

CHAPTER ONE:

The Legal and Policy Basis for Monitoring Electronic Technologies

INTRODUCTION TO MONITORING ELECTRONIC TECHNOLOGIES

Citizens have a right to genuine elections, manifested in the right to vote and to be elected, and citizens have a right to seek and impart information that informs the public concerning whether elections are genuine, somehow tainted or fraudulent. These precepts are as fundamental as a government's obligation to organize genuine elections. They are critical to any discussion concerning the proper application of electronic technologies in the electoral context.

Electronic technologies are increasingly important to election processes around the world. Without doubt they will be used ever more broadly in future elections and the integrity of elections will increasingly depend on their proper functioning. There are definite benefits accompanying the appropriate application of electronic technologies in the electoral context. The benefits include more rapid performance and the potential elimination of possibilities for certain types of errors and fraud. At the same time, every technology, including electronic technology, brings with it challenges and risks that must be addressed.

Electronic technologies pose particular challenges and risks, because they often limit "transparency" in elections, which makes it more difficult for the public to know whether elections are genuine, somehow tainted or fraudulent. Electronic technologies therefore must be monitored by election authorities, by the electoral

contestants (political parties and candidates) and by citizens through nonpartisan election monitoring organizations. The news media should also play important roles in reporting on electoral integrity.

Monitoring the functioning of electronic technologies and broader factors that determine electoral integrity is important in every country. Party and candidate efforts to monitor all elements of election processes enhance electoral integrity and allow the electoral contestants to more easily understand whether the official results actually reflect the will of the electorate. Monitoring by nonpartisan citizen organizations also plays a critical role in establishing the appropriate level of public confidence in elections.

The impact of electronic technologies is transforming electoral processes and with it, election observation. Transparency is evermore critical and observers from all sectors will need to concentrate their attention on gaining access to decision-making early in the election process, as well as examining the technologies themselves.

Monitoring the applications of electronic technologies in the varied elements of an election process is central to establishing public confidence - both among those seeking elected office and among the electorate. Monitoring elections - including the role of electronic technologies - is not simply expedient, nor is it a matter that can be arbitrarily permitted or denied by those wielding governmental powers. Monitoring elections is a matter of exercising fundamental rights that form part of the core of sovereignty, which ultimately belongs to and derives from the people of a country. Among those core political rights, recognized in international instruments¹ and most modern national constitutions, are:

- The authority of government derives from the will of the people expressed through genuine, periodic elections;

¹ Please see, for example, the *Universal Declaration of Human Rights*, which is applicable to all United Nations Member States, Articles 2, 6, 7, 8, 19, 20 and 21; *International Covenant on Civil and Political Rights*, which creates immediate and direct obligations for all 160 countries that have entered into this treaty, Articles 2, 3, 16, 19, 22, 25 and 26. See Appendices 3 and 4 of this Guide for the relevant texts of numerous international human rights instruments and brief analyses of relevant decisions of international human rights tribunals.

- Citizens have the right and must be provided the opportunity, without unreasonable restrictions, to participate in government and public affairs, directly or through freely chosen representatives;
- Citizens have a right to vote and to be elected;
- Elections must provide universal and equal suffrage, through a secret ballot, guaranteeing the expression of the free will of the electors;
- There is a right to associate to pursue the exercise of these rights and other legitimate activities;
- There is a right to seek, impart and receive information in pursuit of the freedom of expression, which is applicable to information relating to whether elections are genuine; and
- Everyone, including prospective voters and electoral competitors, is to be equal before the law, is entitled without discrimination - based on political opinion or other suspect factors - to equal protection of the law and has a right to effective remedies if their political and civil rights are abridged.

All of these rights come into play when the role of electronic technologies in elections is evaluated.

Governments have an overriding obligation to their citizens to provide genuine democratic elections, which carries special responsibilities in designing electoral organization. This applies to the legal framework for elections, the structure of election administration, the mechanisms for conducting elections, the fairness of electoral competition, as well as reporting accurately and honestly about citizens' choices expressed at "the ballot box."

Political parties, candidates, and supporters and opponents of propositions offered in referendums have an obligation to conduct their activities within the rules of electoral competition — and to safeguard electoral integrity. This includes acting in self-interest to

protect votes gained through campaigning. It also means recognizing an obligation to honor the electorate and its will, rather than seeking to impose a party's, individual's or small groups' will over that of the citizens who voted.

Citizens themselves have a right and a responsibility to ensure electoral integrity. This pertains to each citizen's right to choose representatives who will serve and represent them in government. Joining in the efforts or otherwise supporting civic organizations and news media that monitor and report on election processes is a fundamental element of exercising each citizen's right to participate in government and public affairs.

Electronic technologies pose a critical challenge to election monitoring because their operation is not observable by the "naked eye," and, thus, it is particularly difficult to establish whether the technologies are functioning properly or whether there are malfunctions and even fraudulent outcomes that subvert electoral integrity. This concern must be addressed by: policy makers, who draft, debate and enact laws and regulations; election and other governmental officials, who administer processes that are central to elections; political parties and candidates, who seek to exercise their right to be elected to represent the people; and the citizens, who seek to exercise their sovereign right to choose representatives - who will then have legitimate authority to exercise the powers of elected office.

Monitoring the application of electronic technologies therefore is a key element of guaranteeing genuine democratic elections. Such monitoring can reinforce confidence in electoral authorities and increase participation in election processes. It can also identify problematic areas and lead to corrective action by election administrators, or it can provide a basis to challenge processes and to seek redress before the courts or other forums.

This Guide is designed primarily for political contestants and citizen organizations, though it is also meant to be useful to electoral authorities, legislators and others concerned with honoring the will of the people concerning who should have the authority and legitimacy to exercise the powers of government. The following sections of this Chapter examine the legal bases for seeking

transparency - access to vital information about the functioning of electronic technologies employed in election processes. This provides the foundation for seeking information needed to monitor the application of electronic technologies.

THE LEGAL AND POLICY BASIS FOR MONITORING ELECTRONIC TECHNOLOGIES

Sovereignty and the Right to Genuine Democratic Elections:

In any democratic system of government, it is recognized that sovereignty belongs to and derives from the people of the country. Citizens have the right to participate in government and public affairs to shape governance and demand its responsiveness to their expressed interests. The legitimacy and authority of government therefore derives from the people's will concerning who shall occupy and exercise the powers of electoral office. The right to vote and the right to be elected extend from and are inexorably linked to these fundamental democratic principles.

Most modern constitutions enshrine these precepts in some form, and they are expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and all other human rights instruments that address political rights.

"Everyone has the right to take part in the government of his [or her] country, directly or through freely chosen representatives...The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." (Article 21, *Universal Declaration of Human Rights*)

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

² "[R]ace, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." Article 2, *International Covenant on Civil and Political Rights*.

suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the electors..." (Article 25, *International Covenant on Civil and Political Rights*)

The popular interests in genuine democratic elections therefore are in essence sovereign rights, and guaranteeing and protecting those interests should take a dominant position when they are weighed against other interests presented in election processes, such as privacy interests and proprietary interests in commodities employed by election administrators. Such other interests may be accommodated appropriately, but the popular interests in realizing genuine democratic elections are fundamental and should take a primary position in any interest weighing calculus.

The right to participate in government and public affairs provides a direct basis for the long-accepted state practice of allowing political parties and candidates to have their agents (sometimes referred to by terms such as poll watchers, scrutineers or proxies) present in polling stations and at other critical points in various elements of election processes. The right also belongs to citizen associations dedicated to electoral integrity, often referred to as nonpartisan domestic election monitors or observers. While party and candidate agents seek to protect the right to be elected, domestic election monitors seek to protect the rights to vote and to be elected — together they (and news media acting in accordance with standards for professional integrity) promote and defend the popular right to genuine elections that governmental authorities are obliged to respect.

These points form critical parts of the foundation of monitoring the integrity of electronic technologies used in election processes.

The Right to Associate into Political Parties and Nonpartisan Election Monitoring Organizations to Promote and Defend Electoral Integrity:

The rights to genuine democratic elections discussed above, as well as related rights enumerated below, are both individual rights of citizens and associational rights. To pursue these rights, people must have the freedom to associate and form organizations.³

³ See, for example, Article 20, *Universal Declaration of Human Rights* and Article 22, *International Covenant on Civil and Political Rights* concerning the right to freedom of association.

This may take the form of political parties or individual candidate groups seeking to exercise the right to be elected. Organizations also are formed to seek to pass or defeat propositions put before the electorate in referendums. Such political organizations allow people to aggregate their interests through participation in government and public affairs. In addition, citizens associate to promote and defend their right to vote and overall electoral integrity (the right to genuine elections). This usually takes the form of election monitoring (or observing) organizations or coalitions. In essence, citizen groups that promote and defend electoral integrity are "human rights defenders" and merit the attention that such defenders receive from the international community.⁴

Freedom of Expression and the Right to Seek, Receive and Impart Information Concerning Electoral Integrity – Including Electronic Technologies:

Political contestants (parties and candidates seeking elected office) cannot know whether their right to be elected is honored or abridged unless they know that the sensitive elements of electoral processes are conducted properly. Citizens cannot know whether their right to participate indirectly in government and public affairs through selection of representatives is honored or violated unless they know this as well. Citizens, of course, cannot examine such things individually.

The public depends on governmental authorities, including election officials, to ensure that election processes are honest and accurate. Some citizens rely on the political contestants to safeguard electoral integrity. Many citizens also seek information from what they perceive as independent, impartial, reliable sources. Citizens therefore often rely on nonpartisan civil society organizations that monitor elections, as well as on credible news media, which also have the right to seek information about the functioning of election processes and to report to the public.

⁴ This is important in the United Nations regime for protection of human rights defenders and is relevant to instruments like the Organization for Security and Cooperation in Europe's 1990 Copenhagen Document provisions concerning human rights (paragraphs 10 and 11).

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." (Article 19, *Universal Declaration of Human Rights*)

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice." (Article 19, *International Covenant on Civil and Political Rights*)

The right of citizens to seek, receive and impart information concerning whether election processes are in fact honest and accurate (i.e., genuine), combined with the right to participate in public affairs (such as monitoring and evaluating the character of election processes - whether as electoral contestants, nonpartisan election monitors or news media), form the basis for the requirement of "transparency" in election processes.

Electoral transparency is widely accepted in state practice as a principle for democratic elections. It is not difficult to understand why "transparency" — the ability of electoral contestants, monitoring organizations and the media to see into and understand all elements of the electoral process — is a principle for democratic elections. The right of citizens to have access to government held information that is central to knowing whether elections are genuine is self-evident, recognizing that: sovereignty belongs to the people; their will provides the basis of authority of government; and their will freely expressed through genuine elections determines who shall legitimately occupy elected office and wield governmental powers as representatives.⁵

The rights of electoral contestants, monitoring groups and the media to seek, receive and impart information concerning electoral integrity applies directly to the use of electronic technologies in election processes. As the later chapters in the Guide discuss, the right to information concerns the criteria and process upon which decisions

⁵ Please see the appendices to this Guide for the relevant texts of various international human rights instruments concerning the right to seek, receive and impart information and a review of decisions of international tribunals on the subject.

are made to employ electronic technologies in each element of election processes (e.g., creation of voter registries, electronic voting, results tabulation and transmission), the selection of suppliers of electronic technologies, the testing of the technologies and evaluating the performance of the technologies.

At each step, the interests of the public in access to information concerning electronic electoral technologies - exercised through political contestants, nonpartisan monitoring groups and news media - must be recognized as a fundamental right, in parallel to the individual rights of citizens. The opportunity to exercise that right must be provided without unreasonable restrictions. In practice, this means that, although other legitimate interests may be considered and appropriately accommodated, the right must be honored, guaranteeing access to information that allows the public to know whether the use of electronic technologies may ensure or undermine electoral integrity.

Equality before the Law and Equal Protection of the Law, Universal and Equal Suffrage, and Effective Remedies when Evaluating Electronic Electoral Technologies:

As noted above, "everyone/every citizen" has a right to take part in government and public affairs, among other ways, through genuine elections, and universal and equal suffrage is to be applied to the rights to vote and to be elected. Everyone, without discrimination and without unreasonable restrictions, also must be permitted to exercise the right to seek, receive and impart information and other political rights necessary to realize genuine democratic elections. These principles relate to a non-discrimination norm that derives from the fundamental precepts that everyone is entitled to equality before the law.

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (Article 26, *International Covenant on Civil and Political Rights*)⁶

⁶ See also, for example, Articles 2 and 7, *Universal Declaration of Human Rights*.

Going beyond these precepts, international human rights instruments state that if fundamental rights are abridged, everyone has a right to an effective remedy.

"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 [or her] 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 2, Paragraph 3, *International Covenant on Civil and Political Rights*)⁷

To be *effective*, any remedy must be able to address the harm created by the violation of rights and cure that harm. In the electoral context, remedies typically must be rapidly available - or the harm will quickly become irreparable. Prevention of harm is critical which merits an even stronger priority for providing access to all elements of an electoral process at early stages, such as criteria and processes for deciding on whether to employ electronic technologies, on where to acquire them, testing and other phases.

Effective remedies cannot be available where it is not possible in a timely manner to determine whether a technology actually performed properly. For example, if electronic voting is conducted and no auditable basis exists for a recount of votes, the only remedy available may be to hold a new election. Otherwise, the person who would take office, while time-consuming forensic investigations are conducted, would lack a legitimate mandate and could be the wrong person. In addition, re-elections are time and resource intensive, and holding a vote at a different point in time may produce a different electoral outcome. Thus, the remedy may not be truly "effective" for protecting the right to be elected or the right to vote. Examples can

⁷ See also, for example, Article 8, *Universal Declaration of Human Rights*.

also be illustrated concerning application of electronic technologies in the creation of voter registries and other election processes, which are described in the following chapters of this Guide.

At every point where electronic technologies are to be employed in election processes the following question must be asked by policy makers, election administrators, political contestants, nonpartisan election monitors, the media and the public:

Will it be possible to provide sufficient transparency into the application of this technology to allow problems to be identified and allow effective remedies to be provided?

If the answer is no, or if the answer is uncertain, there may be an unacceptable risk that the principles of equality before the law and equal protection of the law will be denied. In those cases, protection of the fundamental right to genuine elections should take priority, and the technology should not be employed.

