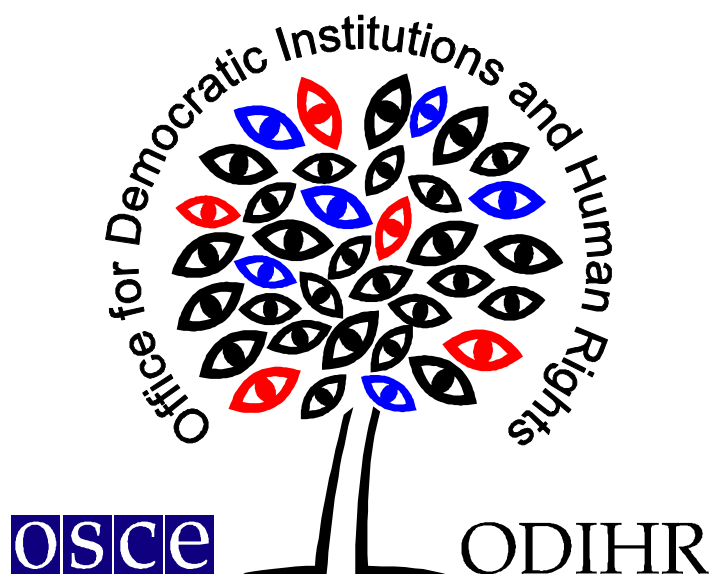




Office for Democratic Institutions and Human Rights

Resolving Election Disputes

in the OSCE Area:
Towards a Standard
Election Dispute Monitoring System



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Executive Summary

The international community has increasingly focused on election disputes in recent years. This attention results from the political controversy and sense of distrust surrounding the complaints and appeals procedures in many countries. Not only have judicial systems and electoral bodies often been at odds with each other, but there have also been instances of discrepancies and loopholes in domestic laws that have resulted in dual appeals processes, confusing time-limits, duplicative complaints filed with different bodies, an absence of clear sanctions for non-compliance with the law, and enforcement problems. One indication of the seriousness of these concerns is the number of complaints left unresolved months after the ballot.

This report is based on the outcomes of an International Election Standards Programme, which the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) launched in 1998, with the purpose of outlining best practices in resolving election disputes. This programme was implemented only in Ukraine, Kazakhstan and Kyrgyzstan but has resulted in the design of a standard monitoring methodology, which can be used in any country, regardless of its political, legal and judicial system. This methodology has been developed from the standardized format of election observation missions mandated by the OSCE/ODIHR but is equally suited to missions organized by other international bodies.

The main components of this methodology are:

- (1) Generic guidelines setting out what is generally accepted as good practice in addressing election related disputes;
- (2) A system to collect, compile, process and analyse information received on election complaints filed with courts, election commissions, or other state institutions, and to trace complaints through to a resolution by the relevant entities;
- (3) Tools to evaluate the performance of the judiciary in resolving election disputes, which in turn can be used to identify underlying problems that involve the overall performance of the judicial system.

The generic guidelines are not intended to describe in detail a model system of election dispute resolution. They seek only to set parameters for election dispute resolution in compliance with the rule of law. These parameters have been formulated with reference to a dual complaints procedure involving election commissions and courts. They are based on existing international legal instruments and were developed in the light of the emerging international consensus on minimum standards, reflected in various international documents¹.

These guidelines are coupled with a standard election dispute monitoring system with which to assess the performance of both judiciaries and election commissions in resolving election disputes. This methodology provides a broader perspective of the election dispute resolution process in a given country. Its incorporation within election observation missions may result in a more comprehensive analysis of both the election disputes and the legal system. A separate endeavour would undoubtedly be less effective in this respect.

The election dispute resolution scheme serves to readily assess whether a given legal system has the necessary provisions to uphold core principles for election dispute resolution. The scheme establishes a strategy to assess the ability of a legal system to resolve election

¹ See Appendix.

disputes. Complaints brought to the attention of an election observation mission are categorized and processed through a database. The purpose of this database is to gather information on both the quantity of election-related disputes in a given country and the dispute resolution process of a given legal and electoral system. The data processed will then facilitate the analysis of legal, topical, geographical and other patterns.

The methodology also includes qualitative tools, such as the election dispute analysis matrix, which is essentially a list of specific questions. The answers to some of these questions serve to indicate where further analysis would best reveal the strengths and weaknesses of the legal system in election dispute resolution. Other questions go beyond the kind of information available from the database; they require further analysis so as to reveal the efficiency and functioning of dispute resolution mechanisms within the overall legal framework of a given country.

This methodology has already been used by the OSCE/ODIHR on its election observation missions to Ukraine and Kyrgyzstan. Although election disputes has always been an area covered by election observation, the system described below goes further by providing tools for collecting and processing data, categorizing complaints, tracing them through to a resolution and exposing trends and patterns with statistical accuracy.

I. Introduction

Election disputes are inherent to elections. Challenging an election, its conduct or its results, should however not be perceived as a reflection of weakness in the system, but as proof of the strength, vitality, and openness of the political system. Therefore the increase in the variety and number of election-related disputes results partly from an increase in public understanding of the redress process. This trend is, however, particularly challenging where the legal systems and electoral administration are still developing.

The fundamental issues in election dispute resolution theories are:

- the validity of the result, and therefore the right to challenge the outcome of elections,
- the administrative action of election officials to correct a problem, which infers the right to seek redress for violations of suffrage rights
- criminal prosecution against those who have corrupted or attempted to corrupt the election process.

These remedies are not mutually exclusive, and can be used in conjunction with each other.

Beyond this simple demarcation, a variety of approaches and mechanisms, forged by different legal and political traditions, are used by governments in the resolution of election disputes. The system chosen derives primarily from the overall electoral framework, depending upon the institutions and procedures involved in the process. While in most democratically consolidated countries the resolution of election disputes is secured through the ordinary administrative and judicial bodies operating under special procedures (as in the United Kingdom, Germany, France and Italy), in most developing countries jurisdiction over election disputes is shared between ordinary courts and special – permanent or temporary – election commissions mandated by the election law. Another model is a permanent electoral court commissioned directly with the resolution of election disputes and this model is characteristic of Central America and some countries in South America, but is also used in Greece and in Eastern Europe.

There are also a variety of models of legal process through which election disputes are handled. Final decisions on claims can either remain within the hierarchy of election commissions, be dealt with by the ordinary court system exclusively or rest upon the constitutional court, acting as an electoral court. In addition, different remedies may be provided, including among others administrative action by state and/or election officials to correct a problem, and criminal prosecution of an alleged election fraud. Finally, in countries with legal systems based on the socialist civil system, one strikingly unique feature which has an impact on the manner in which election disputes are resolved, is the strong presence of the procurator throughout the proceedings.

Obviously, there is no single method that is equally suited to all countries. Which model is endorsed largely depends upon the degree of consolidation reached in the democratic process. However, a country's discretion in its choices is not unlimited and must be exercised consistently with international standards. The right to a remedy for violation of human rights is itself a human right. The same applies to all rights associated with voting.

The resolution of election disputes is not specifically addressed in international legal instruments² and there is no clearly established consensus in the international community on common standards for a “fair, effective, impartial and timely” resolution of election disputes. Nevertheless, drawing on existing rules and the requirements of international law, it is possible to identify the acceptable range of variation and deviation in the systems used to resolve election disputes.

The CSCE 1990 Copenhagen Document, which can be considered as the most comprehensive international document related to “free and fair” elections, does not refer explicitly to election disputes. However, its election commitments would be empty promises without the accompanying power to enforce them. By way of example, the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law. Likewise, the right to seek redress before the courts is corollary to the right of candidates “who obtain the necessary number of votes required by the law”³ to be “duly installed in office”⁴. Without the protection of the law, all rights associated with elections are of little value.

Furthermore, no just and credible election dispute resolution system may be contemplated unless the prerequisites of an independent judiciary and due process of law requirements are guaranteed in law and practice. These include the right to a fair trial and to effective remedies, as well as access to independent tribunals. These rights and principles stand at the very core of any system of rule of law. However in the field of election dispute resolution, where extra-judicial bodies are involved, this requires a specific system of implementation.

Nevertheless, this does not provide specific parameters that all systems of election dispute resolution should comply with. The fact that elections infer the right to sue the relevant authorities to enforce all rights associated with voting may offer a standard of effectiveness, but the ways and means by which progress towards that standard can be measured still need to be delineated. Indications may be found in various international documents that draw upon existing norms but extend them to take into account the specific requirements involved in resolving election disputes. None of these texts rises to the level of a convention but, bearing in mind the importance of practice in standard-setting, especially in the realm of elections, they may ultimately contribute to the emergence of a consistent *usus*.

The Draft General Principles on Freedom and Non-Discrimination in the Matter of Political Rights, which is a UN non-binding document adopted in 1962, first recognizes the power to enforce all suffrage rights by providing that any aggrieved person should be entitled to seek redress before independent and impartial tribunals (XIX). It further provides that the decisions of electoral commissions should be reviewable by the courts or other independent and impartial bodies (VIII, d). A further UN document, the Framework for Future Efforts, adopted in 1989, calls upon “nation institutions” to ensure universal and equal suffrage and impartial elections, partly by securing methods for resolving election disputes (III: Operational aspects).

Other statements of principle from other international organizations outline minimum guarantees necessary to ensure the protection of political and electoral rights. The “Declaration on Criteria for Free and Fair Elections” of the Inter-Parliamentary Council adopted in 1994 extends the scope of the right to “a remedy for violation of political and

² See Appendix.

³ Paragraph 7.9 – Copenhagen Document.

⁴ Id. 4.

electoral rights” by including references to violations of candidature, party and campaign rights (4). Mention is also made of the need to reach prompt decisions “within the timeframe of the electoral process” (4.6 and 4.8). In contrast to the UN text, this document explicitly bestows upon electoral commissions the responsibility of resolving election disputes (5.9). For the time being, this Declaration is certainly the most accurate and precise document available in the area of election dispute resolution.

From the body of principles established in these documents, two main components can be singled out:

- (1) The right of every individual or political party to a remedy for violation of political and electoral rights, including the right to vote and to be registered as a voter, as well as candidature, party and campaign rights;
- (2) The responsibility of States to ensure that complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

In practical terms, the assessment of the manner in which election disputes are resolved and the extent to which they match certain minimum standards involves weighing up the following key elements:

Jurisdiction: This a major concern in countries where courts and election commissions share the burden of resolving election disputes. Ambiguous, evasive or incomplete provisions in the election law or other normative acts may generate confusion over the jurisdiction of the courts and election commissions to deal with election disputes. In recent elections in the OSCE region, this has provided opportunities to “forum shop” for a desired result between the courts and election commissions, which was exploited, causing obstruction and delays in the process of installing elected candidates.

Timeliness: The election law must guarantee the resolution of disputes within a period of time suited to the electoral process. It is crucial here to ensure that the outcome of elections is not delayed. This implies that the period between the filing of a complaint and when it is dealt with is very short. This requirement is *per se* a challenge for judicial systems. It involves critical considerations regarding the efficiency of the judicial system and the relation of the courts to the electoral administration.

Enforcement: The proper and timely implementation of decisions taken by courts and electoral bodies is critical to the effectiveness of the election dispute resolution system. The more the electoral administration is involved in resolving disputes the more serious the enforcement issue is likely to be. For instance, entrusting the power to pass final decisions on disputes to the highest electoral body is meaningless without effective ways and means by which its decisions can be implemented and corrective action taken. This also raises the question of the role assigned to state law-enforcement agencies within the electoral process. All too often, national legislation does not provide adequate sanctions for non-compliance by state institutions, mass media and state officials over whom the election commissions have no authority, while sanctions such as suspension or cancellation of a party or candidate qualification are subject to abuses.

Prosecution: Corruption in the election process can warrant criminal prosecution and result in legal sanctions, including fines or imprisonment, over which only courts hold jurisdiction (with a few exceptions for minor offences). Electoral offences and the legal sanctions

associated with them should be stipulated in the criminal code. Criminal prosecution and administrative action by election officials to correct a problem can be used in conjunction with each other. Also, whether criminal prosecution is the appropriate remedy to the case presented is a crucial issue. In particular, criminal investigation by law enforcement agencies or departments of the relevant ministries should be instigated and conducted in a way that eliminates, or at least minimizes, the possibility of it becoming a factor in the election.

These are the four pillars upon which the standard monitoring system and the generic guidelines for election dispute resolution described in this report lie.

II. Generic Guidelines for Election Dispute Resolution

The following guidelines are not intended to describe in detail a model system of election dispute resolution. They seek only to set out what is generally accepted as being good principle and practice in addressing election-related disputes. They set the parameters for election dispute resolution mechanisms which comply with the rule of law.

Subject to adjustments required as a result of the great variety of legal and electoral systems in the world, the standards discussed below should serve to stimulate a constant endeavour to overcome practical difficulties in their application. They represent, as a whole, the minimum condition commonly accepted by the international community.

These standards cover a field in which theory and practice are constantly developing. They are not intended to preclude experiments and different practices, provided these are in conformity with the standards and seek to further the purpose of consolidating the rule of law and free and fair elections.

The principles set out below have been formulated and articulated with reference to a dual complaint procedure specifically involving electoral bodies and courts. In some countries, alternative procedures are being considered, such as the creation of specialist courts to adjudicate election complaints and appeals, or the development of an administrative justice system with jurisdiction over election disputes. However these alternatives have so far had little chance of being endorsed and implemented, mainly for financial reasons.

Finally, these principles stand at the crossroads of international rule of law and election standards. Some of them are principles of justice or related to fundamental rules embodied in international instruments, while others are practical. They all have as their foundation the rules relating to the right to a fair trial, particularly as laid down in paragraph 5.10 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE⁵, in paragraph 13.9 of the CSCE Concluding Document of Vienna⁶ as well as in Article 6 of the European Convention on Human Rights⁷. In particular, this includes the independence of the judiciary⁸ as further prescribed in paragraphs 19, 20 and 21 of the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE.⁹

A. General principles

1. Every individual and every political party has the right to the protection of the law and to a remedy for violations of their political and electoral rights.
2. Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to address their grievance within a competent jurisdiction.

⁵ Copenhagen, 29 June 1990.

⁶ Third Follow-Up, Vienna, 19 January 1989.

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

⁸ The “Basic Principles on the Independence of the Judiciary”, adopted by the Seventh United Nations Congress On the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, should also be taken into account.

⁹ Moscow, 3 October 1991.

3. Where a violation has been found, the competent authority within the appropriate jurisdiction should provide for redress in a prompt manner within the timeframe of the electoral process.
4. The effectiveness, impartiality and independence of the judiciary, including the office of the prosecutor, and that of electoral bodies, is a pre-condition for the fair, effective and impartial handling of election-related disputes in conformity with the commonly accepted international standards on elections and the rule of law.
5. The decisions made by independent and impartial authorities which are responsible for supervising the conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be subject to appeal with an independent and impartial judicial authority.
6. The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts and the electoral bodies so as to exclude the possibility of courts or electoral bodies being served with repeated or concurrent complaints on the same matters.

B. Hierarchical appellate procedure

7. The electoral law should set out a clear hierarchical appellate procedure for the handling of election-related complaints and appeals, in accordance with the framework legislation governing the judiciary and civil proceedings.
8. The electoral law should provide for at least one appeal procedure to ensure that a higher court or electoral body reviews all cases. The law should clarify which decisions are final. When a decision is reviewable, it should be stated which court or electoral body it may be appealed to.
9. No pre-requisite for a review by an electoral body should be required prior to the admissibility of a challenge in court and a court challenge should always be available.
10. For all types of election disputes, the decisions of the higher electoral body should be reviewable by the highest body of the judiciary whose ruling should then be final.
11. If the law allows the decisions of the highest electoral body to be reviewed by lower level courts, this should be stated as an exception to the general rule and be strictly defined in the law. The court to which such decisions may be appealed should be unambiguously identified in the law.
12. The electoral law should stipulate which decisions are final and binding. The highest body of the judiciary or the constitutional court should not be entitled or compelled to release an election-related case to a lower level court.

C. Accessibility and transparency

13. The complaints procedure should be transparent and easily understandable. Appropriate forms should be readily available for filing complaints and appeals in the language(s) used in the country. Election officials should be acquainted with the rules and procedures for filing complaints as well as with the standards governing election disputes and

relating to the scope of their involvement in these matters. Finally, civic education campaigns should include basic information on the complaints procedure.

14. The relevant authorities should take the necessary policy and institutional steps to ensure that those with election-related responsibilities are trained on election dispute rules and procedures in accordance with the election law of the country and international standards.
15. The complaints procedure should be free of unnecessary obstacles, especially as regards the cost of bringing an action to court. Wherever possible the complaints procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.
16. An effective, fair and transparent complaints procedure requires that potential complainants be informed of the means by which the complaint should be made, which body it will be considered by and the time frame for its resolution. In addition, complainants should be aware of the type and amount of evidence needed to sustain their allegations with sufficient factual and legal materials.
17. Decisions taken by the electoral bodies, in particular those related to voter and candidate registration, should as a rule indicate the remedies available.¹⁰
18. Mechanisms for resolving election disputes should be governed by a coherent body of legal norms, preferably in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions on the different subject matters should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

D. Promptness of the proceedings: time limits and deadlines

19. Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals.
20. When setting time limits a balance should be struck between imperatives relating to the administration of justice in a timely manner within the electoral timeframe and the right to challenge decisions, actions or omissions of the electoral bodies in the fulfilment of their mandate.
21. In particular, time-limits should allow courts and electoral bodies sufficient time to process, review and make decisions upon the complaints and appeals submitted to them. The fact that some complaints or appeals, especially those related to election funding or campaigning, may require further investigation should also be taken into consideration.
22. For each phase or facet of the electoral process, the electoral law should expressly and systematically set deadlines after which applications, objections, complaints and appeals may no longer be admitted by courts and electoral bodies alike. Specific time-limits may

¹⁰ This principle is in line with the broader principle set out in paragraph 5.10 of the Document of the Copenhagen Meeting of the CSCE, 29 June 1990.

be prescribed for complaints and appeals on the voter registers or the validation of candidates.

23. For each phase or facet of the electoral process (such as voter registration or the validity of the candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals by which either the courts or the electoral bodies must reach a decision. Specific time-limits departing from the general rules may be prescribed for complaints and appeals pertaining to the voter registers or the validation of candidates.
24. In the case of violations of an allegedly criminal nature, particular care should be taken to conduct an objective and impartial investigation by the responsible authorities in the most expedient manner possible.

E. Voter registration

25. All citizens should be entitled to file complaints and appeals on the accuracy of the register of voters.
26. The electoral law should set a deadline after which applications, objections or complaints to the voter register may no longer be admissible. The law should not permit the accuracy of the voter register to be challenged right up to the eve of an election. This would ensure that electoral bodies and the judiciary are not diverted from urgent complaints and appeals related to the voting and counting process and drawn into resolving disputes that could have been addressed earlier.
27. The electoral law should set out an exclusive venue for filing complaints and appeals regarding the accuracy of the voter register or, where applicable, the electoral cards. The complaints procedure should be designed so that courts are not unnecessarily burdened with minor disputes.

F. Validity of candidatures

28. A deadline should be set by the electoral law, after which the validity of candidatures may no longer be challenged. The time-frame for the verification process of the candidatures should be adjusted accordingly.
29. The electoral law should establish the procedure for the verification of signatures collected in support of candidates.

G. Election results

30. The electoral law should provide a mechanism for the invalidation of election results. In both parliamentary and presidential elections, the decision to partially or fully invalidate election results should be assigned to the highest electoral body. This decision should be reviewable by the highest body of the judiciary or the Constitutional Court.
31. The electoral law should specify whether the entities vested with the power to invalidate the election results can take action without being presented with a formal complaint and whether their decisions should be made on a polling-station-by-polling-station basis. It should be clear from the law whether a general invalidation mechanism applies or a

restricted one, depending upon the fulfillment of special conditions as regards evidentiary matters and the admissibility of complaints and appeals.

32. Both the preliminary and the final results should be subject to challenges. Therefore the electoral law should differentiate between the procedures, deadlines and time-limits applicable to each phase. The principles below are based on this assumption.
33. Where lower level electoral bodies are mandated to publish the preliminary results of the election, they should not be entitled to declare the results void but should be able to make non-binding recommendations to that purpose to the highest electoral body.
34. The final results should not be published before all challenges of the preliminary results have been decided upon by the highest body of the judiciary or the constitutional court.
35. Challenges pertaining to the preliminary results of the election within the mandate of lower level electoral bodies should be filed with the highest electoral body so as to secure a coherent and hierarchical procedure. The time-limit for filing and deciding upon such challenges should not exceed one month, so as to enable the publication of the final election results no later than this deadline (taking into account the deadline for publication of the preliminary results).
36. All complaints pertaining to the overall final results or the declaration of election results to be partially or fully void should be filed with the highest body of the judiciary, the Constitutional Court or with the court where the highest electoral body is located. In the latter case, the ruling delivered by the court may be further appealed to the highest body of the judiciary.
37. In accordance with the procedural time limits prescribed by law for publication of the preliminary and final results and for filing and deciding upon related challenges, all complaints and appeals should be determined once and for all within a maximum of two months.
38. The electoral law should clearly state the grounds upon which the election results may be partially or fully invalidated. A mere reference to the constitution should not be held as providing a sufficient basis for adjudicating such cases. Also, the law should specify the amount and type of evidence required for a review of the results. In the absence of clear and unambiguous standards of evidence, the determination of what evidence would satisfy these standards could vary on a scale that may undermine the whole process.
39. Where a polling-station-by-polling-station resolution mechanism applies, the invalidation of voting in a particular polling station should be considered by means of an evaluation of the way the alleged irregularities or violations have affected the outcome of the election.

H. Admissibility of complaints and appeals

40. The electoral law should lay down the grounds upon which complaints and appeals are admissible. Any complainant should be duly notified in writing of the decision as to whether his/her petition was considered admissible or not, with reasons given.

41. Grounds for appeal should be strictly defined in the law, preferably for each phase involving an election dispute mechanism, so that courts and electoral bodies are not burdened with irrelevant or frivolous challenges.
42. The parties authorized to bring election-related complaints or appeals before a court or an electoral body should be strictly identified by the electoral law.
43. Time-limits and procedures governing the admissibility of complaints and appeals should be designed so as to preserve the right of aggrieved parties to seek redress.

I. Enforcement

44. Bodies with jurisdiction over election disputes should be vested with the power to enforce their decisions within a reasonable time. Electoral legislation and/or framework legislation governing the administration of justice should expressly indicate the legal consequences associated with the decisions taken by the various bodies which have jurisdiction over election disputes. It should also specify unambiguously the legal sanctions which can be imposed and enforced, including fines, imprisonment, suspension or disqualification of a candidate.

J. Consistency in the interpretation and application of election dispute provisions

45. Election laws should expressly bestow upon the highest body of the electoral administration the authority to pass regulations or instructions aimed at securing a uniform interpretation and application of the election law by electoral bodies.
46. The highest body of the judiciary should ensure that all election-related legislation, including framework legislation (such as Civil and Penal Codes, as well as Criminal and Civil Procedure Codes) which is generally considered as having primacy over other legislation, is not flawed with discrepancies, loopholes or gaps.
47. The highest body of the judiciary should also take the necessary steps to ensure the constitution of a coherent set of governing judicial precedents and that judges be acquainted with these precedents and the reasoning behind them.
48. Well in advance of the elections, the highest entity within the hierarchy of the election commissions and the highest body of the judiciary responsible for issuing final and legally binding decisions on election-related cases, should jointly develop instructions, guidelines or resolutions on the various matters involved in election disputes. Where a dual complaint and appeals process applies, both institutions should clarify their respective areas of competence and those of the lower level courts and election commissions. They may also play a crucial role in fostering reforms of the electoral legal framework or judicial practices and standards in the consideration of election-related cases. Conflicts between the institutions or mutual misunderstandings may seriously undermine the uniform interpretation and application of election laws and regulations at lower levels and could threaten the certainty of the law as well as confidence in the electoral process.

K. Electoral offences, irregularities and violations of the electoral law

49. The electoral law should enumerate in a separate paragraph or article the categories of irregularities and infractions together with their possible consequences for the electoral process. A mere reference to violation of the law or the constitution should be avoided.
50. The electoral law should further specify the standards by which the impact of these irregularities or violations upon the electoral process should be determined.
51. Electoral offences which entail a criminal prosecution should be the subject of a separate chapter in the criminal code and preferably be referred to in the election law. Due attention should be given to the consistency of the provisions in the election law and in the criminal code and criminal procedural code so as to avoid any confusion over the legal consequences associated with them.

L. Prosecution

52. Cases which give rise to criminal prosecution should be conducted through the venues and following the rules and standards prescribed in the law governing criminal proceedings. This does not preclude the determination by either the courts or the election commissions of the impact of alleged violations on the electoral process.
53. The laws should clearly set forth the standards for the institution of criminal proceedings in election-related cases. Specifically, the laws should indicate the standards to be used by prosecutors in deciding whether there is sufficient evidence to prosecute. These standards should be established by the election law and/or by criminal legislation. All laws and other legally binding statutes, which govern this particular issue, should be unambiguously cross-referenced so as to ensure uniformity and consistency.
54. The laws should provide for a clear delineation of prosecutorial discretion. In particular, the terminology used to define this discretion should be strictly determined by law. Where the law limits this discretion, the limitations should not be left unspecified. The grounds for not prosecuting an electoral offence should be clearly stated and not merely referred to as the interests of the state or society. The provisions which set out limitations on prosecutorial discretion should not conflict with other provisions. Finally, the law should provide standards for the exercise of prosecutorial discretion.

III. Standard Election Dispute Monitoring System

The following section outlines a standard election dispute monitoring system, which includes the following components:

- An election dispute resolution scheme, which aims to map out the legal provisions outside the election laws within which election disputes are decided;
- A database used to trace complaints and appeals through to their resolution;
- An election dispute analysis matrix, which consists of a list of inquiries which the database can assist in answering, and which can serve to indicate election dispute trends in a given country;
- An organizational scheme for the election dispute monitoring team within an election observation mission;
- Guidelines for long term observers and comments.

A. Election Dispute Resolution Scheme

The election dispute resolution scheme is in a table format, structured as follows:

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.
Activity	Election Related Violations	Legal Provision	Defendant	Who Can Complain	Where	Deadline For Complaint	Deadline For Consideration	Appeal	Sanction

- Columns one and two describe the type of category outlawed.
- Column three indicates which laws or codes refer to the election-related violation or activity or list it as an offence.
- Column four refers to the person or institutions likely to be accused.
- Column five refers to the interested party.
- Column six indicates the forum with jurisdiction over the violation.
- Columns seven and eight give the time limits imposed by law.
- Column nine describes whether there is the possibility for an appeal by either party.
- Column ten indicates what the outcome of a guilty verdict could be and what the enforcement mechanisms are.

The table is then divided under the following row headings, to indicate roughly chronological phases of the elections:

A. Pre-election registration	
B. Election campaign	
C. Election day issues	
D. Post voting issues	
E. General issues	

This scheme serves to readily assess if the given legal system contains the necessary provisions to uphold the core principles of election dispute resolution. For instance, the lack of an appeal provision would violate a State's OSCE commitments. Or, where there is no sanction foreseen, the possibility of enforcing a remedy in the case of a guilty verdict should be monitored. Finally, whether the provisions outlined are enforced or applied efficiently by

the election commissions, courts and other institutions are separate questions which can only be addressed through analysis of the decisions and actions taken. However, this scheme can help establish a strategy to assess the ability of a legal system to resolve election disputes.

In many instances, election laws may be excluded from the table because there are no sanctions directly associated with violations in the election laws *per se*. The table may then refer to the provisions found in other laws, such as the criminal code or the criminal procedural code. As these provisions are not usually readily available in translation for every election observation mission, the scheme has been devised for easy consultation. However, the key provisions to include in the actual table will invariably change according to the legislation of the country. Furthermore, it is not possible for the scheme to be exhaustive, but it is important that real election disputes are analysed and as comprehensive a scheme as possible is outlined.

B. Database for Election Disputes

Part A of this section outlined the methodology for categorizing and organizing the data gathered, as well as for tracing complaints through to a resolution when a decision has been taken. This section will now examine the practical aspects of how the database on election disputes has been developed to do this.

First and foremost, it must be noted that in most cases the database is likely to be limited to complaints which are filed with an authoritative institution and for which the election observation mission has received a copy of documentary evidence related to the allegation. There are four primary reasons why this approach is taken:

- First, only complaints for which redress has been sought can serve to monitor the efficiency of both the legal system and the quasi-judicial mechanisms for election dispute resolution.
- Secondly, because the defendant or the authorities may contest the validity of the allegations, some record of the occasion or event about which the complaint is being filed is necessary if the data is to be used to draw conclusions.
- Thirdly, tangible evidence facilitates the follow-up and verification of allegations.
- Finally, this strategy seeks to eliminate unsubstantiated complaints and increase efficient use of the limited resources available to the mission to monitor both elections and complaints.

However, there is one major drawback to this methodology. In cases where people are intimidated and unwilling to provide names or documents (a possible factor in the gravest violations) the event would be excluded from registration in the database.

Below is a description of each of the fields (i.e. the boxes to be filled in when registering a complaint file) used in the election dispute database. The purpose of the database is to gather information on both the quantity of election-related disputes in a given country and the dispute resolution process of a given legal and electoral system. The data will serve to facilitate the analysis of legal, topical, geographical and other patterns.

Number: Each case or complaint registered is allotted a number in order to identify within the election observation mission the complaints received. This number is for organizational purposes only and should not be confused with the numbers allotted to cases in

courts or the numbers of decisions and cases assigned by the state institutions in which redress is being sought.

Court/Election Commission/Other Institution: This field indicates the state institution with which the complaint is filed. Courts generally decide disputes and complaints, however during elections, special provisions often allow for other institutions, such as election commissions, to have authority over election disputes. Other institutions can include ministries, special courts or public prosecutors. This field is key to understanding the possible forums within which complainants may seek redress.

Date: This field refers to the date on which the case was filed with the state body on the registration form of the given case, NOT the date on which it was brought to the attention of the election observation mission or registered. As noted, only complaints on which action is sought ought to be registered. By entering the date on which the case was filed, it is easy to assess whether the time-limit for action by the court or commission has passed (see table).

Region: This field refers specifically to the electoral administrative subdivisions of a state (i.e. precincts and constituencies) and will vary from country to country. However, it is crucial to the understanding of possible election-related violations that the area in which complaints occur is monitored. This will allow the election observation mission to note whether there are geographic patterns to disputes during an election.

Constituency: This refers to the election-specific administrative units in a given election. The entry of data in this field is particularly important to the monitoring of administrative violations and violations which occur during the voting process and the vote counting.

Complainant: This refers to the person or organization complaining that their rights have been violated. In court cases, this refers to the plaintiff and in elections candidates are among those most likely to complain. Since candidates often file complaints during the election process, it is desirable to include their name in this field, even if it is their proxy or party which complains for them.

Accused: The information in this field refers to the organization or person being complained about. Commonly accused during elections are election commissions, other candidates, state institutions or other organizations.

Summary: This should contain a detailed description of the alleged facts that occurred and resulted in the complaint. This entry should be both as exhaustive and concise as possible.

Status: This field should note whether appeals or referrals have been filed following a decision or action by the institution where the case was first filed. For instance, if the case was filed with a government department which in turn referred it to another body, such as the prosecutor, central election commission, or court.

Comments: All other information that is of interest should be noted here. For instance, if there are similar complaints or other relevant information not appropriate to the other fields, it can be mentioned here.

In order to enable the election observation mission to monitor the effectiveness of election dispute resolution, it is essential that the legislative, adjudicative and enforcement basis of decisions be included in the relevant fields.

Legal Basis of Complaint: The alleged violations claimed in the complaint. This field is for the basis alleged by the complainant, NOT that believed to be so by the registrant of the complaint. For instance if no legal reference (i.e. no law or article cited as having been violated) is made by the complainant, the field remains empty.¹¹

Decision: Decisions adopted by courts, election commissions or other institutions. The legal basis of the decision must be specified (national laws, codes, and articles).

Enforcement: Was the decision implemented? When and how? Was the redress satisfactory for the plaintiff and was it enforced in full? The development of categories within which to classify complaints is fundamental to the analysis of the information gathered. While the categories will never be exhaustive and variations may be needed for each election and in each country, adherence to the basic categories of election disputes will allow analysis of international and regional trends.

Category: Categorization of complaints serves to reveal where the complaints are concentrated in the election process and where the legal weaknesses are. Further analysis of the substance of cases found in given categories can uncover whether weaknesses relate to the law or its implementation. For instance, a deeper look into cases on campaign obstruction may reveal that actions by the state administration are often the source of complaints.

C. Election Dispute Analysis Matrix

1. Basic Data Retrieval

The set of general questions which fall under the rubric of ‘Basic Data Retrieval’ can be readily retrieved from the database through simple queries. This heading is further divided into the types of questions to be addressed in order to obtain an initial overview of the status of election-related complaints. The categories are outlined as ‘general information’, ‘categorization of complaints and appeals’, and ‘bodies with the authority to resolve election disputes’. Under the heading of ‘general information’, an overview of the data gathered during an election observation mission should be provided. The categorization of disputes will allow the mission to identify the alleged weaknesses of an election and a breakdown of the institutions to which cases were brought will clarify the possible channels for remedies.

The answers to the questions under these headings should then serve to indicate where further analysis would best reveal the strengths and weaknesses of the legal system in election dispute resolution.

a) General Information

1. How many cases have been brought to the attention of the election observation mission?
2. Of these cases how many final decisions were taken?

¹¹ The rationale for this approach is that, in order to trace the efficiency of the legal system, the ability of parties to argue their cases must be noted. Furthermore, it is the judicial opinions which are of interest to the election observation mission in election disputes monitoring and the inclusion of other legal opinions would confuse this.

3. How many of these decisions have been enforced?
4. Who complained? (Give a detailed breakdown of complainants)
5. What is the geographical distribution of complaints (regions, constituencies, precincts)?
6. What is the geographical distribution of complaints and appeals upon which a decision has been reached?
7. Who are the defendants?

b) Categories of complaints

8. How many cases are related to the election campaign? (State the total number of cases related to illegal campaign and campaign obstruction. Also specify breakdown between election commissions and court cases¹²)
9. How many cases are related to the illegal campaign? (Specify whether election commission or court cases)
10. How many cases are related to campaign obstruction? (Break down into election commission and court cases)
11. How many cases are related to the registration of candidates? (Break down into election commission and court cases)
12. How many cases are related to election day concerns? (Include voting and counting? Also specify breakdown between election commission and court cases)
13. How many cases are related to the voting process ? (Specify breakdown between election commission and court cases)
14. How many cases are related to the counting process? (Specify breakdown between election commission and court cases)
15. How many cases are related to the administration of the elections? (Specify breakdown between election commission and court cases)
16. How many are libel cases? (Specify breakdown between election commission and court cases)

c) Bodies with the authority to resolve election disputes

Election Commissions

17. How many cases have been brought to Election Commissions? (Break down into categories of complaints)
18. How many cases have been decided by the Election Commissions? (Break down into categories of complaints)
19. Have these decisions been taken within the prescribed time-limit? (For those cases where time-limits have been exceeded, explain the reasons given or assumed. Also break down into categories of complaints)
20. How many of the cases decided by election commissions have been enforced? (Break down into categories of complaints)

Courts

21. How many cases have been brought before the courts? (Break down into categories of complaints)
22. How many cases have been decided upon by courts? (Break down into categories of complaints)

¹² The answer to this question is also provided in the section dedicated to “bodies with the authority to resolve election disputes.”

23. Have these decisions been taken within the prescribed time-limit? (For those cases where time-limits have been exceeded, explain the reasons given or assumed. Also break down into categories of complaints).
24. How many of the cases decided upon by courts have been enforced? (Break down into categories of complaints)

Prosecutors

25. How many cases have been brought before prosecutors? (Break down into categories of complaints)
26. How many of the cases brought before public prosecutors have been decided? (Break down into categories of complaints)
27. Have these decisions been taken within the prescribed time-limit? (For those cases where time-limits have been exceeded, explain the reasons given or assumed. Also break down into categories of complaints).
28. How many of the cases originally sent to the prosecutor have been enforced? (Break down into categories of complaints)

2. In-Depth Analysis of Channels for Election Dispute Resolution

On the basis of the basic information retrieved from the database, further analysis can serve to expose the efficiency and functioning of a dispute resolution mechanism. To a certain extent, the analysis conducted will vary from country to country, or according to the type of elections held. However, in most cases the answers to these questions will be more difficult to discern and will require analysis of the decisions and documents on the cases.

Below are examples of analytical questions which, if answered, will increase a legal adviser's ability to analyse the legal system and will improve the appropriateness of recommendations.

Analytical questions: cases requiring further investigations

29. How many cases have been considered to require further investigation? (Break down into categories of complaints)
30. Among the complaints how many have been sent by the election commissions to law enforcement agencies or other state bodies? (Break down into categories of complaints)
31. Among cases requiring further investigation how many have been sent to the prosecutor? (Break down into categories of complaints)
32. How many of these cases have been decided? (Break down into categories of complaints)
33. What are the substantive grounds of the decisions by the election commissions?
34. What are the substantive grounds of the decisions by the courts at each level?
35. Are there institutional comparisons on the efficiency and extent of enforcement of the decisions?
36. What are the substantive grounds for the appeals (especially with regard to the prosecutor)?
37. What are the statistics on the total number of cases filed with each institution? (in order to assess the relevance of the cases brought to the attention of the election observation mission)
38. How many of the cases are related purely to the administration of elections and how many are tied to the structural weaknesses of the legal and/or electoral system?

D. Organizational Scheme for the Election Dispute Monitoring Team

Election dispute monitoring should be an integral part of election observation and should be integrated into the election observation mission. Since the assessment of a legal system's efficiency in resolving election disputes indicates the overall state of the rule of law within a country, election dispute monitoring can help to link election observation with other human rights and democratization projects.

Whenever possible, election dispute monitoring should be headed by a legal adviser and done in close co-operation with an election expert responsible for liaising with the election commissions or administration and an expert responsible for co-ordinating with long term observers (LTOs). Regardless of the roles of the election commissions vis-à-vis the courts, there are always likely to be areas where co-ordination, if not collaboration, between the two institutions is required.

Because of the tremendous variations in legal systems around the world, assistance from local jurists is essential. The number of local jurists will depend on various factors, such as the size of the country, the size of the population, the jurisdictional regimes (i.e. in instances where there are autonomous regions with separate rules and procedures), and the type of election. While the legal adviser represents the international community, it is the local jurists who are better equipped to navigate the local laws, even in instances where the legal adviser is fluent in the language.

Ideally, the LTOs will do much of the election dispute monitoring. The LTOs are well-placed to gather information on election disputes and, if equipped with a computer, can easily register the data directly on the database. Otherwise, the registration of complaints will have to be done by the local jurists and the legal adviser. If election disputes can be monitored and registered by the LTOs at the regional level, the staff at headquarters can then focus on the following tasks:

- election dispute monitoring at the national level;
- legal research directly related to election disputes; and
- analysis of election dispute patterns.

While the LTOs are best situated to monitor local disputes, headquarters can more readily observe cases and decisions at the national level. This includes those election disputes which reach the highest courts and election commissions. Legal research on election disputes requires assessing, at the national level, the consistency with which election laws are applied (i.e. are courts around the country coming to similar conclusions or are the election laws being interpreted differently?). Finally, an analysis of election dispute patterns requires an overview of the information gathered throughout the country.

E. Guidelines for Long Term Observers and Comments

Part of election observation has always touched upon the dispute resolution mechanisms available during elections, yet a systematic and comprehensive approach to election disputes greatly complements the election observation mission and can identify the weaknesses of both the election process and the legal system within which elections are held. Furthermore, the following guidelines for information gathering on election disputes have been developed.

In addition to the code of conduct laid out in the OSCE/ODIHR's Election Observation Handbook¹³, the observers monitoring election disputes must abide by the following rules.

1. Code of Conduct for Complaint Information Gathering

- When speaking with a complainant, be sure to inform them that the election observation mission has no authority to intervene or to resolve a complaint or dispute. However, monitoring and tracking election-related complaints is part of the observation task and this can increase the awareness of the authorities.
- Confidentiality and the protection of those who file complaints is a top priority.
- Be as objective as possible. Contact and speak with all sides involved (i.e. complainant, defendant and the adjudicative authority).
- Meetings on complaints should be conducted with two observers whenever possible.
- For complaints which have been filed with an institution, a copy of the documentation should be obtained whenever possible.
- If an election commission or court session is holding a hearing on an election dispute, try to attend but ask for permission even if the hearing is public. The person to address with a request to attend is usually the presiding judge or chairperson. Do NOT approach the parties at the hearing and remember that you are a **neutral** observer.

2. Gathering Complete Information

The types of questions to ask and the detailed information to be gathered can be summarized as follows:

- **Who:** Obtain all names, affiliations and functions of the persons involved and contact details where possible. Who is complaining? (for example: voters, candidate, party representative). Who is committing the alleged violation? (for example: another party, local or other authorities, mass media).
- **What happened:** Take detailed notes and track the exact timing of the story. Ask for as many specifics as possible (i.e. names, exact place, date, witnesses, etc.). Determine and obtain when possible any tangible evidence such as copies of written documents, videotapes, newspaper articles, etc.
- **Where:** Where was the complaint filed? Court or Election Commission? (or is there another source?). Specify the source from which a complaint is heard of. When a complaint has been brought to a court or an election commission ask for a case number assigned by the court or commission dealing with the dispute.

Although it is the documented cases which are of interest in election disputes monitoring, general information on complaints is of interest for two reasons. First, it helps to give an

¹³ The ODIHR Election Observation Handbook – Fourth edition, April 1999, Warsaw.

overview of the grievances, and secondly, complaints reported but unsubstantiated could at a later date be filed with an institution.

Beyond the details of the events and persons involved, the value of the information gathered for the legal adviser will depend on how complete the information is with regard to the dispute resolution process of the legal system. In order to discern this the following three phases of the process should be kept in mind and information for each phase should be gathered.

Legal reference and results

1. **Legal Provisions:** What laws prescribe the alleged actions? What are the relevant statutes and regulations (emphasis should be placed on electoral and campaign laws, but also all other pertinent laws).
2. **Adjudication (the decision):** Was a decision taken? By whom and with what authority? Is the case being appealed? Was any administrative action taken? Is there a date and copy of the decisions?
3. **Enforcement:** Were decisions implemented? By whom? (The defendant? A state body? Was redress obtained? Was it satisfactory?

INTERNATIONAL ELECTION DISPUTES STANDARDS

Introduction

There are no international election disputes standards *per se*. Resolving election disputes involves international standards that are to be found across the wider spectrum of election-related rights and rules and those associated with due process of law requirements and judicial independence.

The recognition of the rights associated with voting requires a judicial or administrative response to their potential denial. The right to challenge decisions, actions or failures to act in connection with an election, may therefore be considered as part of these rights. However, the right to seek redress is of little value without, among other things, an impartial and independent judiciary that can enforce the laws equitably and efficiently. This also infers that the requirements of due process of law are met by fair procedures, including notice to the defendant and an open trial before a competent tribunal with the right to counsel.

Therefore, the international texts and conventions compiled below are presented in two sections. The first section sets out the human rights standards related to elections while the second section is focused on standards referring to due process of law and judicial independence. This presentation gives an overview of the spectrum of rights and principles involved in the resolution of election disputes.

These standards are based primarily on OSCE commitments, and generally accepted international standards, which have been developed based on international legal instruments such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the protocols thereto.

I. INTERNATIONAL HUMAN RIGHTS STANDARDS RELATED TO ELECTIONS

A. *The United Nations*

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 21

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

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 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.

B. *The Council of Europe*

PROTOCOL N°1 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS¹⁴

Article 3

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

¹⁴ Paris, 20 March 1952.

C. The Organization for Security and Co-operation in Europe (OSCE)

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

Human Rights, Democracy and Rule of Law

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

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

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

- (5) They 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 recognise 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.

II. INTERNATIONAL STANDARDS REFERRING TO DUE PROCESS OF LAW AND THE INDEPENDENCE OF JUDGES

A. The United Nations

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed.
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INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 2, paragraph 3

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 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 judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order 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 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 as will take 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.

B. The Council of Europe

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS¹⁵

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

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 the criminal offence was committed.

2. This article shall not 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 recognised by civilised nations.

¹⁵ Rome, 4 November 1950.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

C. The Organization for Security and Co-operation in Europe (OSCE)

CONCLUDING DOCUMENT OF VIENNA : THE THIRD FOLLOW UP MEETING (19 JANUARY 1989)

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia*, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
 - the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
 - the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.
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DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (29 JUNE 1990)

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law;

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

Human Rights, Democracy and Rule of Law

Everyone also has the right : (...) to fair and public trial if charged with an offence.

We (OSCE Participating States) will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.

DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (3 OCTOBER 1991)

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.

(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals affected thereby.

(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.

(19) The participating States

(19.1) - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(19.2) - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, inter alia, provide for

(i) prohibiting improper influence on judges;

(ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;

(iii) protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;

(iv) ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;

(v) guaranteeing tenure and appropriate conditions of service, including on the matter of promotion of judges, where applicable;

(vi) respecting conditions of immunity;

(vii) ensuring that the disciplining, suspension and removal of judges are determined according to law.

(20) For the promotion of the independence of the judiciary, the participating States will

(20.1) - recognize the important function national and international associations of judges and lawyers can perform in strengthening respect for the independence of their members and in providing education and training on the role of the judiciary and the legal profession in society;

(20.2) - promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;

(20.3) - co-operate among themselves through, inter alia, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;

(20.4) - co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

(23.1) The participating States will ensure that

(i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;

(ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;

(iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;

(iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;

(v) anyone charged with a criminal offence will have the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;

(vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;

(viii) the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;

(ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;

(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

III. OTHER DOCUMENTS OR STATEMENTS OF PRINCIPLES

The following documents or statements of principle have no legally binding effect but are indicative of «good practices» in the areas they cover. Most of them have been adopted within the framework of the United Nations.

A/ ELECTIONS

DECLARATION ON CRITERIA FOR FREE AND FAIR ELECTIONS¹⁶ - INTER-PARLIAMENTARY COUNCIL

2. Voting and elections rights

¹⁶ Adopted in Paris, 26 March 1994 ; the Inter-Parliamentary Council is the policy-making body of the Inter-Parliamentary Union, the world organization of Parliaments of sovereign States.

(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.

4. Candidature, Party and Campaign Rights and Responsibilities

(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.

(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.

5. The rights and responsibilities of States

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the Courts.

Draft General Principles on Freedom and Non-Discrimination in the Matter of Political Rights¹⁷

VIII. Genuine Character of Elections and Other Public Consultations

(d) 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.

XIX. 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.

ENHANCING THE EFFECTIVENESS OF THE PRINCIPLE OF PERIODIC AND GENUINE ELECTIONS ; FRAMEWORK FOR FUTURE EFFORTS¹⁸

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.

¹⁷ Annexed to resolution 1 (XIV) adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities at its Fourteenth session, in 1962; see report of the fourteenth session (E/CE.4/830-E/CN.4/Sub.2/218), para. 159.

¹⁸ UN Commission on Human Rights resolution 1989/51 of 7 March 1989, annex (*Official Record of the Economic and Social Council, 1989, Supplement N°2* (E/1989/20), Chap. II, SectA)

IV. Common Elements of electoral laws and procedures

D. Nominations, parties and candidates

107. Electoral law and procedures should guard against 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.

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.

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.

9. THE PRE-ELECTION PHASE: THE LONG-TERM OBSERVER

c. Voter Identification and Registration

(...)

The voters list should therefore be posted well in advance of the election to permit complaints about incorrect inclusions or exclusions.

There should be legal provisions governing the method of registration, registration timetable, qualification and disqualification in respect of nationality, age and abode, temporary absence, means of identification, registration form, format of the register, publication of a draft register, procedure for claims and appeals, publication of a final register, and availability and right to inspect registers.

(...)

d. Registration of Candidates and Political Parties

(...)

The registration requirements should be clear and predictable, and not involve potentially discriminatory demands such as excessive deposits or an unreasonable number of names on registration petitions. A right of appeal must exist for the refusal of registration to a party or candidate.

(...)

i. Complaints and Review Process

The right to appeal to an independent, impartial national legal body must be ensured for all involved parties in the electoral process. A complaints and appeals procedure should be established as a review mechanism, which can serve as the final arbiter of disputes.

Observers should pay particular attention to the selection and composition of the review authority, its terms of tenure and its institutional autonomy, as the integrity of the election process can only be upheld if the review mechanism is independent and impartial.

Complaints concerning the election process that are submitted by candidates or voters alike, must be dealt with equitably and according to due process of law. Procedures and deadlines should be clearly enumerated in the election code. There must also be accessible and adequate facilities for filing complaints with the judicial authorities nominated for this purpose by the electoral law.

Response should be provided in a timely manner, and all rulings should be recorded and made public.

The complaints that are registered during the campaigning process can serve as indicators of the issues that should be further investigated by the LTOs.

(...)

9.2. The Election Campaign

a. The Political Campaign

(...)

Candidates must have the freedom to convey their programmes to the voters without disruption of campaign meetings, and with no geographic infringement imposed by government "no-go areas." There must be a well defined process for issuing permits for conducting public rallies, political meetings, and fund raising activities. There must be judicial recourse in the case of unreasonable delays or refusal in granting such requests.

(...)

12. EXTENDED POST-ELECTION PHASE: LONG-TERM OBSERVERS

(...)

12.2. Complaints and Review Process

Observers should follow all judicial and other processes regarding complaints filed about the election process and any possible reviews specifically called for.

(...)

B/ INDEPENDENCE OF THE JUDICIARY

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY¹⁹

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

¹⁹ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.