHANCING THE EFFECTIVENESS OF THE PRINCIPLE OF PERIODIC AND GENUINE ELECTIONS: FRAMEWORK FOR FUTURE EFFORTS<sup>a</sup>

##### I. THE WILL OF THE PEOPLE EXPRESSED THROUGH PERIODIC AND GENUINE ELECTIONS AS THE BASIS FOR THE AUTHORITY OF GOVERNMENT

- A. Universal and equal suffrage.
- B. The right to take part in the government of one's country, directly or through freely chosen representatives.
- C. The right to equal access to public service in one's country.
- D. The need for a secret vote or equivalent free voting procedures, guaranteeing the free expression of the will of the electors.
- E. The importance of the right to freedom of peaceful assembly.
- F. The importance of the right to freedom of association.
- G. The importance of the right to freedom of opinion and expression, including the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media.

- H. The right of citizens of a State to change their governmental system through appropriate constitutional means.

##### II. THE ACTIVITIES OF CANDIDATES FOR PUBLIC OFFICE

- A. Equal opportunity for all citizens to become candidates.
- B. The right of candidates to put forward their political views, individually and in cooperation with others.

##### III. OPERATIONAL ASPECTS: NATIONAL INSTITUTIONS

National institutions should ensure universal and equal suffrage, as well as impartial administration. There is particular need for independent supervision, appropriate voter registration, reliable balloting procedures and methods for preventing electoral fraud and resolving disputes.

##### IV. COOPERATIVE ACTIVITIES OF THE INTERNATIONAL COMMUNITY

The host country may wish to invite observers or seek advisory services. Either or both may be available from regional organizations or from the United Nations system.

<sup>a</sup> Commission on Human Rights resolution 1989/51 of 7 March 1989, annex (*Official Records of the Economic and Social Council, 1989, Supplement No. 2 (E/1989/20), chap. II, sect. A*).

## Annex IV

### RELEVANT PROVISIONS OF SELECTED REGIONAL HUMAN RIGHTS INSTRUMENTS

#### A. The right to take part in government

##### 1. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

###### *Article 13*

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

##### 2. AMERICAN CONVENTION ON HUMAN RIGHTS

###### *Article 23. Right to participate in government*

1. Every citizen shall enjoy the following rights and opportunities:

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

(b) To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

(c) To have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

##### 3. PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS<sup>a</sup>

###### *Article 3*

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

#### B. Equality and non-discrimination

##### 1. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

###### *Article 2*

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

<sup>a</sup> Convention for the Protection of Human Rights and Fundamental Freedoms.

###### *Article 3*

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

##### 2. AMERICAN CONVENTION ON HUMAN RIGHTS

###### *Article 1. Obligation to respect rights*

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

###### *Article 24. Right to equal protection*

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

##### 3. EUROPEAN CONVENTION ON HUMAN RIGHTS<sup>a</sup>

###### *Article 14*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### C. The right to self-determination

##### AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

###### *Article 19*

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

###### *Article 20*

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.



## **International Electoral Standards**

*Guidelines for reviewing the legal framework of elections*

**G u i d e l i n e s   S e r i e s**

This publication originated as a set of regional guidelines, applicable to the Organization for Security and Co-operation in Europe (OSCE) region, jointly developed by International IDEA and the Office for Democratic Institutions and Human Rights (ODIHR) of OSCE in Warsaw, which was published in 2001. The OSCE publication provided the basis for further developing these International IDEA Guidelines and the Institute is grateful to the ODIHR for their continued co-operation and contribution to this global work.

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Design: Holmberg & Holmberg Design AB

Printed and bound by: Bulls Tryckeri, Halmstad, Sweden  
ISBN: 91-89098-88-9

## Preface

International IDEA seeks to promote sustainable democracy around the world and has consequently laid much emphasis on supporting efficient and sustainable electoral processes. IDEA has in this context worked on clarifying, defining and promoting internationally-recognized standards in the election field. The Institute has published three Codes of Conduct covering election administration, election observation and political parties campaigning in democratic elections, and Guidelines for external involvement in election observation.

This book sets out internationally-recognized standards applicable across a range of areas of electoral legislation. This, we hope, will be useful to those engaged in reviewing existing legal frameworks for elections, or formulating new electoral legislation.

These standards are intended to be used as benchmarks to assess whether or not an election is free and fair. While IDEA's earlier Codes of Conduct set out the basic procedural principles underlying the election process (e.g. "*how to*" observe elections), these guidelines are more substantial, setting out what should be the actual content of an election process (e.g. "*what to*" observe in an election).

These guidelines will fulfil a long-felt need in the electoral field. I hope they will be useful not only to professionals in this field but to all those concerned to see good electoral practice across the world.



karen fogg  
secretary-general  
International IDEA

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## Abbreviations

CSCE	Conference on Security and Co-operation in Europe
ECOSOC	Economic and Social Council of the United Nations
EMB	Electoral management body
NGO	Non-governmental organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
PR	Proportional representation

# Introduction

## *Objective*

International IDEA's intention in developing these Guidelines is to set out the basic components of a legal framework governing democratic elections, incorporating internationally-recognized electoral standards ("international standards"). These international standards are relevant to each component, and necessary for the legal framework to be able to ensure democratic elections. This publication is intended to identify electoral standards which contribute to uniformity, reliability, consistency, accuracy and overall professionalism in elections. Though there is a greater degree of acceptance of international standards in certain areas, it is recognized that in some areas they remain inadequate.

## *How to use these guidelines*

The sections are presented in an order intended to facilitate methodical review and assessment of a country's legal framework for elections. Section headings identify the subject matter of the legal framework addressed in the section. Beginning with Section Two, following each section heading is a statement of the objective of the international standard relevant to that particular component of the legal framework. Discussion of that particular component of the legal framework follows. Each section concludes with a checklist. This checklist can be used to verify if any legal framework has addressed all issues related to that particular component.

Where the electoral legislation being reviewed has been in existence for some time, it cannot be reviewed in isolation, without some reference to the way it is applied. A minimum level of knowledge of a country's electoral practices is essential to assess effectively how legal provisions are interpreted and enforced. Therefore reviewing the legal framework should normally extend beyond the letter of the law and at times might include observations regarding a country's practices -- the spirit in which a such legal framework is interpreted.

These Guidelines are meant to be used to examine a country's legal framework for elections. These standards should be used to ensure non-discrimination and equality of access for all citizens. The legal framework must therefore ensure that no identifiable societal group is excluded or marginalized from electoral and political processes. Such groups include women, ethnic minorities, citizens with disabilities, language minorities, internally displaced persons and refugees. Sometimes very important political issues might be put directly to the electorate through referendums or plebiscites. Though there may be some points of similarity between the two, these Guidelines do not specifically deal with such referendums or plebiscites.

## 1. The bases of internationally recognized electoral standards

### *Primary sources*

The primary sources for the international standards set forth in these guidelines are various international, regional and un declarations and conventions on human rights and other relevant legal documents. the more important of these instruments include the following:

- The 1948 Universal Declaration of Human Rights;
- The 1966 International Covenant on Civil and Political Rights;
- The 1950 European Convention (together with its Protocols) for the Protection of Human Rights and Fundamental Freedoms;
- The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Co-operation in Europe (CSCE);
- The 1948 American Declaration of the Rights and Duties of Man;
- The 1969 American Convention on Human Rights; and
- The 1981 African Charter on Human and People's Rights.

The formal applicability of such standards to a particular country will depend upon its international undertakings in relation to such documents. In any case it is hoped that the overall normative guidance they provide will nevertheless foster the promotion of, and support for, these international standards. The other instruments and relevant texts are included in Annex 1 (see page 95).

When a country's legal framework is being reviewed and it is a signatory to an international treaty or convention, the provisions of such a treaty or convention incorporating electoral standards are directly applicable and might even have a constitutional or a legal status therein. Other UN instruments to which the country is not a party, or which lack strictly binding force, may be seen as incorporating electoral standards of a strong persuasive value for that country.

### *Supplementary sources*

A review of a country's legal framework should also consider the following:

- Final reports of various election observation missions (international and domestic) where they are available;
- The requirements of any international instruments to which the country is a party, which impact on the election law; and
- Model codes of conduct addressing election issues developed by international, governmental or non-governmental organizations (NGOs). Annex 3 includes examples of such model codes (see page 111).

### ***General approach***

It is important to assess to what degree the country's legal framework for elections complies with international electoral standards. This will provide a set of constructive suggestions for corrections, improvements and possible best practices to strengthen the legislation. At the same time, another country's particular system or practice of legislation should not be considered to be ideal or directly transferable.

*A country has discretion in its choice of an appropriate electoral system. However, such discretion in choosing an electoral system is not unlimited and should be consistent with international standards. Given the past tendency of many countries to adopt electoral systems which applied during their colonial periods or for other historical reasons, the review of a country's legal framework could usefully reflect on current cultural, political, social or other factors and realities. A question to pose is: Which is the electoral system most likely to promote democratic elections today?*

A meaningful review of a country's legal framework requires more than an examination of the relevant instruments' texts. An assessment is of little value, no matter how thorough the review, if comments, recommendations and advice are not given in an appropriate and constructive manner. Even if it delivers direct and serious criticisms an assessment should be phrased to reflect the delicacy of the task at hand.

When reviewing a country's legal framework, all related legislation (such as the constitution, civil and criminal codes, nationality and citizenship laws, laws relating to the media etc.) need to be consulted and analysed to ensure that they do not conflict with one another and that they do meet international standards.

### ***Accurate translations***

It is critically important that, wherever necessary, accurate translations of all laws reviewed are available. Sometimes a recommendation, comment or criticism can arise from a text that may have been unofficially or erroneously translated. This constitutes a significant challenge when reviewing a translated text and should be highlighted in the assessment report.

### ***Prioritizing recommendations***

If recommendations are put forward they should be prioritized to distinguish what is required under international standards from what is more generally desirable, as it is likely that not all recommendations will be acted upon.

Recommendations should be carefully worded to indicate both their importance and their priority. (For example : "it would be advantageous if...", "it is strongly recommended that ...", "it is essential to...", etc.). Recommendations which will enhance the credibility of, and public confidence in, the elections

-- such as legal provisions which enhance transparency -- should be given a high priority.

### ***Rationalizing recommendations***

It is important to explain why a particular recommendation is being made. Some promote conformity with an internationally-recognized electoral standard, a particular international commitment or a particular human right. Other recommendations are made simply to make the legislation more coherent or effective, such as recommendations on addressing particular contradictions or gaps in the laws under review. The internationally-accepted norms and standards discussed in these Guidelines are designed to enhance the credibility of, and public confidence in, elections and to provide increased legitimacy.

### ***Finer detail: laws or regulations***

It may be appropriate to incorporate some of the finer detail -- such as voting procedures -- into regulations adopted by government bodies or by electoral management bodies (EMBs), rather than to include it in the electoral law itself. Fundamental issues that should be addressed in the primary electoral legislative frameworks (the electoral law and the constitution) include:

- Qualification to register as a voter, together with any restrictions on such right, if any;
- Qualification for and restrictions on candidacy;
- Rules governing seat allocation;
- Qualification on terms of office;
- Methods of filling casual vacancies;
- Removal of mandates;
- The secrecy of the vote; and
- Election management.

## **2. Structuring the legal framework**

*The legal framework should be so structured as to be unambiguous, understandable and transparent, and should address all components of an electoral system necessary to ensure democratic elections.*

### ***Scope of the legal framework for elections***

The term “legal framework for elections” generally refers to all legislation and pertinent legal and quasi-legal material or documents related to the elections. Specifically, the “legal framework for elections” includes the applicable constitutional provisions, the electoral law as passed by the legislature and all other laws that

impact on the elections. It also includes any and all regulations attached to the electoral law and to other relevant laws promulgated by government. It encompasses relevant directives and/or instructions related to the electoral law and regulations issued by the responsible EMB, as well as related codes of conduct, voluntary or otherwise, which may have a direct or indirect impact on the electoral process.

*Briefly, the legal framework will include the following sources, each with an attendant degree of flexibility for amendment:*

<i>Type of legislation (source) dealing with election</i>	<i>Formal authority</i>	<i>Flexibility</i>
<i>Constitution</i>	<i>Constituent assembly, or the Legislature exercising its constituent powers</i>	<i>More difficult to amend, requiring debate and decisions often with special majorities or special procedures.</i>
<i>International peace agreement</i>	<i>The high contracting parties to the peace agreement</i>	<i>An amendment can normally be done only if all high contracting parties to the peace agreement unanimously agree.</i>
<i>Electoral law</i>	<i>The legislature</i>	<i>Normally requires a simple majority to amend, easier to amend than the constitution.</i>
<i>Other legislative acts dealing with other aspects of elections</i>	<i>The legislature</i>	<i>Normally requires a simple majority to amend, easier to amend than the constitution.</i>
<i>Rules and regulations</i>	<i>The government department (executive)</i>	<i>The government department concerned can amend these regulations, subject to possible confirmation or veto by the legislature.</i>
<i>Instructions and directives</i>	<i>The electoral management body (EMB)</i>	<i>Flexible: the EMB can change these to achieve the desired objective.</i>
<i>Codes of conduct for political parties, for election officials and for election observers</i>	<i>Regulatory bodies such as EMB or political parties or non-governmental organizations (NGOs)</i>	<i>Normally these codes are not a part of the formal legal framework; can be amended by consensus amongst the political parties or the responsible regulatory body or NGO, outside the purview of either the legislature or the executive.</i>

The terminology may vary, e.g., “Electoral Law” as defined above was called the “Proclamation” in Namibia in 1989 and the “Regulations” in East Timor in 2001. Sometimes all the above elements may not be available within a country’s legal framework, e.g., there is no written Constitution in the UK, or there was no Electoral Law in East Timor in the 1999 referendum.

It is important to note that each successively inferior authority cannot make provisions that contradict or are inconsistent with those of a superior authority. For example, an act of the legislature cannot contravene the constitution; regulations can contravene neither the constitution nor the electoral law.

National authorities enact the legislation according to their own legal traditions. What is important is that the structural approaches and the legislation that may affect the conduct of elections are all taken into account.

### *Use and merit of the written law*

Although governments are free to develop their legal frameworks, there is a need for written law as opposed to customary law or administrative policies to govern elections. Written law provides the benefits of certainty, visibility and transparency. It is more readily subject to judicial interpretation and review, and is more useful to interested parties, including electors.

### *Constitutional provisions*

A written constitution, as the basis of a country’s governmental structure, should provide the foundation for key elements of its electoral framework. As constitutional amendments are often subject to a qualified majority vote or other comparatively onerous processes, the constitution’s electoral provisions should only contain fundamental electoral rights and the basic principles of the electoral system. These should include the following:

- The right to vote and to be elected;
- The institutions subject to democratic elections and their terms of office;
- The composition of any non-elected institutions; and
- The body or agency to be entrusted with the conduct of elections.

It may also be appropriate to include the essential elements of the electoral system to be used.

As constitutions are generally more complicated and time-consuming to amend, constitutional provisions should not go beyond describing the very basics of electoral rights and the electoral system. In order to allow for necessary flexibility, provisions related to the management of elections should be incorporated into parliamentary legislation, and administrative and procedural matters should be left

to administrative rules and regulations, to be issued by subsidiary bodies, including through instructions and directives of the EMBs.

### *General versus specific election legislation*

National election legislation can be divided into two categories:

- General election legislation relevant to any election. This establishes a common legal framework governing all elections, including elections to the executive and legislative branches, at national and local levels.
- Legislation relevant to specific elected institutions. This establishes special legal provisions that govern elections to a specific body of government with provisions deviating from or supplementing the general legal framework for elections.

Different countries have handled the division between general and specific election legislation in different ways. A country may adopt a separate law on the “basic principles” of elections, which defines provisions that are applicable to all elections. Additionally, that country may also adopt separate laws containing provisions specific to individual elected institutions, or other elections. In contrast, another country may include the entire election legislation in one law with separate chapters containing provisions for the various elected institutions or other elections.

Although either of these approaches is acceptable, one electoral law regulating all elections is highly desirable and is recommended. It encourages consistency in election administration and practices whilst fostering unified implementation of the law in connection with all elections. Such an approach also simplifies the drafting process in cases where amendments to legislation are needed. However in some cases, particularly in federal systems, such an approach may not be possible. Regardless of which of the above-described approaches is adopted by a country, certain principles are fundamental to election legislation:

- Election legislation should be stated in clear and unambiguous language.
- Election legislation should avoid conflicting provisions between laws governing national elections and laws governing sub-national (provincial or state) and local elections; provisions governing the administration of national elections should be in harmony with the provisions governing such other elections because court decisions at one level could affect legislation in other jurisdictions.
- The respective powers and responsibilities of the national and local electoral management bodies, and governmental bodies, should be clearly stated, distinguished and defined to prevent conflicting or overlapping powers being exercised by other bodies.
- Election legislation should be enacted sufficiently far in advance of an election date to provide political participants and voters with adequate time to become

familiar with the rules of the election processes. Election legislation enacted at the last minute tends to undermine the legitimacy and the credibility of the law and prevents political participants and voters from becoming informed in a timely manner about the rules of the election processes.

- Election legislation should be enacted in accordance with the applicable legal provisions governing the promulgation of laws by the legislature. Election legislation that is not enacted in accordance with the applicable legal provisions may be challenged and risks annulment by the courts.
- Election legislation should be published and made readily available for the intended users including the general public.

### *Election legislation versus other legislation*

*An election law neither can nor should contain all provisions relevant to the election process. The election process will require the involvement of institutions and procedures based on other parts of the national legal system. It is important that the existence of other relevant legislation is included in the review process. Of particular importance is national legislation governing the media, registration of political parties, citizenship, national registers, identity documents, campaign finance and criminal provisions related to election law violations. All legal provisions that have an impact on the election process should be identified and assessed.*

### *Election legislation and EMB's instructions and directions*

In a democratic system, the legal framework is enacted by a popularly-elected national legislature. To uphold democratic values, the regulation of elections should not be done by way of executive decrees. However, there are limits to the number of administrative matters that can be included in the enacted law. Most election laws allow for the EMB to issue instructions to further clarify issues related to the election process. However, electoral legislation normally requires that such instructions are consistent with the provisions of the existing electoral legislation. The role and powers of the EMB in this connection should be clearly defined but sufficiently broad to enable it to deal with gaps in the law and unforeseen contingencies.

The EMB does not act as a substitute legislator, but it must be able to respond to emergent needs and provide practical solutions by way of interpreting and supplementing electoral law and the regulations.

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

- Electoral legislation should adhere to basic election principles, such as the secrecy of the ballot.
- Electoral legislation should provide for the authority of the EMB and should

clearly state and define the scope and extent of the EMB's authority to issue instructions.

- Electoral legislation should provide for a process whereby electoral participants and voters can lodge complaints and appeals arising from the adoption and implementation of EMB instructions. This process should also allow for such complaints and appeals to be resolved in a timely and effective way.
- Electoral legislation should state clearly the legal hierarchy, including the precedence of constitutional and legislative provisions over EMB instructions.
- Electoral legislation should state and define clearly the EMB's residual powers (its "inherent powers") to issue instructions in emergency situations, including on election day, to meet any unforeseen contingency.

### ***Election legislation and codes of conduct***

In addition to formal election legislation, other relevant electoral instructions may also be contained in the informal codes of conduct agreed among various political parties and generally overseen by the EMB. In some countries such codes play a more important role than in others. They may relate to a number of aspects of elections, such as for the rules of behaviour for political parties and candidates during the electoral campaign, the conduct of the ruling government party to prevent it from having an undue advantage over the other parties, or the self-regulation of the media. Sometimes a code of conduct contains a set of normative ethical principles for practical application in the field, such as a code of conduct for electoral observers or for EMB staff engaged in the conduct of elections. The legal status of such codes varies between jurisdictions, as do the consequences of breaches of them.

*Informal codes of conduct should also be reviewed with a view to checking their conformity with internationally-recognized standards. The legal framework may sometimes set out the procedures and mechanisms to be used when dealing with complaints and disputes arising from violations of a code of conduct. Such provisions will obviously differ from country to country, both in detail and in content, and may affect how a code of conduct is enforced.* For example, a country's legal framework may provide for adjudication or mediation to deal with infringements of a code of conduct or disputes arising from an infringement.

The general guiding principles that a code of conduct for election administrators must conform to are:

- Election administration must demonstrate respect for the law.
- Election administration must be non-partisan and neutral.
- Election administration must be transparent.
- Election administration must be accurate, professional and competent.
- Election administration must be designed to serve the voters.

The general guiding principles that a code of conduct for election observers must conform to are the following:

- Election observation must recognize and respect the sovereignty of the host country.
- Election observation must be non-partisan and neutral.
- Election observation must be comprehensive in reviewing the election, considering all relevant circumstances.
- Election observation must be transparent.
- Election observation must be accurate, professional and comprehensive.

### *Checklist*

- Is the legal framework objective, clear, transparent and publicly accessible?*
- Are fundamental suffrage rights, such as the right to vote and to register as a voter, the right to run for a public office etc., safeguarded by constitutional guarantees?*
- Have all relevant laws been reviewed, including the constitution, general and specific election legislation, laws relating to citizenship, political parties and campaign finance, media and public information legislation, criminal provisions related to election law violations and EMB instructions?*
- Do the codes of conduct form part of the electoral legal framework? If so, have they been reviewed to ensure that they conform and contribute to the overall objective of holding free and fair elections?*
- Does the legal framework ensure that the instructions and directives of EMBs at all levels are consistent with the provisions of the constitution and the electoral law?*
- Does the legal framework ensure that the provisions relating to national level elections, sub-national (provincial or state) level and local elections are in harmony with each other?*
- Was any part of the electoral law enacted just before the elections without affording a sufficient opportunity for discussion and debate?*

### **3. The electoral system**

*The choice of electoral system should ensure that the international standards for democratic elections are met in terms of institutions elected, the frequency of elections and the organization of electoral units.*

The choice of an electoral system should ensure that the political cleavages of a society are properly addressed by the electoral legal framework in such a way that the main conflicts and differences between and among social groups can be accommodated through the system of political representation. This is to guarantee political inclusiveness and representation. Thus the choice of electoral system is

best approached as an exercise in which particular goals (e.g., proportional election outcomes, strong local district representation) are first enumerated, before moving on to consider which electoral system is most likely to deliver such goals in the context of a particular country's social, political, geographic and historical situation.

### *Choosing an electoral system*

Choosing an electoral system is one of the most important institutional decisions for any democracy. An electoral system can help to “engineer” specific outcomes, such as encouraging cooperation and accommodation in a divided society. Electoral systems are the rules and procedures through which votes cast in an election are translated into seats won in the legislature or some other office (e.g., a presidency). Electoral systems can also influence other aspects of the political system (e.g., development of the party system) as well as being of importance to the link between citizens and their leaders (e.g., political accountability, representation and responsiveness). Thus electoral systems have many long-term consequences for democratic governance.

### *An electoral system has three main tasks:*

- *To translate the votes cast into seats won in a legislative chamber;*
- *To act as the conduit through which the people can hold their elected representatives accountable; and*
- *To give incentives to those competing for power to frame their appeals to the electorate in distinct ways. In divided societies, for example, where language, religion, race or other forms of ethnicity represent a fundamental political cleavage, particular electoral systems can reward candidates and parties who act in a cooperative, accommodating manner to rival groups, or they can punish these candidates and instead reward those who appeal only to their own group.*

Thus a country's choice of electoral system is the foundation upon which the legal framework of an election is built. The application of a particular electoral system within a particular country context can make a significant positive or negative impact on the electoral fortunes of the various political contenders. If there is a question of the appropriateness of a particular electoral system to a specific country, it would be useful to examine the results of the previous elections, with a view to seeing whether, for example, the ruling political party significantly benefits at the cost of other parties or whether other factors in the system significantly distort the international standards or thwart a valid democratic result. For example, in a proportional representation (PR) system where the law establishes a percentage of the vote as a legal threshold for securing a seat in the legislature, this percentage can be “adjusted” in such a way as to benefit certain parties and adversely affect other parties, to the point of even

eliminating others.

Electoral systems are often categorized according to how proportionately they operate in terms of translating votes cast by electors into seats won by parties. A typical three-way structure divides such systems into plurality-majority, semi-proportional and PR systems. Plurality-majority systems typically give more emphasis to local representation via the use of small, single-member electoral districts than to proportionality. By contrast, PR systems typically use larger multi-member districts and deliver more proportional outcomes. Semi-proportional systems offer yet other approaches, as well as various mixtures of plurality and proportional models (such as the “mixed” models by which part of the legislature is elected via PR and part from local districts, a common choice in many new democracies over the past decade). There is no “best” electoral system suitable to all and no universally recognized standard. The choice of electoral system needs to be made with desired goals in mind. The effects which different kinds of electoral system can promote are ultimately contextual and depend on the specific cleavages and divisions within any given society. While some electoral systems are certainly more likely to produce, say, more proportional electoral results than others, the overall consequences of electoral systems are highly context-specific.

When reviewing the electoral system an important consideration is whether a country is sharply divided along political, religious, ethnic or other lines and whether minorities are properly and equitably represented in the political system. If a country has some particular problem, which could be either directly attributed to the choice of electoral system or remedied by using a different electoral system or by introducing certain reforms to the existing electoral system, the advantages and disadvantages of the different electoral systems should be described along with related recommendations for resolving existing inequalities. (For more details see the International IDEA Handbook of Electoral System Design).

### *Institutions elected and frequency of elections*

In a federal polity there are central as well as provincial or state (federal unit) legislatures that are elected, and either one of these or both levels might have legislatures that are bicameral. Sometimes the mandate of the EMB or the scope of the electoral law includes provisions for election to municipal and other local bodies as well. In countries where the chief executive (president) is directly elected, or elected through a directly-elected college of representatives (the USA, for example), the electoral law will include provisions relating to election to that institution as well. Normally the regulation of election to political party offices does not fall within the mandate of electoral law and the EMB but, in such cases, it should also be examined. As a general principle, international standards require that all seats in at least one

chamber of the national legislature be freely contested in a popular vote, held at reasonable intervals as established by law. This could, in practice, be up to six years. However, there may be situations where a country is seeking admission to a particular international organization, or is a signatory to a particular international instrument, and may be required to hold popular or direct elections for other institutions within other specified timeframes.

### *Special provisions for under-represented groups*

In many countries the electoral system includes provisions intended to promote the inclusion of historically under-represented groups in elected institutions. Most often this is to assist the election of women, ethnic and linguistic minorities or groups with treaty or similar rights within the state.

Such provisions can take the form of :

- Reserved seats: where a number or percentage of seats can only be contested by candidates from, and sometimes only voted for by voters from, designated historically under-represented groups.
- Rules pertaining to candidate recruitment and selection: where parties are required to put forward a set number or percentage of candidates from designated historically under-represented groups.

### **Checklist**

- Does the legal framework provide that all seats in at least one chamber of the national legislature are subject to direct or popular elections to be held at regular and reasonable intervals as provided by law?*
- Does the legal framework clearly provide an electoral formula for converting votes into legislative seats?*
- Has any adjustment to the legal threshold for securing a seat in the legislature been made which could benefit a party or parties at the expense of others?*
- Is the length of the term of the institution being elected acceptable?*
- Does the country have sharply divided political, religious or ethnic minorities, and does the existing electoral system accentuate such differences?*

Where such provisions exist, the law must clearly define the group that is the subject of the provision, whether the provision is a transitional or permanent measure, and must detail the mechanism for enforcement. Any such provisions should be carefully examined to ensure that they do not themselves lead to exclusion from elected institutions.

#### 4. Boundary delimitation, districting or defining boundaries of electoral units

*The legal framework for elections should seek to ensure that the boundaries of electoral units are drawn in such a way as to achieve the objective of accord- ing equal weight to each vote to the greatest degree possible to ensure effective representation.*

The legal framework needs to address the issue of how constituencies or the electoral units being represented (sometimes also called voting districts) are to be defined and drawn. The overriding importance of this subject means that it is often part of the constitutional provisions of a country. The legal fra- mework regulating drawing boundaries for electoral units should state:

- The frequency of such determination;
- The criteria for such determination;
- The degree of public participation in the process;
- The respective roles of the legislature, judiciary and executive in the pro- cess; and
- The ultimate authority for the final determination of the electoral units.

There are different ways in which boundaries of the electoral units are drawn up. Since this whole exercise is politically very sensitive, in many jurisdictions the EMB is not directly involved. The process is often undertaken by a spe- cial commission, to which the EMB might provide support. Such a commis- sion or a similar body may be made up in a variety of ways including:

- Representatives of political parties;
- Independent non-political individuals such as judges;
- Relevant experts -- demographers, geographers, statisticians, cartograp- hers; or
- A combination of all or some of the above.

The most important element that differentiates electoral systems is the man- ner in which seats in the legislature are allocated. Allocation may be:

- To candidates receiving a plurality of the vote;
- To candidates obtaining a majority of the vote; or
- Proportionally on the basis of votes cast for political parties or candida- tes.

Of course, the general aim of all these electoral systems purportedly remains the same, namely, to translate the will of the general electorate into representative government. Boundary delimitation in each of these types of electoral system produces a different result, but each should ensure that cer- tain guiding principles are honoured in its implementation. The ideal inter- national standard for this exercise is the equality of voting power for each vote, providing effective representation.

Though boundary delimitation or redistricting practices vary greatly around the world, there are three universal principles to guide the delimita- tion process:

- Representativeness;
- Equality of voting strength; and
- Reciprocity and non-discrimination.

### ***Representativeness***

Boundaries of the electoral units should be so drawn that constituents have an opportunity to elect candidates they feel truly represent them. This usually means that electoral unit boundaries should coincide with communities of interest as much as possible. Communities of interest can be defined in a variety of ways. They can be administrative divisions, ethnic or racial neighborhoods, or natural communities such as islands delineated by physical boundaries. If electoral units are not composed of communities of interest, however defined, it may be difficult for a single candidate to represent the entire constituency. However, this principle will often be compromised, especially in large multi-member proportional representational constituencies or where the whole of the country is a single constituency.

### ***Equality of voting strength***

Boundaries should be drawn so that constituencies are relatively equal in voter strength, resulting in each voter casting a vote of equal weight to the greatest degree possible. Equi-populous electoral units allow voters to have an equally-weighted vote in the election of representatives, but this ideal is not attainable in practice and many other competing principles are applied simultaneously.

### ***Reciprocity and non-discrimination***

The procedure for delimiting electoral units should be clearly spelled out in the legal framework so that the rules regulating the process are the same, regardless of who is drawing the electoral unit boundaries. If the redistricting process is to be non-partisan, then all political parties shall refrain from attempting to distort the outcome. If political concerns are permitted to play a role in the process, then all political parties must be given equitable access to the process. If the legislature is to draw electoral unit boundaries, then the political party with a majority in the legislature will have an opportunity to control the process. These rules must be clearly understood and must be acceptable to all major political parties and participants in the redistricting process.

The law should also specify under what circumstances the number of voters in an electoral unit might deviate from the established “equality criterion”. Thus, the legal framework should require that electoral units be drawn in such a way that each electoral unit has approximately the same population in order to ensure equal suffrage to the maximum degree possible (in the absence of a continuous voter registration process the exact number of voters might not be available; hence the use of the term “approximately the same population”). However, this does not preclude consideration of such factors as natural barriers, convenience, accessibility

for voters or pre-existing administrative and historical boundaries. Care should be exercised to ensure that the standard deviation from one electoral unit to another is within acceptable and clearly stated limits.

Ideally, the legal framework should provide that the persons or institution drawing electoral unit boundaries be non-partisan, independent, professional and impartial. Failing this, an alternative is to allow all political parties in the legislature to take an equitable part in the process of boundary delimitation. The legal framework should also provide for maximum public input and participation in the process of drawing electoral units.

Jurisdictions vary in their treatment of appeals against or reviews of the decisions of boundary delimitation, some allowing them, others not.

Depending on the historical and local needs of a jurisdiction, either approach is acceptable so long as it is non-discriminatory and applied equally in all situations.

### *Checklist*

- Does the legal framework provide for the principle of equality of votes, drawing electoral unit boundaries with a more or less equal number of voters? Does the legal framework also provide for objective criteria for deviating from the “equality” standard in terms of physical geographical features, existing administrative and historical boundaries, or other well-established criteria?*
- Does the legal framework provide for an impartial, non-partisan, independent and professional body of persons or an institution to undertake boundary delimitation?*
- Is there a broad consensus and measure of support among the political parties regarding the existing electoral units’ boundaries?*
- Does the legal framework clearly state the events which trigger the boundary delimitation process?*
- Do the existing boundaries of electoral units favour the ruling party?*
- Is the EMB involved in the boundary delimitation exercise? Is it likely to impinge upon the impartiality and independence of the EMB?*
- Does the legal framework provide for appeals against decisions concerning boundary delimitation?*

## **5. The right to elect and to be elected**

*The legal framework should ensure that all eligible citizens are guaranteed the right to universal and equal suffrage as well as the right to contest elections without any discrimination.*

Formal constitutional or statutory recognition of a citizen’s right to vote, and to run for public office, is common to democratic states and plays both a substantive and a

confidence-building role. These rights are often subject to certain qualifications insofar as most states make them subject to citizenship, age and residency requirements. Those reviewing the legal framework of a country need to look carefully behind the veil of such restrictions to check for any possible hidden intent. For example, where a citizen convicted of treason cannot vote, in the context of a spate of such convictions only against leaders of the opposition by an apparently “packed” court, the genuineness of such a qualification becomes questionable. The denial of suffrage rights for long-past political crimes would be equally open to question. Even seemingly simple and clear rules such as disqualification for “mental incapacity” may require examination.

Access to voting can be as important as substantive rights, because a right which cannot be exercised is a right denied. For example, where voters are not provided with accessible voting facilities or where the identification of a voter at the polling station is overly complex, this effectively deprives an elector of the right to vote. Where disproportionately large deposits are required for nomination, this effectively can deprive poor candidates of the ability to freely contest an election. Frequently, facilities for voting are not afforded to expatriate citizens, though this restriction must be weighed against a consideration of the capacity of, for example, a poor country to provide the facility. On the other hand, depending on the economic and technological development of a country, providing voting access to citizens by allowing voting by mail or via the Internet might be considered.

### ***Universal and equal suffrage***

One clear international standard which must be provided for is the guarantee of universal and equal suffrage to each adult citizen. The right to be elected as a member of the legislature or other provincial or local body, as well as the right to be elected president, may require an age beyond the age of majority, but must be guaranteed to all citizens of that age without discrimination.

### ***Non-discrimination***

The legal framework must ensure that every citizen above a certain age has the right of suffrage and that every person who has the right of suffrage is allowed to exercise that right in a non-discriminatory manner on the basis of equal treatment before the law. No discrimination on account of race, colour, sex, language, religion, political or other opinion, association with a national minority, property, birth or other status should be allowed to deprive an otherwise eligible citizen of the right to vote or the right to contest an election.

### ***Scrutiny of restrictions on suffrage***

The legal framework should clearly state the circumstances under which a

person's suffrage rights may be curtailed or suspended, in what manner or to what degree. Any limitation or restriction on the right to elect or be elected is justifiable only by exceptional circumstances or according to accepted principles. Different jurisdictions have taken different approaches to the issue of giving voting rights to convicts: these range from a total ban on registering as a voter for any person convicted of any offence, to restricting these rights in cases where the conviction is for certain identified offences (of moral turpitude, for example) with a defined term of sentence, to imposing no restrictions at all on convicts. The principle of natural justice requires that any class of citizens disqualified from voting be known in advance. Such disqualifications should be clearly laid down in the legal framework and not be subject to the arbitrary discretion of an institution or a person. Scrutiny and caution are required since the right of suffrage is a fundamental human right.

### **Checklist**

- Are all citizens of the age of majority guaranteed the right of universal and equal suffrage?*
- Does the legal framework ensure that suffrage rights are exercised in a non-discriminatory manner on the basis of equal treatment before the law?*
- Are there any limitations or restrictions on the right of suffrage and, if so, are they clearly justified by exceptional circumstances or based on recognized norms?*

## **6. Electoral management bodies**

*The legal framework should require that EMBs be established and operate in a manner that ensures the independent and impartial administration of elections.*

### **General overview**

In some established democracies, national and local government officials, whose neutrality and fairness are generally accepted by the electorate, handle electoral administration. Ordinary courts settle disputes, as they have a tradition of fairness and neutrality and generally enjoy the confidence of the electorate.

In emerging democracies, there has been an increasing trend to establish independent EMBs. This is seen as an important step in building a tradition of independence and impartiality, as well as building the confidence of the electorate and political parties in the electoral process. However, since there is yet no internationally-recognized standard in this respect, the term "independent EMB" in this section means an autonomous and impartial EMB.

For any EMB to be credible and effective, sufficient and timely funds must be made available to it as well as human resources (election officials) who are impartial and independent.

Administering democratic elections requires that EMBs be, and be seen to be, impartial and independent of government or other influence. This is a critical area, as the election administration machinery makes and implements important decisions that can influence the outcome of the elections. The political circumstances of the particular country under consideration need to be taken into account when assessing the legal framework regulating electoral management bodies.

### *Formation of electoral management bodies*

The legal framework for elections must provide for the size, composition and membership tenure of the EMB, as well as for the appointment and removal of members. All these factors directly affect the independence and impartiality of the EMB. Considerations to be taken into account concerning the formation of EMBs include the following.

#### *Structure*

The administrative structure established by the legal framework should include a central or national EMB with exclusive authority and responsibility over any subordinate electoral bodies. There should be a subordinate electoral body for the lower levels, for a province or a state in a federation, or for other electoral units (i.e., for a voting district in which a member of the legislature is elected), depending on the size of the electoral unit and the level of communications available. Whether any additional intermediate electoral bodies are needed will depend on the electoral system, and on the geographic and demographic factors of the country. However, the creation of unnecessary or superfluous electoral bodies should be avoided. The lowest level of the election structure is the polling station where actual voting takes place. It is critical that the legal framework for elections defines the relationship between the central EMB and the lower-level election bodies as well as the relationship between all election bodies and the executive government authorities.

#### *Authority and responsibility*

The authority and responsibility of EMBs at each level should be clearly defined in the legal framework for elections. The legal framework needs to address the following questions:

- How is each EMB constituted?
- How does each EMB conduct its business?
- What are the quorum requirements for each EMB?

- What are the voting rules for EMB decisions?
- How are the EMB's decisions to be made public?
- What are the clear-cut, transparent procedures for the conduct of business so that the work of the EMB can be transacted smoothly?

### *Composition and qualifications*

Where possible, professionals familiar with the electoral framework of a country should be appointed to administer a country's elections. A common provision requires that at least some members of EMBs, at every level, have a background or training in law. Such a provision is reasonable but may present a problem for lower-level bodies and polling stations. EMBs comprising political party representatives also have advantages and disadvantages. Provisions such as those requiring that EMB membership must include party representatives or judges, who are ultimately appointed by the incumbent party, obviously will impact on an EMB's independence and impartiality. Generally, people having political credibility, such as members of civil society or those from the judiciary, might be more suitable for appointment to the EMB. Any conflict of interest, especially where the EMB is party-based, should be disclosed by the appointed members in advance. The age of retirement for the members of the EMB should at least be same as for a judge of the highest court of that country, although retired judges could also be considered for these positions.

### *Tenure*

An EMB should be a body that functions continuously and not only for a limited time period just before elections. This means that the EMB, if empowered to maintain voter registers, should be required by law to work either continuously or periodically to improve and update them, prepare for an election and strengthen the system. However, it is normal for lower-level election bodies, such as polling station committees, to be temporary bodies established for a certain period before an election and to cease to function once the results are published or the appeals process is complete. The legal framework should ensure that the selection and appointment of EMB members are impartial. Additionally, it is suggested that members' terms of office be staggered to provide continuity in the work of successive EMBs. The legal framework should specify the grounds and process for removal of a member to protect members from arbitrary removal and to provide immunity in connection with the performance of legal duties and salary provisions that cannot be manipulated by the government. The legal framework should lay down the general principle that the terms of appointment should not be varied to a member's disadvantage during the term of his/her appointment. The law should also specify the rights of each member of the EMB, including the right to receive timely

and adequate notice of meetings, the right of access to all EMB documents, and the right to participate in all EMB meetings. Some jurisdictions also provide for functional immunity of members of EMBs to enable them to carry out their duties and responsibilities efficiently and fearlessly.

### *Financing*

The legal framework should require that all levels of electoral bodies be established in a timely manner before an election and be adequately funded. It is crucial that the legal framework contains provisions as to how funding for the ongoing operations of the EMB will be made available. Some of the major methods of funding election operations are:

- The budget is allocated to an EMB through a department of the government (though in many emerging democracies this arrangement has not worked very satisfactorily).
- The budget is directly voted by parliament without the intervention of a department, sometimes through the medium of a standing all-party parliamentary committee.
- A lump sum advance allocation, with some guiding principles, is provided for. Once the EMB has conducted the electoral operation and exhausted that amount, the necessary audited sums are approved by the legislature.
- The EMB has direct and uncontrolled access to the State treasury for funding elections and reports to parliament only after an election.

### *Duties and functions*

The legal framework should clearly define the duties and functions of the EMB. These must particularly include the following:

- Ensuring that election officials and staff responsible for the administration of the election are well trained and act impartially and independently of any political interest;
- Ensuring that clear voting procedures are established and made known to the voting public;
- Ensuring that voters are informed and educated concerning the election processes, contesting political parties and candidates;
- Ensuring the registration of voters and updating voter registers;
- Ensuring the secrecy of the vote;
- Ensuring the integrity of the ballot through appropriate measures to prevent unlawful and fraudulent voting; and
- Ensuring the integrity of the process for the transparent counting, tabulating and aggregating of votes.

In some cases the duties and functions of an EMB may also include the following:

- Certification of the final election results;
- Delimitation of electoral boundaries;
- Monitoring and overseeing electoral campaign finance and expenditure; and
- Research, advice to government and/or parliament, and international liaison.

### *Operation of electoral management bodies*

EMBs should operate independently, transparently and impartially. Once formed, an EMB must impartially serve the interests of all citizens and electoral participants. The primary objective of a legal framework is to guide the EMB and enable it to achieve the delivery of a free and fair election to the electorate. In doing this, the EMB must undertake its functions at each step in the election process in an impartial and efficient manner.

The critical attributes of a free and fair election, and of the electoral management body, include the following:

### *Independence and impartiality*

The functioning of the EMB should not be subject to the direction of any other person, authority or political party. It must function without political favouritism or bias. The EMB must be able to operate free of interference, simply because any allegation of manipulation, perception of bias or alleged interference will have a direct impact not only on the credibility of the body in charge but on the entire election process.

### *Efficiency and effectiveness*

Efficiency and effectiveness are integral components of the overall credibility of an election. Efficiency is critical to an electoral process insofar as technical breakdowns and problems can, and do, lead to chaos and a breakdown of law and order. Efficiency and effectiveness depend upon several factors, including staff professionalism, resources and, most importantly, sufficient time to organize the election and train those responsible for its execution.

### *Professionalism*

Elections should be managed by a specialized group of highly trained and committed experts who manage and facilitate the electoral process and who are permanent employees of the EMB.

### *Impartial and speedy adjudication*

The legal framework should make provision for a mechanism to process, adjudicate and dispose of electoral complaints in a timely manner.

### *Transparency*

The overall credibility of an electoral process is substantially dependent on all relevant groups (including political parties, government, civil society and the media) being aware of and participating in the debate surrounding the formation of the electoral structure and processes. An informed debate in these groups should also take place regarding the functioning of the EMBs. In this respect the value of constant consultation, communication and cooperation among EMBs, the political parties and the institutions of society cannot be over-emphasized.

### *Checklist*

- Does the legal framework for elections provide for the EMB to be constituted as an independent and impartial body?*
- Does the legal framework protect EMB members from arbitrary removal?*
- Does the legal framework require the EMB to operate in an independent, impartial and transparent manner? Are there any provisions in the legal framework that could prevent the EMB from working in such a manner?*
- Does the legal framework clearly define the authority and responsibility of each level of EMB and their relationships to each other as well as to other relevant governmental bodies and executive authorities?*
- Does the legal framework provide for adequate opportunity to seek review or reversal of an EMB decision?*
- Does the legal framework provide for continuity of electoral administration by staggering the terms of office of its EMB members?*
- Does the EMB have sufficient lead time to organize elections, especially at the lower levels?*
- Does the legal framework provide for making available sufficient and timely funds to the EMB to manage its operations?*

## **7. Voter registration and voter registers**

*The legal framework should require that voter registers be maintained in a manner that is transparent and accurate, protects the right of qualified citizens to register, and prevents the unlawful or fraudulent registration or removal of persons.*

## *Transparency*

The right to vote is violated if the legal framework makes it difficult for a person to register to vote, as normally a person who is not registered cannot legally vote. The right to vote is also violated if the legal framework fails to ensure accuracy in voter registers or facilitates fraudulent voting. The international standard for voter registration is that the register must be comprehensive, inclusive, accurate and up to date, and the process must be fully transparent. The process should facilitate the registration of a qualified voter, while at the same time safeguarding against the registration of ineligible persons. Some of the fundamental issues that must be clearly defined in the legal framework for elections are:

- Citizenship and age qualifications;
- Residential qualifications;
- Methods of voter registration;
- Process for dealing with objections and appeals;
- Identification of voters; and
- Documentation required by voters.

All the above must be clearly stated, objectively determinable and not subject to arbitrary decision.

Transparency requires that voter registers be public documents that can be monitored and made available for inspection at no cost to the requester. The legal framework should clearly specify who may inspect voter registers, how the inspection will take place, and the period when voter registers are available for public inspection. It should also specify who is permitted to request registration changes, additions and deletions, the procedure for making such requests, and during what time period such requests may be made. Requests for changes, additions and deletions in voter registers should only be limited to a minimum time period before a given election in order to finalize registers. A person should not be limited to making requests that relate only to herself/himself. When a person is permitted to make a request that affects another person, such other person must be notified of the request and be permitted to respond to the request. Changes, additions and deletions should be made only upon the presentation of specific documentation and in accordance with the procedure identified in the legislation. Before finalizing voter registers, in addition to the general public, all registered political parties should also be given notice of and provided access to such registers so that they may verify, object to or seek to add such names as they wish. Decisions on requests should be made expeditiously, within a set time period provided by the law. Decisions must be subject to appeal to be determined expeditiously, also within a set time-period.

The legal framework may provide that the responsibility to register lies either with the individual -- *passive voter registration* where the individual voter has the responsibility to approach the registration authorities to get her- self/himself registered -- or with the state -- *active voter registration* where the state, the EMB or other authorized body sends its official enumerators from house to house to register voters. In some cases the responsibility may be a combination of both active and passive voter registration. In all cases, however, the final responsibility for the accuracy of the voter registers lies with a local or central state authority or EMB, which must ensure that voter registers are maintained in an accurate and transparent manner. This should both facilitate and protect the right of citizens of legal age to register and prevent unlawful or fraudulent registration.

The legal framework should require that voter registers be systematically updated and corrected in a transparent manner to allow electoral participants and voters the opportunity to review their accuracy. It should also provide for voter registers to be updated either on a continuous basis or periodically by a certain cut-off date, in advance of polling.

### ***Protection of personal data and information***

The legal framework often requires that a person disclose certain information to authorities when registering as a voter or as a candidate. Legislation related directly to voter registration should not allow for the collection, use or dissemination of such personal data or information for any purpose other than the exercise of suffrage rights. This includes provisions that relate to fingerprints, photographs and personal identification numbers, as well as to ethnicity or other factors that could lead to discrimination or place the voter at risk of personal harm. The legal provisions should specify what personal information and data will be publicly listed on the voter register. As an alternative, some jurisdictions rely on the civil registration as the basis of their voter registers.

The legislation should also clearly state the permitted uses of information obtained from inspection of the voter registers and whether the information can be used for purposes other than challenging the registration of a particular voter. In particular, the law should state whether the information may or may not be used for the campaign activities of political parties and candidates, for police investigations or for commercial or other purposes. The legal framework should also state the sanctions for misuse of information obtained from voter registers.

## Checklist

- Does the registration process provide for accurate voter registers? Is the process itself transparent?*
- Does the legal framework contain provisions for regular and timely updating of voter registers before an election?*
- Are the requirements for voter registration stated in clear and unambiguous language?*
- Does the law clearly identify what documents are necessary to register as a voter?*
- Are the provisions for challenging a registration decision stated in clear and unambiguous language?*
- Is the time period for challenging a registration decision clearly stated?*
- Are voters protected from the wrongful disclosure of personal data?*

## 8. Ballot access for political parties and candidates

*The legal framework should ensure that all political parties and candidates are able to compete in elections on the basis of equitable treatment.*

The legal framework should differentiate between the registration of political parties in general and the rules governing ballot access at election time. Many of the procedural requirements for getting access to the ballot may be the same as for the initial registration of parties (signature requirements, deposits, geographic spread etc.) but the legal framework might make it easier, or sometimes even automatic, for registered parties to be on the ballot papers.

### *Equitable treatment*

The legislative framework for elections should provide for the right of all individuals and groups to establish, in full freedom, their own political parties or other political organizations with legal guarantees to enable them to compete with each other on a basis of equitable treatment before the law. Accordingly the legal framework must provide a level playing field for the recognition and registration of all political parties, regardless of ideological position. Once registered, each category of political parties must be treated equitably for the purposes of access to the ballot. Similarly, within the confines of the electoral system, the right of individuals to run as independent or non-affiliated candidates must be protected.

### *Registration of political parties*

The legal framework may provide a structure for the registration of political parties. The legal framework should clearly provide for notification of the dates for commencement and closure of registration, or provide that such registration

could be continuously open; specify when, how and where registration procedures must be undertaken; and set out the process of verification of registration. Where the legal framework requires the collection of signatures as evidence of support of an application for registration, it should provide for a reasonable timeframe for this to be done and for the subsequent verification of the signatures. The legal framework should provide for uniformity in the registration process so that the same process applies to all political parties at all levels.

The grounds for rejection of a registration application should be based on objective criteria and clearly stated in the legal framework for elections, along with avenues of appeal against such rejection.

### *Ballot access*

Some registered parties may be able to gain ballot access automatically by virtue of their status as a registered party, while unregistered parties may need to fulfil some or all of the requirements for registration before gaining ballot access.

The legal framework should clearly provide for notification of the dates for commencement and closure of nominations; specify when, how and where nomination procedures must be undertaken; and set out the process of scrutiny and verification of nomination forms and declarations. Where the legal framework requires the support of a nomination by the collection of signatures, it should provide for a reasonable timeframe for this to be done and for the subsequent verification of the signatures. The legal framework should provide for uniformity in the nomination process so that the same process applies to all political parties at all levels.

Unless the electoral system is restricted to parties or party lists, individuals should not be precluded from being nominated as independent or unaffiliated candidates.

Ballot access for a particular election is usually granted when a political party, coalition, bloc, or independent candidate meets one or more of the following requirements:

- Having paid a monetary deposit: monetary deposits should be of a sufficient level to discourage frivolous independent candidates and political parties, but should not be so high as to prevent legitimate political parties or independent candidates from obtaining ballot access. Additionally, monetary deposits should be refundable upon a reasonable number or percentage of votes being received. This threshold should be stated in the electoral legislation;
- Having previously won a seat in the legislature or having gained a minimum percentage of the votes in the last election; and
- Having collected a minimum number of validated signatures of registered voters. Special attention should be given to the manner of validating signatures. An invalid

signature should merely be what it is -- an invalid signature. It should not invalidate other signatures or the signature list. When signature collection is involved, registration should be based on verification of a fixed number of valid signatures without regard to the number or percentage of invalid signatures that may be on the registration list. The law should be very clear on the verification process involved in order to ensure that all party and candidate lists are exposed to the same level of scrutiny, under clearly stated objective criteria. Legal provisions to achieve this objective may include:

- The size of the sample to be drawn and checked;
- The method by which the sample is to be drawn (for example, the computer generation of random numbers);
- The tests to be applied to determine whether a particular signature is valid;
- A formula for determining the number of signatures in the sample which must be valid in order for the registration to be accepted;
- The circumstances under which a further sample may be drawn if necessary;
- The definition of the deadlines for approval or rejection of registration application;
- The acceptable grounds for objections by other parties, candidates or voters.

There are three other points worth noting:

- Provisions regarding the geographic regions where signatures are obtained must also be carefully reviewed. An election law may require that a party obtain a certain number of signatures in every region of the country. Such a provision discriminates against regional, ethnic and smaller parties that enjoy a strong public following but whose support is limited to a particular area,
- Any requirement that voters may only sign in support of one candidate or party which can give rise to abuse of the registration process; and
- Provisions regarding the process for appeal and the requirement for expedited court ruling -- adequate time must be permitted for correcting minor deficiencies before formally rejecting the nomination. The law should provide for appeal to a court of law after final rejection of registration. The law should clearly specify the process for appeal and require either an expedited court ruling to enable a candidate or party to be placed on the ballot where registration was improperly denied, or to allow the appellant to file an election petition after the election is concluded.

### Checklist

- Are all political parties and candidates assured equitable treatment?*
- Are eligible citizens assured of the right to seek office as either candidates for a political party or independent candidates?*
- Does the legal framework provide a level playing field for registration and ballot access for all political parties and candidates?*
- Are the requirements and procedures for party and candidate registration based on relevant, reasonable and objective criteria? Are these criteria clearly stated in the law?*
- Does the legal framework provide for a timely appeal to expeditiously review the decisions made on party and candidate registration?*
- Does the legal framework provide for minor corrections of errors or allow further information to be added so that candidates' nominations are not rejected on flimsy grounds?*

## 9. Democratic electoral campaigns

*The legal framework should ensure that each political party and candidate enjoys the right to freedom of expression and freedom of association, and has access to the electorate, and that all stakeholders in the election process have an equal chance of success.*

Elections are a means to translate the general will of the electorate into representative government. To achieve this objective it is necessary that all parties and candidates be able to put out their manifestos -- the political issues and their proposed solutions -- freely to the electorate during the electoral campaign. The electoral campaign period should normally be well defined and should commence after the valid nomination of parties and candidates, ending one or two days before polling. However, certain jurisdictions might not have any well defined campaign period. All contesting parties and candidates should be afforded an opportunity to reach out to the electorate at large and to put forth their views, policies and programmes. The legal framework should ensure that:

- There are no unreasonable restrictions on the right to freedom of expression and whatever restrictions there are be set out in the law.
- Every party and candidate has equitable access to the media, especially the electronic media, to undertake their campaign.
- Where state or private funding is permissible, every party and candidate has equitable access to resources to undertake a credible election campaign.
- No party or candidate (especially the ruling party) is favoured, financially or otherwise through the availability or use of state resources, over the other parties and all stakeholders in the election process have an equal chance of success.
- No party or candidate threatens or does violence to another party or candidate,

or incites anyone to violence or otherwise impedes the freedom to campaign.

- All parties and candidates should normally cease active campaigning one or two days prior to polling day, allowing the electorate to weigh the options and to exercise their franchise freely and without undue pressure. However, in certain jurisdictions this may not be possible or adhered to for historical reasons.

### *Campaign violence*

The legal framework should state in clear language what type of conduct and behaviour is prohibited during the electoral campaign. Provisions regulating the conduct of political parties and candidates or references to codes of conduct may be provided in the electoral law or the criminal law. Sometimes such informal codes of conduct are arrived at as a result of an agreement reached between various political parties, often brokered by the EMB. These provisions should be consistent with the legislation but should not be unduly restrictive and should provide the opportunity for active and open campaigning, free from interference.

### *Campaign mechanisms*

Electoral legislation generally sets out the procedures and mechanisms for dealing with complaints and disputes during the campaign. Some legal frameworks for elections provide for adjudication or other mechanisms, such as mediation, to deal with disputes. The legal framework should provide for a mechanism for interaction between contesting parties and candidates during the campaign period -- such as a standing committee coordinated by the EMB. This enables the stakeholders to exchange views with each other or raise complaints of violations of campaign provisions or codes of conduct with a view to finding a common approach to resolving them and containing electoral violence.

### *Sanctions*

Merely incorporating provisions for a free electoral campaign in the legal framework is not sufficient unless it is backed by a reasonable, effective and credible sanctions regime. If a code of conduct is incorporated in the electoral law or based on the provisions of the law, criminal or civil penalties may apply. Other specific electoral penalties, such as the disqualification of candidates or parties, may also be possible. Whatever legal or other sanctions are established, a party and its members have to clearly understand their obligations. Therefore, it is important that rights, obligations and the sanctions should be spelt out unambiguously.

The legal framework should ensure that penalties are not disproportionate to offences and that the same infractions are treated equally.

### *Basic assumptions*

The parties and candidates should agree that the legitimacy of a government coming to power through a democratic multiparty election rests on the following principles:

- That having been informed during the electoral campaign of the policies and qualities of all political parties and candidates the voters have made an informed choice which is reflected in the election results; and
- That voters have been able to vote freely, without interference, fear, undue influence, bribery or intimidation.

All parties and candidates should then recognize that the elections express the credible free choice of the voters and accept the result of the election as an expression of that choice.

### *Code of conduct reflecting campaign legislation provisions*

The campaign period is crucial to reach out to the electorate. A code of conduct for democratic campaign management should ensure that all parties and candidates:

- Respect the right and freedom of all other parties and candidates to campaign and disseminate their political ideas and principles without fear;
- Conduct themselves in a manner that respects the rights of other parties and candidates, and respects the rights of voters and other members of the community;
- Respect the freedom of the press;
- Use their good offices to seek to ensure reasonable freedom of access by all parties and candidates to all potential voters; and
- Seek to ensure that potential voters wishing to participate in related political activities have freedom to do so.

At the same time the code of conduct should ensure that no party or candidate will:

- Harass or obstruct media representatives engaged in their professional activities;
- Disrupt, destroy or frustrate the campaign efforts of any other party and in particular will not:
  - Prevent the distribution of handbills and leaflets, nor the display of posters, of other parties and candidates;
  - Deface or destroy the posters of other parties and candidates;
  - Deface private property or government or public buildings by writing slogans, pasting posters etc.;
- Prevent any other party from holding rallies, meetings, marches or demonstrations;
- Seek to prevent any person from attending the political rallies of another party;
- Permit their supporters to do anything prohibited by the code of conduct.

### *Checklist*

- Does the law regulate the conduct of political parties and candidates during electoral campaigns and provide for active and open campaigning free from government and other political parties' or candidates' interference?*
- Where admissible, does the legal framework define the campaign period -- the date of its commencement and date when it ends?*
- Where admissible, does the legal framework provide for cessation of all active campaigning one or two days prior to polling day?*
- Are there provisions and safeguards to avoid electoral violence so that the electorate and other candidates and parties are not intimidated?*
- Does the legal framework for elections provide for procedures and mechanisms to deal with complaints and disputes during the campaign period in a timely manner?*
- Is there a prohibition on the use of government resources during the campaign period, other than those available to all parties and candidates?*

### 10. Media access and freedom of expression

*The legal framework should ensure that all political parties and candidates have access to the media and are treated equitably by media owned or controlled by the state, and that no unreasonable limitations are placed on the right of political parties and candidates to free expression during election campaigns.*

Some political parties own newspapers and even television channels, which are used as party mouthpieces to communicate the campaign issues of the party to the electorate. Where there are private rather than government-owned media the question of equitable access for parties and candidates arises and may need to be regulated. The acceptable international standard in this respect is that of non-discrimination. If political advertising is allowed, private media should charge the same rates to all parties and candidates without any discrimination. Some jurisdictions ban political advertising altogether; in other jurisdictions such a ban has been interpreted as an unjustified breach of the right of free speech and expression. Nevertheless, paid political advertising should always be identified as such and should not be disguised as news or editorial coverage.

#### *Equitable treatment and access*

The legislative framework for elections should ensure that all political parties and candidates have access to the media and *equitable* treatment in media owned or controlled by the state, so that the general public can be informed of the political platforms, views and goals of all parties and candidates in a fair and unbiased manner. This includes all forms of print and electronic media.

A country's legal framework should contain the following guarantees:

- That the political parties and candidates are given the necessary legal guarantees to enable them to compete with each other on a basis of equitable treatment before the law and by the state authorities; and
- That no legal or administrative obstacle stands in the way of access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.

There should be clear legal provision for the timely implementation of these guarantees before and during elections. The process for establishing a formula or schedule for access and equitable treatment in the media for a given election should be unambiguous and capable of objective application.

The legal framework should ensure equitable access for political parties and candidates on state-owned radio and television during the election campaign period by providing that all parties are guaranteed a certain amount of broadcasting time according to a defined formula. For example, 50 percent of the time could be allocated equally among all parties with the remaining 50 percent differentially allocated on the basis of the number of votes obtained by a party in the last election or in proportion to its seats in the previous legislature.

Access to the media by parties and candidates may be regulated in a country's law covering the media or public information rather than in the election law. Media law may only provide general statements on access and delegate authority for promulgating the specifics of implementation to an administrative body such as a specialized media commission.

The standard of equitable treatment and access to the media are undermined if state-owned or controlled media are able to favour a political party or candidate in supposed news coverage, political coverage, forums or editorials. Biased coverage or preferential treatment in State media should be prohibited by law, with penalties or corrective mechanisms defined.

### ***Limitations on free expression***

A democratic election is not possible where the legal framework for elections inhibits or dampens campaign speeches and free expression. Too often, the legal framework in a country in transition to democracy censors campaign speeches by imposing sanctions against public speaking that "defames" or "insults" another person or political rival, which could include criticism of the government, a government official or a candidate in the electoral campaign. Such provisions may not only be found in the electoral code or media (public information) law but may also be included in general constitutional, civil, criminal and administrative laws. Any law regulating defamation of character or reputation should be limited to the civil

law. Any provision, regardless of the legal source, that imposes disqualification or imprisonment or monetary fines for criticizing or “defaming” the government, another candidate or a political party may be subject to abuse.

Limitations on free expression violate international human rights law. Additionally, such provisions may violate free speech guarantees found in a country’s constitution. These freedoms need consideration when reviewing provisions that permit censorship of candidates, supporters or the media, and are contrary both to international standards and often to the domestic law of the country. The only exception may be the specific prohibition of inflammatory speech calculated to incite violence or hatred against another person or group.

The conduct of opinion polls and exit polls -- especially when their findings can influence the judgement of a part of the electorate which has not yet gone to the polls -- is another area for consideration. Some jurisdictions consider any limitation on opinion polls or exit polls as an infringement of freedom of speech and expression, and hence unacceptable. On the other hand, some jurisdictions permit publication of such findings only after the polling is completed.

Any legal provisions placing unreasonable or disproportionate limitations on free speech and expression during election campaigns should be amended or deleted from the legal framework.

### **Checklist**

- Does the legal framework for elections ensure that all political parties and candidates are provided access to the media and equitable treatment in media owned or controlled by the state?*
- Does the legal framework establish a formula for media access and equitable treatment that is fair, understandable and capable of objective application?*
- Does the legal framework provide for free expression during election campaigns?*
- Does the legal framework provide that no party or candidate shall be discriminated against in terms of access to the media or, where paid advertising is permitted, in being overcharged for political advertising?*
- Does the legal framework ensure that the ruling party does not get disproportionately large media coverage in the guise of news or editorial coverage?*

## 11. Campaign finance and expenditure

*The legal framework should ensure that all political parties and candidates are equitably treated by legal provisions governing campaign finances and expenditures.*

One of the main characteristics of a democracy is the holding of multi-party elections. The availability of credible alternative choices depends on the existence of robust political parties. In turn, political parties require a secure base for financing their election campaigns and their routine operations. Thus it is an acceptable practice for a legal framework to provide for the campaign financing of parties and candidates. Laws relating to the financing of parties and candidates are sometimes found not in the electoral legislation but in separate laws. Basically there are two forms of funding of parties and candidates: public funding and private funding, with contributions sometimes coming from foreign sources.

The legal framework may provide for electoral campaign financing on the basis of the following internationally-recognized standards:

- That there should be a transparent system of disclosure of the funding received by any party or candidate;
- That there should be no discrimination with regard to access to public funds for any party or candidate;
- That public funding should be made available to parties on an equitable basis; and
- That there should be a level playing field among the parties or candidates.

### *Public funding*

Payment of direct financial subsidies to candidates or to political parties from public funds is gradually becoming the norm. The main forms of indirect public funding could be one or more of the following:

- Free broadcasting time;
- Various types of state payments and facilities made available to members of the legislature;
- Use of government facilities and public personnel;
- State grants to party foundations; and
- Tax relief, tax credits and matching grants.

The distribution of direct public funds for political parties or candidates may be based on several criteria. Some of the main criteria are:

- The grant may be a proportion of actual expenditure where the receipt of public money is conditional on the party or candidate also raising money from private sources.
- The grant to parties may be proportional to their votes in the previous general election.

- The grant may be proportional to the number of each party's seats in the legislature.

If the legal framework for elections provides for public funding, it should be provided on the basis of equity. This does not mean that all political parties and candidates are to receive an equal amount of campaign funds. Provisions for public funding should be clearly stated in the law and based on objective criteria that are not open to subjective interpretation by government authorities. Additionally, the legal framework should ensure that state resources are not used or misused for campaign purposes by the party in power. The legal framework should specifically provide that all State resources used for campaign purposes, such as state media, buildings, property and other resources, are also made available to all electoral participants on an equitable basis.

### ***Private funding contributions***

The main forms of private funding are:

- Membership subscriptions;
- Donations to political parties or candidates by individuals;
- Funding by institutions such as large business corporations, trade unions etc; and
- Contributions in kind by supporters.

Where there are provisions in the legal framework for elections relating to private contributions to campaign expenses incurred on behalf of parties and candidates, these should be so designed as to ensure equality of freedom to raise private funds. Furthermore, these provisions may include limits on contributions in order to “level the campaign playing field” to a reasonable degree, taking into account geographic, demographic and material costs. However, the enforceability of such provisions must be kept in mind while framing or assessing such provisions.

### ***Expenditure control***

The legal framework may control the election expenditure of the parties and candidates in order to bring about some semblance of an equal chance of success. Certain financial limits may be prescribed for varying levels of elections: presidential, legislative and local. Parties and candidates are then periodically required to file statements and reports of election expenditure to the monitoring organization, which in most jurisdictions is the EMB. However, some jurisdictions do not restrict election expenditure (as is the case in the USA), regarding it as an unconstitutional curtailment of the fundamental right to freedom of speech and expression.

### ***Reporting and disclosure requirements***

Limitations on contributions or campaign expenditure are meaningless without transparent reporting and disclosure requirements. The legal framework should require periodic reporting at reasonable intervals of all contributions received and expenditure incurred by an electoral contestant. Penalties for failing to file reports or filing erroneous reports also should be clearly stated in the legal framework and should be proportional to the gravity of the offence. For example, candidates should not be disqualified from contesting elections or taking their seats, if elected, due to minor reporting irregularities.

The legal framework should specifically identify the agency responsible for receiving, compiling and holding campaign contribution and expenditure reports. The legal framework should clearly specify where and when such reports are available for public inspection. The law should also permit the public access to campaign contribution and expenditure reports so that the contents will be available to other interested parties, candidates and voters.

### ***Monitoring and enforcing compliance***

Often there are too many laws and too little enforcement. For political financing to be effective, the legal framework should provide mechanisms for monitoring and enforcing compliance with political finance laws.

### ***Checklist***

- Does the legal framework ensure that all political parties and candidates are treated equitably through provisions governing campaign contributions and expenditures?*
- If the legal framework for elections allows public funding or the use of state resources for campaigns, does it regulate such use on the basis of equitable treatment for all political parties and candidates?*
- Are limitations on funding of campaigns reasonable, clear and capable of objective application?*
- Does the legal framework for elections require periodic reporting on campaign contributions and expenditure?*
- Does the legal framework for elections provide for public access to reports on campaign contributions and expenditure?*
- Does the legal framework for elections provide for adequate and effective enforcement of the political finance laws?*
- Does the legal framework for elections provide for equality of freedom to raise private funds without unreasonable limitations?*

## 12. Balloting

*The legal framework should ensure that polling stations are accessible, that there is accurate recording of ballots and that the secrecy of the ballot is guaranteed.*

### *Secrecy of the ballot*

The international standard for a democratic election requires that votes be cast by secret ballot or by other equivalent free, secret voting procedure.

The provisions in the legal framework regulating control and security of the ballot, as well as the provisions governing the casting of a ballot at the polling station, should ensure ballot security, while at the same time ensuring that no individual ballot can be identified as having been marked by a specific voter. Ballot secrecy is an effective counter to vote-buying, to voter intimidation and to other undue influences. No member of a polling station committee or any other person, except during the counting of ballots, should be allowed to see a voter's marked ballot. Obviously, this prohibition does not apply to a person legally authorized to assist a blind voter or a voter requiring assistance due to physical infirmity or illiteracy in certain cases. However, a member of a polling station committee should not handle or control the voter's marked ballot before it is placed in the ballot box.

The principle of secrecy of the ballot requires election legislation to ensure that secret voting is not only a right on the part of the voter but an absolute obligation. The tear-off part of the ballot should not bear any serial number, while the counterfoil might have these numbers for control purposes. The practice of family voting -- where the head of a family casts ballots on behalf of the other members of the family -- should not be condoned. Similarly, proxy voting is another practice to be discouraged. Legislation should make it clear that every voter's ballot must be marked and cast individually and secretly.

### *Voting procedures*

When reviewing the legal framework all provisions regulating the voting process should be carefully examined. These should ensure that voters are adequately identified and that other mechanisms are in place to prevent fraudulent or double voting. However, voting procedures should not be so cumbersome or complicated as to hinder the voting process. Voting provisions should require that all ballots and voting materials be adequately safeguarded before, during and after voting.

The legal framework should be flexible enough to allow for technological innovations to be applied to various aspects of balloting and counting, for example, utilizing electronic voting machines for recording and counting of ballots. Such wide flexibility might be regulated by requiring that certain types of approval be obtained before adopting them.

The legal framework for elections should prohibit the presence of unauthorized persons in polling stations. This can usefully be coupled with a provision for police officers only to enter polling stations either to vote or when officially requested to restore order. In the latter event, police should enter polling stations only if authorized by the person in charge of the polling station, and should be required to leave as soon as order is restored.

The legal framework for elections may provide for other methods of voting, such as voting by mail or mobile voting. These types of voting may be available to a single individual, such as a person who is abroad on business; to a class of voters, such as diplomats, police, the military or other security forces; or to an entire community, such as persons displaced due to the outbreak of war. In the case of mobile voting, it may be available to a single housebound, incapacitated voter or to an entire community, as, for instance, in a hospital or other institution. In all cases adequate mechanisms must be provided to prevent the abuse of such methods of voting.

Election laws may contain special provisions to facilitate voting by persons who are physically disabled, those in hospital or in prisons, those who are out of the country or who cannot come to the polling station for other valid reasons. Such provisions must not be discriminatory and must be applied uniformly to all similarly-placed voters.

It is common and acceptable for the electoral framework to provide for members of the military and the police to be able to exercise the right to vote while on active duty. Although protecting the right to vote of a member of the military or the police is appropriate, the provisions must be written carefully to avoid abuse.

It is not unusual for the legal framework for elections to permit special polling stations to be set up within military units located in remote areas far from any centre of population. While such a provision may be unavoidable, it should be accompanied by an express provision that this is strictly exceptional and that, wherever possible, members of the military and the police should vote in advance polls. Otherwise on polling day those not on duty should vote in ordinary civilian polling stations where they reside, without bearing arms and without wearing uniform.

Some or all of these groups may be the subject of provisions which include: bringing the ballot box to the voter or “mobile voting”; voting by mail for security forces and other persons outside the country such as refugees, and advanced polling. The voter accommodation principle is commendable. However, related provisions may be written in such a manner that they are not subject to abuse and fraud. To minimize this possibility and to safeguard the integrity of the special voting activities, the legal framework should include the following:

- There must be a process to clearly identify voters eligible to use alternative voting provisions and to prevent double voting.

- Special voting provisions should only be applied in well-defined situations, e.g., in cases where it is not physically possible for the voter to travel to a regular polling station to vote; however, some jurisdictions might provide exceptions to this for special reasons, for example, allowing a large section of its voters to vote by mail.
- Representatives of parties and candidates as well as election observers should be permitted to monitor special voting stations.
- The number of ballot papers with serial numbers and other security features used and the number later returned, should be formally and transparently recorded.
- The number of ballot papers issued should correspond with the number of requests received, plus a specified small number of extra ballots to allow for voters who may spoil their ballot paper.
- The names and number of requesting voters who have used or are using the special provisions should be recorded in polling-station and other protocols in order to avoid double voting and to identify particular areas where the proportion of votes cast is unusually high, which may point to the occurrence of fraud.

### ***Balancing voter convenience with safeguards against fraud***

Accommodating voters' needs must be carefully balanced against safeguarding against voting fraud. If not drafted carefully, a provision accommodating the needs of a special group of voters, by establishing exceptional voting procedures, can be abused by persons attempting to vote more than once or who do not meet the legal requirements for the exceptional voting procedure. Such provisions must provide sufficient safeguards to prevent abuse and fraud when alternative methods of voting are permitted.

### ***Checklist***

- Does the legal framework guarantee that votes are cast by secret ballot?  
Are there adequate prohibitions against "family voting"?*
- Does the legal framework for elections require that voters be adequately identified prior to receiving a ballot?*
- Does the legal framework contain sufficient provisions for the security of all ballots and voting materials before, during and after voting?*
- Does the legal framework provide alternative methods of voting for specific persons or special categories of person?*
- Does the legal framework contain sufficient safeguards to prevent fraudulent or double voting?*
- Does the legal framework prevent a person from using an alternative method and the regular process to vote twice in the same election?*

- *Does the legal framework prohibit the routine entry of police or other armed forces into polling stations except when they enter to vote or when they are specifically authorized by the person in charge of polling station to restore order?*

### 13. Counting and tabulating votes

*The legal framework should ensure that all votes are counted and tabulated accurately, equally, fairly and transparently.*

#### *General principles*

A fair, honest and transparent vote count is a cornerstone of democratic elections. This requires that votes be counted, tabulated and consolidated in the presence of the representatives of parties and candidates and election observers, and that the entire process by which a winner is determined is fully and completely open to public scrutiny.

The legal framework should provide for the presence of the representatives of parties and candidates and election observers during the counting, tabulation and consolidation of votes. The legal framework must clearly state the electoral formula that will be used to convert votes into legislative seats. Thresholds, quotas and all details of the electoral formula must be stated clearly and all possibilities, such as ties, withdrawals or death of a candidate, must be addressed. The law must lay down clear criteria for determining valid and invalid ballots in all polling and counting stations across the jurisdiction. Rules for determining the validity of ballots to be counted should not be so stringent as to unreasonably result in disenfranchising a voter. The paramount principle should be that if the intention of the voter is clear, the ballot should be counted.

#### *Counting ballots*

Regardless of whether ballots are counted at the polling station or at a central counting location or at both places, the representatives of parties and candidates and election observers should be permitted to remain present on this occasion. As well as ensuring the presence of above all entities during the counting of ballots, the legal framework should provide safeguards where technology is used to count ballots. The legal framework must make possible the independent verification of the accuracy and soundness of hardware and software used for counting ballots. Whether manual, mechanical or electronic counting is used, overview procedures must be in place to ensure accuracy and reliability. The law must also allow objections to counting procedures, including objections to criteria used to determine the validity of ballots.

The legal framework for elections should clearly specify that the representatives of parties and candidates and election observers be given, as far as practicable, certified copies of tabulation and tally sheets. The law must also clearly specify what authorities, if any, are entitled to receive this information prior to certification of the election results by the central EMB.

### ***Tabulating results***

The legal framework should provide, in clear and objective language, the procedures for transferring the certified copies, results of counting, ballot papers and other election materials from polling stations and other, lower levels of EMBs to intermediate and higher EMBs for consolidation and safekeeping. The law should require that all consolidation of vote counts be available in tables or similar format so that representatives of parties and candidates and observers may track the vote count of any polling station all the way up, through intermediate levels to the final consolidated results. The tabulation for any polling station should provide detailed information such as the number of ballots used and returned, the number of blank, spoiled and invalid ballots, and the number of votes for each political party or candidate. This information should be broken down for alternative methods of voting, such as voting by mail or mobile voting, where this can be done without compromising the secrecy of the ballot. This degree of detail is necessary to enable the representatives of parties and candidates and election observers to track results and locate specifically, if fraud has occurred, where the numbers have been unlawfully changed during the consolidation processes.

A strictly defined division of responsibility among various tiers of EMB and the state authorities is vital during the tallying process. Election legislation should underline the principle that only EMB members should be involved in this process. To ensure this it is also important that representatives of parties and candidates and election observers are given access to all stages of the process of counting, tabulating, consolidating and tallying results.

### ***Publication of counting, tabulation and consolidation of results***

Many times timely publication of the result of ballot count may turn out to be crucial for its acceptance by all contenders. Therefore the legal framework should provide for such timely publication of results. It should also clearly state whether the election authorities may announce partial or preliminary results prior to final certification. If results can be announced prior to final certification, the legal framework should clearly regulate the making of such announcements. Subject to restrictions regarding time zones, the media and party, candidate or other representatives should be free to publicize the poll results. It is normally the chair of the polling station

committee, in the case of counting at the polling station level, or the director of elections at the higher level of the EMB, who announces the results of the count. It is acceptable in countries that spread across more than one time zone for there to be restrictions on the reporting of results before all polls have closed.

The legal framework should require that all relevant counting documents other than the ballots, such as election protocols, tabulation and tally sheets, and decisions determining or affecting election results, be publicly accessible. Such electoral documents should be publicly posted at all levels of election administration, including the polling station, municipal, and state EMB levels. Detailed tabulations of overall results, including the voting results in each polling station, should be posted at each election office. These detailed tabulations should also be published in state-owned or-controlled print media, in the official gazette and, wherever possible, on the website of the EMB as soon as the results are certified.

To prevent fraud, the legal framework should require public posting of ballot counts and tabulations at each level where the count or tabulation occurs. The possibility of fraud arises where an intermediate EMB is not required to publicly post the tallies and tabulations.

### ***Effective date of certified results***

The legal framework for elections should clearly specify the timing of the final certification of the election results, the process of final certification including public announcement and notification to candidates of their election, and the terms of office of elected candidates. Additionally, the law must be clear as to what circumstances require a recount or new election in any or all polling stations. The law must be clear as to who can request a recount or new election, the deadline for the request, all necessary procedures to make the request, the deadline for adjudicating on the request, and the date of and procedures that will govern a recount or new election. Where technology is to be used in counting or tabulating, the law must be clear as to what the recount would entail i.e., whether the data would be re-entered, a parallel manual count be conducted, etc.

The legal framework must provide for secure storage of all ballots and election materials until either the deadline for making legal challenges to the certified results has passed or, in case a legal challenge is made, the final adjudication of such a challenge is pronounced.

### ***Personal safety exception***

In extreme circumstances, publication of election results at the polling station level might jeopardize the safety of voters or polling station committee members in that community. This possibility exists where an election is held after civil conflict or

in a society with deep-rooted conflict where tensions remain high. In such extreme circumstances the law may provide limited exceptions to these principles in order not to place voters at risk of personal harm.

### *Checklist*

- Does the legal framework ensure that the entire process for counting and tabulating votes is conducted in the presence of representatives of parties and candidates as well as election observers?*
- Does the legal framework provide for independent verification of all hardware, software and other elements in the counting and tabulation processes where methods other than manual counting are used?*
- Does the law require that all tabulations be available in a format that allows representatives of the parties and candidates and observers to track the vote count of each polling station all the way up, through intermediate levels to the final consolidated results?*
- Does the law require that tabulations of results contain detailed information on results for all methods of voting other than where the secrecy of the ballot might be threatened?*
- Does the law require public posting and publication in the print media of detailed results from the polling station level up to the central EMB?*
- Does the law clearly specify the processes for final certification of election results and notification to candidates, and the tenure of office for elected candidates?*
- Are all requirements and procedures for a recount of ballots clearly stated?*
- Are all requirements and procedures for a new election clearly stated?*

## 14. Role of representatives of the parties and candidates

*As a necessary safeguard of the integrity and transparency of the election, the legal framework must contain a provision for representatives nominated by parties and candidates contesting the election to observe all voting processes. The rights and responsibilities of candidate and party representatives in polling stations should also be defined in the legal framework.*

### *Observation and monitoring role*

The legal framework should clearly state that party and candidate representatives are permitted to observe proceedings, not to campaign or otherwise participate in voting. All legal restrictions on campaigning within the polling station area -- such as communication with voters, distribution of partisan material, wearing of badges or apparel, or public broadcasts that can be heard within the polling station -- must be enforceable. The law must clearly state whether the representatives of parties and

candidates are to be allowed to handle any election document at any stage, as well as any penalty for mis- handling.

The legislation should provide that the representatives of parties and candidates are subject to the authority of the polling station committee president and staff, and may be removed from the polling station on the orders of the polling station committee president if their conduct breaches any of the standards laid down in the regulatory framework, including any code of conduct. The legislation should specify that, while the representatives of parties and candidates should have the right to immediately query decisions made by polling officials or the implementation of voting procedures, they should not be permitted to influence voters, to disregard polling officials' directions or to otherwise disrupt voting.

The legislation should provide that, while they are within the boundaries of the polling station, representatives should prominently wear an identifying sticker indicating their role. Legal frameworks may restrict the numbers of representatives any one candidate or party may have present in a polling station at any time. A balance has to be struck between transparency of the process and the capacity of polling stations to manage large numbers of representatives. Where there are large numbers of candidates and parties, and hence large numbers of representatives present, the legal framework may provide for restricting the movement of representatives within the polling station so as not to interfere with voting processes.

### ***Recording complaints and challenges***

The legislation should provide that any challenges to voters by the representatives of parties and candidates or complaints regarding the operations of the polling station must be recorded in writing by the polling station committee president (and preferably countersigned by the relevant representative of a party or candidate) and included with the polling station committee president's reports on voting submitted to the EMB.

### ***Rights of representatives of the parties and candidates***

While the specific manner in which their observation duties are undertaken may vary according to the voting systems used, the legal framework should generally provide the following rights to duly accredited representatives of parties and candidates in polling stations:

- To remain within the polling station while lawfully carrying out her/his functions and enter and leave the polling station at any time, subject to restrictions on the number of representatives for any one party or candidate;
- To observe all activity -- with the exception of the marking of ballots by voters -- within the polling station, from the check counting of ballots and sealing of ballot

boxes prior to the commencement of voting to the final packaging of material after close of voting;

- To challenge the right of any person to vote;
- To query any decisions made by polling officials with the polling station committee president and election management officials;
- To witness the marking of ballots for physically impaired or non-literate voters by a polling official, where such assistance to voters is allowed and such witnessing is provided for in the law; and
- To make notes of any occurrences, make copies of any official documents and take note of any statements freely made by voters.

Additionally, formal training may be provided in order to help representatives of parties and candidates discharge these responsibilities more effectively.

### ***Conduct of representatives of the parties and candidates***

The legislation may provide that, as a condition of accreditation to voting locations, the representatives of parties and candidates must have formally accepted the applicable code of conduct on behaviour. If a full code of conduct has not been developed, then at the very minimum it is expected that as a condition for accreditation they will make a formal declaration that:

- They maintain voting secrecy.
- They follow the directions of polling officials.
- They not interfere with election processes.
- They be bound by the legal framework for elections.

A more comprehensive code of conduct for party and candidate representatives while within the polling station area would include the following:

- They shall not attempt to influence or intimidate any voter.
- They shall not attempt to intimidate, harass, otherwise threaten or interfere with the work of any polling official.
- They shall communicate with polling officials and voters only as necessary for the conduct of their duties.
- They shall neither mark nor handle any official election material (except to witness records of the poll).
- They shall not attempt to remove any official election material from the polling station, nor attempt to introduce any purported official election material into the polling station.
- They shall not attempt to destroy any official election material in the polling station.
- They shall obey all lawful directions by the polling station committee president and polling officials delegated by her/him to issue directions to representatives.

- They shall not campaign for votes within the polling station area.
- They shall not provide any voter with false information regarding their eligibility to vote at that polling station or in the election.
- They shall not enter the voting compartments, except (if allowable under the law) when nominated by a voter to assist her/him in voting or to witness the vote of a voter who is assisted by a polling official.

The legal framework must also be clear on what representatives may bring with them into the polling station: for instance, a ban on carrying weapons into a polling station should be in the law and not subject to local interpretation. Any ban on communication devices such as mobile phones or radios should also be in the law.

### *Checklist*

- Does the legal framework provide for independent observation of the polling process, and of the counting of ballots, by the representatives of political parties and contesting candidates?*
- Does the legal framework facilitate observation of elections by providing for easy accreditation of such representatives, by way of provision of training manuals for the representatives of parties and candidates for polling and counting, and by imparting formal training?*
- Does the legal framework contain sufficient safeguards to ensure that the representatives of parties and candidates do not undertake active campaigning within the premises of the polling stations and within the prohibited limits around the polling stations?*
- Does the legal framework provide a clear procedure for the representatives of parties and candidates to obtain relevant information to facilitate their observation of polling, or for challenging the identity of the voter? Does the legal framework provide for clear procedure for dealing with such challenges by the polling station chairperson?*
- Does the legal framework provide for a code of conduct for the representatives of parties and candidates to ensure orderly conduct on polling day within polling stations and during the counting at the counting station (if it is separate from the polling station)?*

## 15. Election observers

*To ensure transparency and to increase credibility, the legal framework should provide that election observers can observe all stages of election processes.*

A transparent election process is an international standard necessary to ensure democratic elections. The presence of domestic and international election observers in the evolving democracies tends to bring credibility and legitimacy to

the election process being observed and serves to deter overt acts of electoral fraud, especially during the polling. However, certain mature democracies, where there is public trust in the impartiality and neutrality of the election administration, such observation of elections may not be provided.

Many legal frameworks provide for the presence of observers, both domestic and foreign, in addition to representatives of the media, political parties and candidates, to ensure transparency. Essentially, election observation means *the purposeful gathering of information regarding an electoral process, and making informed judgements on the conduct of such process on the basis of information collected, by persons who are not inherently authorized to intervene in the process and whose involvement in mediation or technical assistance activities should not jeopardize their main observation responsibilities.*

### ***Domestic election observers***

There is now an increasing trend to permit domestic election observation. Election observers from civil society groups (such as various church groups, women's and youth organizations, and NGOs) can play an important role, and should have the right to be accredited to observe. All facilities should be afforded to these domestic observers to carry out their assigned duties. Any laws regulating NGOs and public associations should be reviewed to ensure that they do not unreasonably obstruct acquisition of the necessary legal status and accreditation as domestic election observers. The legal framework should provide clear and objective criteria for registration and accreditation as an observer and be clear as to the authority accrediting observers, the requirements for obtaining observer status and the circumstances in which observer status can be revoked.

The law should provide clear and precise provisions establishing the rights of observers to inspect documents, attend meetings, observe election activities at all levels and at all times, including counting and tabulation, and to obtain relevant certified copies of documents at all levels. The law should also establish an expedited process for observers to obtain corrective relief when an election management body refuses to accredit an observer or observer group. The legal framework must also be clear and precise concerning what a domestic observer may not do, for instance, interfere with voting, take a direct part in the voting or counting processes, or attempt to determine how a voter will vote or has voted. It should strike a balance between the rights of observers and the orderly administration of the election processes. But in no case should it hinder legitimate observation, "muzzle" observers, or prevent them from reporting or releasing information that has been obtained through their observations.

### ***International election observers***

International election observation is neither a right, nor as yet an recognized international standard. State sovereignty still requires that there should be a formal invitation to foreign election observers, and there may be more stringent requirements for accreditation of international as opposed to domestic election observers. However, regional and similar international agreements may require countries to open their elections to international observers (for example, in the Organization for Security and Co-operation in Europe (OSCE) countries); if this is the case the law must make appropriate provisions for observers. The law should also state when and by whom such election observers are to be invited.

International election observation may sometimes occur as part of a broader human rights observation process regarding minority rights or the rights of oppressed groups, without a formal invitation or accreditation.

### **Checklist**

- Does the legal framework allow accredited election observers to observe all election processes?*
- Does the legal framework provide clear and objective criteria for the accreditation requirements for election observers as well as providing a well-defined role?*
- Does the legal framework provide clear criteria as to which governmental authority accredits election observers?*
- Does the legal framework provide clear criteria and time-frames for applying for election accreditation?*
- Does the legal framework provide clear criteria for the activities of election observers and as to when and under what circumstances election observer status can be revoked?*
- Does the legal framework strike a balance between the activities of election observers and the orderly administration of elections?*
- Are there any legal requirements that could be too onerous for election observers and serve to hinder legitimate observation?*

### **16. Compliance with and enforcement of electoral law**

*The legal framework should provide effective mechanisms and remedies for compliance with the law and the enforcement of electoral rights, defining penalties for specific electoral offences.*

The legal framework should provide effective mechanisms and remedies for the enforcement of electoral rights. The right to vote is a fundamental human right and the right to a remedy for violation of the right to vote is also a fundamental

human right. The legal framework for elections must set forth detailed and sufficient provisions protecting suffrage rights.

The legal framework should provide that every voter, candidate and political party has the right to lodge a complaint with the competent EMB or court when an infringement of electoral rights is alleged to have occurred. The law must require that the appropriate EMB or court render a prompt decision to avoid the aggrieved party losing his/her electoral right. The law must provide a right of appeal to an appropriate higher level of EMB or court with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.

The legal framework should provide for timely deadlines for the consideration and determination of a complaint and the communication of the decision to the complainant. Some complaints can be determined immediately, others in hours, and some will take days. Deadlines must therefore allow for a degree of flexibility, taking into account the level of the EMB or court, and the nature of the complaint and the electoral urgency. Prompt resolution can frequently prevent escalation of a minor complaint into a major problem. However, certain types of dispute in some jurisdictions can only be raised by means of an election petition after the electoral process has concluded.

The paragraphs above outline the minimum legal standards that must be included in the legal framework. A country has some flexibility in adopting and determining the legal structure of the dispute settlement mechanism most suitable to resolve its electoral disputes.

### **Checklist**

- Does the legal framework provide effective mechanisms and remedies for compliance with the law for the enforcement of electoral rights?*
- Does the legal framework clearly state who can file complaints for election law violations and the process for filing complaints?*
- Does the legal framework provide for the right to appeal an election management body decision to a court of law with authority to review and exercise final jurisdiction in the matter?*
- Does the legal framework provide for timely deadlines for filing, considering and determining remedies for a complaint?*

## Primary sources for international standards

### **1. The United Nations**

#### *The 1948 Universal Declaration of Human Rights*

##### *Article 20*

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

##### *Article 21*

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures.

#### *The 1966 International Covenant on Civil And Political Rights*

##### *Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order (ordre public), or of public health or morals.

##### *Article 21*

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

### *Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labor Convention of 1948 on Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in the Convention.

### *Article 25*

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

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country.

### *The 1952 Convention on The Political Rights of Women*

#### *Article 1*

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

#### *Article 2*

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

#### *Article 3*

Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination

### *Article 5*

- (b) In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...
- (c) Political rights, in particular the right to participate in elections -- to vote and to stand for election -- on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association.

### *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*

#### *Article 7*

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

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Various UN documents (Secretary-General's reports, General Assembly resolutions, ECOSOC resolutions, reports in the Human Rights Committee etc.)

### *United Nations General Assembly Resolution, A/RES/46/137 dated 17 December 1991: Enhancing the effectiveness of the principle of periodic and genuine elections The General Assembly...*

...Reaffirms the Universal Declaration of Human Rights, which provides that everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives, that everyone has the right of equal access to public service in his or her country, that the will of the people shall be the basis of the authority of government and that this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by

secret ballot or by equivalent free voting procedures,

...Notes that the International Covenant on Civil and Political Rights provides that every citizen shall have the right and the opportunity, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to take part in the conduct of public affairs, directly or through freely chosen representatives, 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, and to have access, on general terms of equality, to public service in his or her country,

...Recalls that, under the Charter, all States enjoy sovereign equality and that each State, in accordance with the will of its people, has the right freely to choose and develop its political, social, economic and cultural systems,

...Recognizes that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States...

2. Underscores the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which establish that the authority to govern shall be based on the will of the people, as expressed in periodic and genuine elections;
3. Stresses its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights;
4. Declares that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others, as provided in national constitutions and laws;
5. Underscores the duty of each Member State, in accordance with the provisions of the Charter of the United Nations, to respect the decisions taken by other States, in accordance with the will of their people, in freely choosing and developing their electoral institutions;
6. Reaffirms that apartheid must be abolished, that the systematic denial or abridgement of the right to vote on the grounds of race or colour is a gross violation of human rights and an affront to the conscience and dignity of mankind,

and that the right to participate in a political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections;

*Other UN Resolutions and reports*

- Various reports of the Secretary-General on Enhancing the effectiveness of the principle of periodic and genuine elections.
- General Assembly Resolution number A/Res./55/2, 18 September 2000, United Nations Millennium Declaration.
- General Assembly Resolution number A/C.3/54/L.74, 12 November 1999, Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in their Electoral Processes.
- Economic and Social Council, Draft Report E/CN.6/1997/L.2/Add.2, 14 March 1997, Moderator's Summary of the Panel Discussion and Dialogue on Women in Power and Decision Making.
- General Assembly Resolutions numbers:
  - A/Res./43/157
  - A/Res./47/130
  - A/Res./48/124
  - A/Res./48/131

**2. European Human Rights Instruments**

*The 1950 European Convention on Human Rights*

*Article 3*

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

*The 1990 Charter of Paris For a New Europe: CSCE Summit*

*Human Rights, Democracy and Rule of Law*

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Everyone also has the right : (...) to participate in free and fair elections.

*The 1990 document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE*

...

- (5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal

and inalienable rights of all human beings are the following:

- (5.1) free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives; .....
- (6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or that of another participating State.
- (7) to ensure that the will of the people serves as the basis of the authority of government, the participating States will
  - (7.1) hold free elections at reasonable intervals, as established by law;
  - (7.2) permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
  - (7.3) guarantee universal and equal suffrage to adult citizens;
  - (7.4) ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;
  - (7.5) respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;
  - (7.6) respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;
  - (7.7) ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

- (7.8) provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;
- (7.9) ensure that the candidates who obtain the necessary number of votes required by the law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.
- (8) The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

### **3. *American Human Rights Instruments***

#### *The 1948 American Declaration of the Rights and Duties of Man*

##### *Article 20 Right to Vote and to Participate in Government*

Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

##### *Article 21 Right of Assembly*

Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

##### *Article 22 Right of Association*

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

#### *The 1969 American Convention on Human Rights*

##### *Article 23 Right to Participate in Government*

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
  - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

#### ***4. African Human Rights Instruments***

*The 1981 African [Banjul] Charter on Human and Peoples' Rights*

*Article 13*

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### ***5. Other inter-governmental and international organizations***

*The 1994 Inter-Parliamentary Union Declaration on Criteria For Free and Fair Elections*

*The Inter-Parliamentary Council,*

Reaffirming ...

Therefore adopts the following Declaration on Free and Fair Elections, and urges Governments and Parliaments throughout the world to be guided by the principles and standards set out therein:

##### *1. Free and Fair Elections*

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

##### *2. Voting and Elections Rights*

- (1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.

- (2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.
- (3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.
- (4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
- (5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.
- (6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.
- (7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

### 3. *Candidature, Party and Campaign Rights and Responsibilities*

- (1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.
- (2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.
- (3) Everyone individually and together with others has the right:
  - To express political opinions without interference;
  - To seek, receive and impart information and to make an informed choice;
  - To move freely within the country in order to campaign for election;
  - To campaign on an equal basis with other political parties, including the party forming the existing government.
- (4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.
- (5) The right of candidates to security with respect to their lives and property shall be recognized and protected.
- (6) Every individual and every political party has the right to the protection of the law and to a remedy for violation of political and electoral rights.
- (7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society

in the interests of national security or public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- (8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
- (9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.
- (10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.
- (11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

#### *The 1991 Commonwealth Harare Declaration*

...

4. Its members also share a commitment to certain fundamental principles...
  - we believe in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives;
9. Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems and challenges which the world, and the Commonwealth as part of it, face, we pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:
  - the protection and promotion of the fundamental political values of the Commonwealth;
  - democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
  - fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
  - equality for women, so that they may exercise their full and equal rights.

## Annex 2. Supplementary sources

International IDEA-IFES-UN, *Administration and Cost of Elections (ACE) Project*, <http://www.aceproject.org> CD-Rom also available in English, French and Spanish.

Carl W. Dundas, *Dimensions of Free and Fair Elections: Frameworks, Integrity, Transparency, Attributes, Monitoring* (London: Commonwealth Secretariat, 1994).

Guy S. Goodwin-Gill, *Codes of Conduct for Elections* (Inter-Parliamentary Union, Geneva, 1998).

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Peter Harris and Ben Reilly (eds), *International IDEA Handbook of Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm: International Institute for Democracy and Electoral Assistance, 1998).

ODIHR, *The ODIHR Election Observation Handbook*, 4th edn (Warsaw: Office for Democratic Institutions and Human Rights, 1999). <http://www.osce.org/odihr/documents/guidelines>

Denis Petit, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System* (Warsaw: Office for Democratic Institutions and Human Rights, 2000). <http://www.osce.org/odihr/documents/guidelines>

## Annex 3. Model codes

International IDEA, *Code of Conduct for Political Parties Campaigning in Democratic Elections* (Stockholm, International Institute for Democracy and Electoral Assistance, 1999).

<http://www.idea.int/publications/conduct/polparties.pdf>

International IDEA, *Code of Conduct for the Ethical and Professional Administration of Elections* (Stockholm, International Institute for Democracy and Electoral Assistance, 1996).

<http://www.idea.int/publications/conduct/admin/intro.htm>

International IDEA, *Code of Conduct for the Ethical and Professional Observation of Elections* (Stockholm, International Institute for Democracy and Electoral Assistance, 1996).

<http://www.idea.int/publications/conduct/obs/intro.htm>

Inter-Parliamentary Union, *Codes of Conduct for Elections*, (by Guy S. Goodwin-Gill: Geneva, 1998).

## Annex 4. Glossary of electoral terms

absentee voting | a process by which registered electors who are unable to go in person to the polling site on polling day can still cast their ballot at another location.

amendment of electoral law | a change made to the electoral legislation by formal procedure.

campaign (electoral) | the political activity, including meetings, rallies, speeches, demonstrations, parades, other events, and the use of the media, intended to inform the electorate of the platform of a particular candidate or political party and to gather support.

candidate | person who seeks, or who is nominated, to be elected either as an official representative of a political party or as an independent.

code of conduct | a set of rules of conduct for certain activities in the electoral process. Applicable to political parties and candidates to regulate the conduct of meetings, demonstrations and political propaganda; to election observers to prescribe the conditions and limitations for the conduct of election observation; to the media; and to election administration.

consolidation of votes | a process of bringing together the election results from a number of polling stations.

constituency | the electoral unit of conversion of votes into seats, normally on a territorial basis.

constituency | a geographic unit of conversion of votes into seats.

constituency | geographical areas into which the national territory is divided for electoral purposes within which the voters are called on to elect their representatives. There can be a single national constituency model (in the national territory there is only one constituency) or a plurality constituency model (the

national territory is divided into a number of constituencies). Regarding the seats in every constituency there can be single-member constituencies (every constituency has one seat) and multi-member constituencies (every constituency has several seats).

constituency | a body of voters in a specified area which elects a representative member to a legislative body.

constitution | set of basic rules by which the government of a state is organized, regulating the relationships between the legislature, the executive and the judiciary.

counting centre | a central or regional place where the votes from more than one polling station are counted.

decree | a legal text coming from the executive branch of government. In democratic legal systems, a decree is of inferior rank to a law passed by parliament. Sometimes, under exceptional circumstances, a decree may declare itself to be superior to other laws, including even the constitution.

disclosure | exposure of certain financial details in accordance with law by candidates, political parties and other persons and groups engaged in an election to the public, the EMB or other electoral authority.

district | see constituency above.

domestic election observers | groups of individuals, residents or citizens, who monitor and observe the electoral process in their own country (as opposed to international election observers).

election law | the legislative provisions governing all aspects of the electoral process.

election observation | purposeful gathering of information regarding an electoral process, and making informed judgements on the conduct of such a process on the basis of the information collected, by persons who are not authorized to intervene in the process.

electoral dispute (recourse) | any complaints, challenges, disputes, claims, recalls and contestations relating to the electoral process.

electoral precinct | the territorial unit served by a single polling station.

EMB (electoral management body) | an authority responsible for the management of elections, whose functions may include maintaining and updating the electoral roll; registering voters, parties and candidates; administering the electoral process; issuing the declaration of polls and settling electoral disputes.

eligible voter | an individual who satisfies all the legal requirements by voting in the election.

franchise | the right to vote.

group voting | process by which several persons enter a polling booth and vote

together. international election observers | groups who monitor and observe the electoral process

in a foreign country (as opposed to domestic election observers).

invalid votes | ballots which, due to accidental or deliberate errors of marking on the part of voters, cannot be included in the count.

legal framework | the structure of electoral processes consisting of the constitution, electoral laws, complementary regulations, instructions, directives and codes of conduct.

mobile voting | a polling station operating at various designated locations on polling day.

polling centre | an official premise where voters from a particular electoral precinct cast their votes. A polling centre might contain a number of polling stations.

proxy voting | a procedure whereby voters unable to attend a polling station may appoint another person to vote for them.

quota | threshold for winning a seat in a proportional representation system.

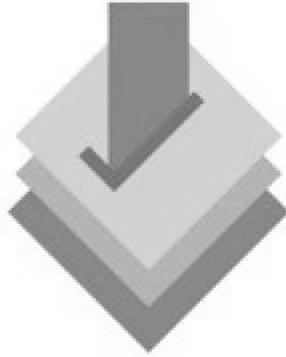
quota | system whereby a number, proportion of seats or a number, proportion and/or placement of candidates are reserved in advance for specific groups such as women, minorities etc.

registered political party | political party which meets the requirements stipulated in the electoral law in order to participate in the election.

riding | see constituency. suffrage | the right to vote.

tabulation of votes | the process of compiling the result of a count at an election.

threshold: 1. | minimum percentage or number of votes necessary for a candidate or a political party to win a seat and/or for other defined purposes; 2. minimum level of support which a party needs to gain representation or a refund of deposit; usually expressed as a percentage of the total vote.,



# ASIAN ELECTORAL STAKEHOLDER FORUM

## **Endorsing the Bangkok Declaration on Free and Fair Elections**

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## Preamble

1. The holding of periodic, genuine, free, and fair elections based on secret ballots and universal suffrage is the true expression of the sovereignty of the people. Free and fair elections are a precondition of democracy and they promote social, political and economic development.
2. Asia is a big continent, with vast geography, a wide variety of political systems, and great human diversity. This Declaration has been drafted with the participation of election stakeholders from across East Asia, South Asia and Southeast Asia.
3. The Bangkok Declaration on Free and Fair Elections recognizes and reaffirms the rights and principles proclaimed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Universal Declaration on Democracy.
4. These rights and freedoms are universal and they apply fully and equally in Asia.
5. The principles for ensuring free and fair elections are also universal. The Declaration herein acknowledges and endorses the International Parliamentary Union's Declaration on Criteria for Free and Fair Elections, and reaffirms its pertinence in Asia.
6. While each country in Asia has its own unique set of challenges with regard to elections, the articles of the Declaration are meant to highlight the most pressing and the most common electoral concerns in Asian countries. Despite what are at times vast differences, there are also elements of shared history, cultural heritage, religious tradition and social and political development that bind the continent, or at least parts of it, together. With its elements of commonality, it is possible to identify a distinct set of challenges with regard to the holding of free and fair elections in Asia.
7. The objective of the Bangkok Declaration on Free and Fair Elections is to identify the most significant and widespread barriers to free and fair elections in Asia and strengthen the resolve of the Asian people to address them by involving all relevant national, regional and international stakeholders.
8. The issues and challenges discussed in this Declaration do not attempt to be comprehensive. The Bangkok Declaration is not a catalogue of principles for the conduct of free and fair elections, nor is it a declaration of democratic rights and freedoms. It is a statement of resolution by the Asian electoral community and other stakeholders to work collectively in their respective spheres to overcome some of their shared challenges, and it is intended to be an organic document.

9. While this document is non-binding, the signatories to this Declaration nevertheless recognize and resolve to address, where they exist in their respective countries, the electoral challenges discussed.

#### Section I: Pre-Election Period

### LEGAL FRAMEWORK

#### **Article 1 – EMB Independence**

1. The fearless independence of election management bodies (EMB) must be guaranteed by a state's Constitution and other legal frameworks.
2. The appointment of EMB members should be fully transparent and depoliticized. EMB members should be removable only for a cause defined clearly in law.
3. Secretariat staff must be able to perform their functions free of outside interference.
4. Fiscal autonomy is a prerequisite for the independence of an EMB. Relevant budget making bodies should ensure that EMBs are provided with a stable, adequate and timely source of funding that allows them to fulfill their mandates effectively and independently over the course of the election cycle.

#### **Article 2 – Universal Franchise**

1. Prohibiting certain groups of people from voting erodes the legitimacy of elections as the true expression of the people. Electoral laws must consider that universal franchise is upheld in accordance with each country's context.
2. Citizens of voting age must be guaranteed the right to vote, regardless of their religious, ethnic or social status.

### TRAINING AND EDUCATION

#### **Article 3 – Access to Voter Information**

1. Voter education is necessary to allow voters to make informed choices and participate fully in elections. Lack of access to voter education can lead to disenchantment with the electoral system and limits the ability of citizens to exercise their rights to free expression, peaceful assembly and free association. EMBs and other stakeholders must ensure that voter education is widespread, inclusive and accessible.
2. EMBs and other stakeholders must ensure that appropriate voter education is accessible to all election stakeholders, including those persons who cannot read, those who speak minority languages and those who are underprivileged

or often underrepresented in the political process.

3. EMBs and other state entities must share the responsibility for conducting voter and civic education that lasts throughout the electoral cycle. Similarly, civil society, political parties and candidates, and other stakeholders should contribute to this effort.

#### **Article 4 – Training of Election Officials**

1. A lack of adequate training for election officials and polling station workers can create problems at every stage of the electoral cycle, from poorly prepared voter lists to mistakes in the vote counting process. EMBs must ensure that election staff are provided with appropriate, updated training that is thorough and of high quality.
2. The training provided to election officials and polling station workers should cultivate a culture of integrity, transparency and accountability and equip them with a thorough understanding of election rules and procedures, inform them of their roles and responsibilities, and nurture an attitude of professionalism and civic responsibility.
3. Although election technology can be highly beneficial, it can also lead to unintentional errors or vote manipulation when not properly understood and used by election staff. Especially when new election technology is introduced, EMBs must ensure that staff are fully trained and knowledgeable about how to operate it properly.

### **PREPARATION OF THE VOTER LIST**

#### **Article 5 – Facilitating Voter Registration**

1. In countries with active voter registration systems, barriers to voter registration, including the type and availability of documents required for registration, the number and location of registration centers, confusing and lengthy multi-step processes, and restrictive voter registration calendars, can all prevent eligible citizens from being added to the voter list. EMBs should promote the highest possible rate of registration by conducting voter registration in a way that is inclusive, convenient, and accessible to all.
2. Where active registration is required, if the window for registration is set too early in the electoral cycle, when interest and understanding is low, there is the risk that people will miss the deadline. EMBs should ensure that voters understand the deadline for registration and that there is sufficient time to register all potential voters.

## **Article 6 – Accuracy of the Voter List**

1. Inaccuracies in the voter list, including errors of both inclusion and exclusion, seriously undermine the legitimacy of elections and public confidence in the electoral process. The EMB or other body responsible for the list should strive to maintain a voter list that is complete, current and accurate.
2. Problems with the voter list such as multiple registrants, dead people, children and underage voters, fictitious names, non--residents and missing names are all too common. The accuracy of the voter list should be maintained using a rigorous and transparent auditing system which includes pre--election checking and updating, updates based on proper objections of voters, and a post--election evaluation.

## Section II: Election Period **ELECTORAL CAMPAIGN**

### **Article 7 – Oversight for Campaign Finance**

1. Fair elections demand that there be adequate oversight of campaign finance. Governments and lawmakers must ensure that there exists a rigorous legal framework that fairly regulates political donations and campaign expenditures and allows for transparency of donations and expenditures.
2. Even where strong laws exist to oversee campaign finance, implementation can be lax, partial or ineffective. EMBs and governments must ensure that the laws are fully and fairly implemented, monitored and enforced. It is essential that violators be punished for their actions in accordance with the law.

### **Article 8 – Vote Buying**

1. Vote buying is the most blatant, and in some countries among the most common, form of election fraud. It is a crime in most countries in Asia, and countries must devote the necessary resources to prevent, monitor, investigate and punish it.
2. Increasingly sophisticated and discreet methods of vote buying make it difficult for anti--vote buying initiatives to succeed. Political determination and strong public support is essential for success.
3. Initiatives to combat vote buying must include rigorous voter education campaigns, strict oversight of campaign finance, thorough investigations of alleged vote buying, and prosecution of offenders conducted without exception.

### **Article 9 – Impartial Coverage by the Media**

1. Using state--run media to provide favorable coverage to the ruling party can

seriously tilt the election playing field and destroy confidence in the legitimacy of the electoral process. State media should provide equitable space and time to all political parties and candidates and be fair in their coverage of opposition parties.

2. In a democracy, it is the media's civic and moral duty to act as a fair observer of public life. Private media should strive to provide fair-minded coverage and analysis throughout the electoral cycle.

### **Article 10 – Election Violence**

1. A peaceful election environment is a necessary pre-requisite for legitimate elections. Used at any point throughout the election cycle, physical force, threats and intimidation seriously undermine the quality and legitimacy of elections. Election-related threats or violence must be urgently dealt with using all necessary social, political and legal actions.
2. Violence can only be prevented if the causes are first determined and the warning signs are recognized as they appear. Efforts to pre-empt election-related violence should begin early and tackle both the causes and the symptoms of violence.

### **Article 11 – Use of Government Resources**

1. When government resources are used to promote political interests during an election, the campaign process cannot be fair and the legitimacy of the result is called into question. Electoral laws must prohibit the unfair use of government resources for partisan political purposes at any time.
2. By themselves, laws against the misuse of government resources during an election are not enough. Governments must ensure that compliance is monitored, the law is enforced, and offenders are prosecuted.

### **Article 12 – Codes of Conduct**

1. Codes of conduct are valuable tools in promoting fair and transparent electoral campaigns. They can take the form of broad guidelines for all electoral stakeholders to follow, or they can be focused on the activities of a particular group such as the media, political parties, or election observers. Codes of conduct should be used to demonstrate the appropriate roles and responsibilities of the various election stakeholders in a free and fair election.
2. Without proper awareness and adherence, codes of conduct are of no use. Thorough measures should be employed to educate election stakeholders about codes of conduct and persuade them of the need to follow them.
3. Compliance with codes of conduct should be monitored and unethical behavior

should be exposed. Where a violation of a code of conduct constitutes a breach of electoral law, it must be prosecuted to the full extent of the law.

### **Article 13 – Military and Police Interference**

1. With their power, organization and resources, security forces that act in a partisan manner are likely to do irreversible damage to the quality of an election and to the perceived legitimacy of the winning candidates. Strong measures are required to ensure that security forces remain strictly impartial and non-partisan.
2. Interference can be direct, as in the case of intimidation, or less direct, as in the case of personnel being used to support campaigns or senior officers endorsing candidates. Military and police forces should remain entirely neutral at all times, and even subtle forms of interference should be investigated and prosecuted.

## **VOTING OPERATIONS AND ELECTION DAY**

### **Article 14 – Polling Station Management**

1. Even when it is entirely unintentional, mismanagement at the polling station has the potential to deny people their democratic rights and skew the results of an election. The most common problem is a lack of training, so EMBs should ensure that polling station staff are thoroughly trained on the layout, the rules, and the procedures that must be followed in order to ensure a fair election. Multi-sectoral efforts and support should be encouraged for the improvement of polling station management.
2. Even when polling station staff are well prepared for the task, if they do not receive the proper logistical support, they are unable to do their jobs properly. EMBs should ensure that polling station staff receive voting materials and other resources that are complete, authentic, and on time.

### **Article 15 – Enfranchising Minorities, Marginalized People and Persons with Disabilities**

1. Certain groups of people face a heightened risk of being disenfranchised. In different ways, minorities, marginalized people and others facing particular challenges, including internally displaced persons (IDP), internal migrants, stateless people, homeless people and persons with disabilities, are at risk of being dispossessed of their right to vote by a number of systemic barriers. EMBs and other stakeholders should take affirmative measures to encourage

the full participation of minorities, marginalized people and persons with disabilities.

2. For minority groups that live in remote locations, such as in mountains, forests or islands, the nearest registration center or polling station can be very far away, and the costs of travelling long distances and forgoing work can be enough to prevent potential voters from engaging in the election process. Minority groups can also suffer from lack of access to voter education, either because of their remoteness, a lack of access to media, or because campaigns are often not conducted in their native language. Efforts must be made to guarantee that minority groups can participate fully in the election process by ensuring that they have access to registration centers, polling stations, and voter education.
3. Since IDPs have often lost their identification cards and registration documents along with their registered addresses, they can have particular difficulty in exercising their right to vote. Internal migrants can face similar barriers when they are not readily able to register in their new place of residence. In both cases, governments must ensure that people are empowered to vote in their new locations by issuing new identification documents, updating the voter lists, and then conducting thorough voter education campaigns to inform people of their right to vote.
4. Persons with physical, sensory or intellectual disabilities can face a distinct set of barriers including lack of access to voter education, inaccessible registration centers and polling stations, and voting materials and procedures in inaccessible formats. Persons with disabilities encounter unique barriers as voter education must be in accessible formats such as sign language, Braille and large print. Persons with disabilities also encounter barriers to securing identification cards due to discrimination and lack of accessible information. Every citizen has the right to vote, and accommodations must be made for all persons with disabilities, including ensuring that the election law does not discriminate against persons with disabilities. Planning and budget should be allocated by EMBs for voter education, voter registration, casting a ballot at the polling station in secret, and, where it is authorized, advance voting and mobile ballot boxes.

### **Article 16 – Voters Living Abroad**

1. Many Asian countries have large numbers of citizens living outside of the country that nevertheless play an important role in the politics and the economy of their home country. Despite this, citizens living abroad often do not have the chance to vote due to the cost or complexity of overseas voting systems.
2. Where the financial and technical resources exist, countries should strive to

allow citizens to vote from abroad with as little difficulty and inconvenience as possible. Opportunities to vote from abroad should be expanded wherever feasible.

### **Article 17 – Participation of Women**

1. In many countries, women are still disadvantaged in the electoral process. Cultural practices, an unfair playing field or running for office in a male dominated area all tend to disadvantage women. EMBs and other stakeholders must ensure that election laws do not disadvantage women. Rather, they should take positive action to encourage women to participate fully in the electoral process.
2. According to local custom in some places, women are expected to vote the way that their husbands or male elders tell them to. In some cases, male heads of household are even permitted to cast votes on behalf of their wives and family. Using voter education, training for polling station staff and any other means available to them, EMBs must ensure that all women are able to exercise their democratic right to vote according to their own choices.

### **Article 18 – Accreditation of Observers**

1. Transparency is a hallmark of truly democratic elections. Domestic and international election observers can enhance the credibility and legitimacy of an election. Well-trained, dedicated and non-partisan election observers are a key tool for promoting the quality and integrity of the entire electoral process, and accreditation allows them to function more effectively. EMBs, subject to their prevailing laws, should ensure that all well-trained and non-partisan observer groups are permitted to observe all stages of election processes including observing the entire polling and counting processes at any polling station.
2. When accreditation is given inconsistently or only at the last minute, it is difficult for election observation groups to properly conduct the complex planning required for a mission to observe the pre-election process as well as the election day and post-election activities. EMBs should set out clear rules for timely accreditation of domestic and international observers and apply them fairly and consistently.

### **Article 19 – Effective and Professional Observers**

1. If election observation organizations lack the objectivity, professionalism, or adequate resources necessary to operate independently and effectively,

their contribution to the transparency and legitimacy of the election will suffer. Election observation organizations should therefore work to ensure that all observers deployed are well-trained, independent, and objective and that they have adequate capacity to perform their duties in conformity with internationally accepted standards.

2. Observers that have adequate training, capacity, independence and objectivity encourage the conduct of free and fair elections. However, unfit observers may fail to perform their responsibilities satisfactorily, and, moreover, may even distort the public's perception of elections. While being welcoming of legitimate election observers, EMBs should insist on high standards such as those declared by the Global Network of Domestic Election Monitors (GNDEM) in the *Declaration of Global Principles For Non-Partisan Election Observation And Monitoring By Citizen Organizations* for the domestic and international election observation organizations they accredit.

### **Article 20 – Printing, Counting, Consolidating, Transporting and Storing Ballots**

1. Management of the vote counting process is one of the most critical functions during an election, and a fair and open process is an absolute prerequisite for a legitimate election. The process of printing, counting, consolidating, transporting and storing ballots, both before and after voting, must be fully transparent to the public, political party agents and election observers.
2. The transparency of vote counting and consolidation is particularly essential, and without it, the final vote count can be manipulated. Observation groups and political parties should ensure that observers are trained and deployed to observe these processes, and EMBs must ensure that they are given the access to do so.

### Section III: Complaints and Electoral Dispute Resolution

### **Article 21 – Electoral Complaint System**

1. An effective electoral complaint system is an essential tool for fighting fraud and mismanagement at each stage of the electoral cycle. EMBs must ensure that the process for filing a complaint is clearly spelled out in advance of elections as well as readily accessible to, and known by, the public. The system must be managed fairly, transparently, and in a way that encourages those with complaints to come forward.
2. When election stakeholders have insufficient information about how to file electoral complaints, they are effectively excluded from the electoral complaint

and oversight process. EMBs should use voter education to ensure that every election stakeholder understands the electoral complaint process.

### **Article 22 – Timely and Impartial Dispute Investigation and Resolution**

1. A fair and neutral system of dispute resolution is critical for the integrity of an election. When mechanisms for handling disputes are deficient, citizens and candidates feel that their voices are not being heard and lose confidence in the election process and its results. Where dispute resolution bodies are subject to political influence or corruption, the dispute resolution process can be manipulated. Governments must ensure that the bodies with the responsibility to investigate and make decisions on electoral disputes are independent, impartial, professional and sufficiently financed.
2. Undue delays in the resolution of cases can be used to manipulate the dispute resolution process and deny the application of justice. Whether delays are due to insufficient capacity, or whether they are politically influenced, they undermine the legitimacy of the entire dispute resolution process. Within the framework of the electoral cycle, reasonable time limits should be set for the resolution of cases to avoid unnecessary delays. These time limits must be rigorously but fairly enforced.

### **Call to Action**

1. We therefore call upon the people of Asia, as well as their governments, election management bodies, political parties, candidates, civil society organizations, observer groups, the media and all other election stakeholders to strengthen their commitment to addressing these common challenges. As members of the Asian electoral community, we call upon all election stakeholders in Asia to work together to build and ensure free and fair elections across the region.
2. The issues and challenges included in this Declaration are neither comprehensive nor ubiquitous, as each country in Asia has its own unique set of challenges with regard to elections. We nevertheless urge the electoral community in each country to work towards improvement by focusing attention on those articles that are relevant in their own contexts.
3. Furthermore, with such great diversity in Asia, not all issues can be resolved in the same way. We call upon the electoral community in each country to use as a foundation the universal principles referenced in this Declaration and documented in other instruments such as the International Covenant on Civil and Political Rights and the Declaration on Criteria for Free and Fair Elections. We urge them to utilize and benefit from the rich electoral experience found across Asia.

4. But we are ever cognizant of the fact that each country's electoral challenges exist within its own unique and complex context. Countries can benefit most from this Declaration by recognizing that as we resolve to address our common challenges as members of the Asian electoral community, the solutions must still fit the unique nature of country--specific problems.

We believe that free, fair, transparent, peaceful and democratic elections are possible in all countries across Asia. As members of the Asian electoral community, we hereby resolve to work towards making this a reality.

### **Endorsing Groups/Individuals**

- 1) KIPP Indonesia -- Independent Election Monitoring Committee of Indonesia
- 2) JPPR Indonesia -- The People's Voter Education Network
- 3) Badan Pengawas Pemilihan Umum Republik Indonesia(Bawaslu Indonesia)
- 4) Women Caucus for Politic (Timor--Leste)
- 5) National Election Monitoring Alliance (NEMA) Nepal
- 6) Open Forum for Democracy Foundation (PollWatch) Thailand
- 7) Center for Korean Women and Politic (CKWP)
- 8) The National Citizens' Movement for Free Elections (NAMFREL)
- 9) Women Social Progress (Mongolia)
- 10) Institute for Political and Electoral Reform (IPER)
- 11) CNE (Commission National on Elections), Timor--Leste
- 12) General Election Commission of Mongolia (GEC)
- 13) Human Security Alliance (Thailand)
- 14) Perludem (Perhimpunan untuk Pemilu dan demokrasi), Indonesia
- 15) Fair Election Monitoring Alliance (FEMA) Bangladesh
- 16) National Election Observation Committee (NEOC) Nepal
- 17) Neutral and Impartial Committee for Free and Fair Elections in Cambodia (NICFEC)
- 18) The Committee for Free and Fair Elections in Cambodia (COMFREL)
- 19) Odhikar, Bangladesh
- 20) Free and Fair Election Network [FAFEN], Pakistan
- 21) People's Action for Free and Fair Elections (PAFFREL), Sri Lanka
- 22) Indonesian National Election Commission, Komisi Pemilihan Umum (KPU)
- 23) Free and Fair Election Foundation of Afghanistan, FEFA, Afghanistan
- 24) Pusat KOMAS, Popular Communications For Human Rights in Malaysia
- 25) Parish Pastoral Council for Responsible Voting (PPCRV, Philippines)
- 26) The Commission on Elections (COMELEC, Philippines)
- 27) AGENDA General Election Network for Disability Access
- 28) Citizen Congress Watch (CCW, Taiwan)
- 29) LOKNITI Programme for Comparative Democracy
- 30) InterBand (Japan)
- 31) Technical Secretariat for Election Administration (STAE), Timor--Leste

### **Observing Organizations**

- 32) IFE (Instituto Federal Electoral) Mexico
- 33) High National Election Commission -- Libya

