

2. Structuring the legal framework

The legal framework should be so structured as to be unambiguous, understandable and transparent, and should address all components of an electoral system necessary to ensure democratic elections.

Scope of the legal framework for elections

The term "legal framework for elections" generally refers to all legislation and pertinent legal and quasi-legal material or documents related to the elections. Specifically, the "legal framework for elections" includes the applicable constitutional provisions, the electoral law as passed by the legislature and all other laws that impact on the elections. It also includes any and all regulations attached to the electoral law and to other relevant laws promulgated by government. It encompasses relevant directives and/or instructions related to the electoral law and regulations issued by the responsible EMB, as well as related codes of conduct, voluntary or otherwise, which may have a direct or indirect impact on the electoral process.

Briefly, the legal framework will include the following sources, each with an attendant degree of flexibility for amendment:

Type of legislation (source) dealing with election	Formal authority	Flexibility
Constitution	Constituent assembly, or the Legislature exercising its constituent powers	More difficult to amend, requiring debate and decisions often with special majorities or special procedures.
International peace agreement	The high contracting parties to the peace agreement	An amendment can normally be done only if all high contracting parties to the peace agreement unanimously agree.
Electoral law	The legislature	Normally requires a simple majority to amend, easier to amend than the constitution.
Other legislative acts dealing with other aspects of elections	The legislature	Normally requires a simple majority to amend, easier to amend than the constitution.
Rules and regulations	The government department (executive)	The government department concerned can amend these regulations, subject to possible confirmation or veto by the legislature.
Instructions and directives	The electoral management body (EMB)	Flexible: the EMB can change these to achieve the desired objective.
Codes of conduct for political parties, for election officials and for election observers	Regulatory bodies such as EMB or political parties or non-governmental organizations (NGOs)	Normally these codes are not a part of the formal legal framework; can be amended by consensus amongst the political parties or the responsible regulatory body or NGO, outside the purview of either the legislature or the executive.

The terminology may vary, e.g., "Electoral Law" as defined above was called the "Proclamation" in Namibia in 1989 and the "Regulations" in East Timor in 2001. Sometimes all the above elements may not be available within a country's legal framework, e.g., there is no written Constitution in the UK, or there was no Electoral Law in East Timor in the 1999 referendum.

It is important to note that each successively inferior authority cannot make provisions that contradict or are inconsistent with those of a superior authority. For example, an act of the legislature cannot contravene the constitution; regulations can contravene neither the constitution nor the electoral law.

National authorities enact the legislation according to their own legal traditions. What is important is that the structural approaches and the legislation that may affect the conduct of elections are all taken into account.

Use and merit of the written law

Although governments are free to develop their legal frameworks, there is a need for written law as opposed to customary law or administrative policies to govern elections. Written law provides the benefits of certainty, visibility and transparency. It is more readily subject to judicial interpretation and review, and is more useful to interested parties, including electors.

Constitutional provisions

A written constitution, as the basis of a country's governmental structure, should provide the foundation for key elements of its electoral framework. As constitutional amendments are often subject to a qualified majority vote or other comparatively onerous processes, the constitution's electoral provisions should only contain fundamental electoral rights and the basic principles of the electoral system. These should include the following:

- The right to vote and to be elected;
- The institutions subject to democratic elections and their terms of office;
- The composition of any non-elected institutions; and

- The body or agency to be entrusted with the conduct of elections.

It may also be appropriate to include the essential elements of the electoral system to be used.

As constitutions are generally more complicated and time-consuming to amend, constitutional provisions should not go beyond describing the very basics of electoral rights and the electoral system. In order to allow for necessary flexibility, provisions related to the management of elections should be incorporated into parliamentary legislation, and administrative and procedural matters should be left to administrative rules and regulations, to be issued by subsidiary bodies, including through instructions and directives of the EMBs.

General versus specific election legislation

National election legislation can be divided into two categories:

- General election legislation relevant to any election. This establishes a common legal framework governing all elections, including elections to the executive and legislative branches, at national and local levels.
- Legislation relevant to specific elected institutions. This establishes special legal provisions that govern elections to a specific body of government with provisions deviating from or supplementing the general legal framework for elections.

Different countries have handled the division between general and specific election legislation in different ways. A country may adopt a separate law on the "basic principles" of elections, which defines provisions that are applicable to all elections. Additionally, that country may also adopt separate laws containing provisions specific to individual elected institutions, or other elections. In contrast, another country may include the entire election legislation in one law with separate chapters containing provisions for the various elected institutions or other elections.

Although either of these approaches is acceptable, one electoral law regulating all elections is highly desirable and is recommended. It encourages consistency in election administration and practices whilst fostering unified implementation of the law in connection with all elections. Such an approach also simplifies the drafting process in cases where amendments to legislation are needed. However in some cases, particularly in federal systems, such an approach may not be possible.

Regardless of which of the above-described approaches is adopted by a country, certain principles are fundamental to election legislation:

- Election legislation should be stated in clear and unambiguous language.
- Election legislation should avoid conflicting provisions between laws governing national elections and laws governing sub-national (provincial or state) and local elections; provisions governing the administration of national elections should be in harmony with the provisions governing such other elections because court decisions at one level could affect legislation in other jurisdictions.
- The respective powers and responsibilities of the national and local electoral management bodies, and governmental bodies, should be clearly stated, distinguished and defined to prevent conflicting or overlapping powers being exercised by other bodies.
- Election legislation should be enacted sufficiently far in advance of an election date to provide political participants and voters with adequate time to become familiar with the rules of the election processes. Election legislation enacted at the last minute tends to undermine the legitimacy and the credibility of the law and prevents political participants and voters from becoming informed in a timely manner about the rules of the election processes.
- Election legislation should be enacted in accordance with the applicable legal provisions governing the promulgation of laws by the legislature. Election legislation that is not enacted in accordance with the applicable legal provisions may be challenged and risks annulment by the courts.
- Election legislation should be published and made readily available for the intended users including the general public.

Election legislation versus other legislation

An election law neither can nor should contain all provisions relevant to the election process. The election process will require the involvement of institutions and procedures based on other parts of the national legal system. It is important that the existence of other relevant legislation is included in the review process. Of particular importance is national legislation governing the media, registration of political parties, citizenship, national registers, identity documents, campaign finance and criminal provisions related to election law violations. All legal provisions that have an impact on the election process should be identified and assessed.

Election legislation and EMB's instructions and directions

In a democratic system, the legal framework is enacted by a popularly-elected national legislature. To uphold democratic values, the regulation of elections should not be done by way of executive decrees. However, there are limits to the number of administrative matters that can be included in the enacted law. Most election laws allow for the EMB to issue instructions to further clarify issues related to the election process. However, electoral legislation normally requires that such instructions are consistent with the provisions of the existing electoral legislation. The role and powers of the EMB in this connection should be clearly defined but sufficiently broad to enable it to deal with gaps in the law and unforeseen contingencies.

The EMB does not act as a substitute legislator, but it must be able to respond to emergent needs and provide practical solutions by way of interpreting and supplementing electoral law and the regulations.

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

- Electoral legislation should adhere to basic election principles, such as the secrecy of the ballot.
- Electoral legislation should provide for the authority of the EMB and should clearly state and define the scope and extent of the EMB's authority to issue instructions.

- Electoral legislation should provide for a process whereby electoral participants and voters can lodge complaints and appeals arising from the adoption and implementation of EMB instructions. This process should also allow for such complaints and appeals to be resolved in a timely and effective way.
- Electoral legislation should state clearly the legal hierarchy, including the precedence of constitutional and legislative provisions over EMB instructions.
- Electoral legislation should state and define clearly the EMB's residual powers (its "inherent powers") to issue instructions in emergency situations, including on election day, to meet any unforeseen contingency.

Election legislation and codes of conduct

In addition to formal election legislation, other relevant electoral instructions may also be contained in the informal codes of conduct agreed among various political parties and generally overseen by the EMB. In some countries such codes play a more important role than in others. They may relate to a number of aspects of elections, such as for the rules of behaviour for political parties and candidates during the electoral campaign, the conduct of the ruling government party to prevent it from having an undue advantage over the other parties, or the self-regulation of the media. Sometimes a code of conduct contains a set of normative ethical principles for practical application in the field, such as a code of conduct for electoral observers or for EMB staff engaged in the conduct of elections. The legal status of such codes varies between jurisdictions, as do the consequences of breaches of them.

Informal codes of conduct should also be reviewed with a view to checking their conformity with internationally-recognized standards. The legal framework may sometimes set out the procedures and mechanisms to be used when dealing with complaints and disputes arising from violations of a code of conduct. Such provisions will obviously differ from country to country, both in detail and in content, and may affect how a code of conduct is enforced. For example, a country's legal framework may provide for adjudication or media-

tion to deal with infringements of a code of conduct or disputes arising from an infringement.

The general guiding principles that a code of conduct for election administrators must conform to are:

- Election administration must demonstrate respect for the law.
- Election administration must be non-partisan and neutral.
- Election administration must be transparent.
- Election administration must be accurate, professional and competent.
- Election administration must be designed to serve the voters.

The general guiding principles that a code of conduct for election observers must conform to are the following:

- Election observation must recognize and respect the sovereignty of the host country.
- Election observation must be non-partisan and neutral.
- Election observation must be comprehensive in reviewing the election, considering all relevant circumstances.
- Election observation must be transparent.
- Election observation must be accurate, professional and comprehensive.

Checklist

- Is the legal framework objective, clear, transparent and publicly accessible?
- Are fundamental suffrage rights, such as the right to vote and to register as a voter, the right to run for a public office etc., safeguarded by constitutional guarantees?
- Have all relevant laws been reviewed, including the constitution, general and specific election legislation, laws relating to citizenship, political parties and campaign finance, media and public information legislation, criminal provisions related to election law violations and EMB instructions?
- Do the codes of conduct form part of the electoral legal framework? If so, have they been reviewed to ensure that they conform and contribute to the overall objective of holding free and fair elections?
- Does the legal framework ensure that the instructions and directives of EMBs at all levels are consistent with the provisions of the constitution and the electoral law?
- Does the legal framework ensure that the provisions relating to national-level elections, sub-national (provincial or state) level and local elections are in harmony with each other?
- Was any part of the electoral law enacted just before the elections without affording a sufficient opportunity for discussion and debate?

