

**Free and fair elections?**



Michael Krennerich

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**STANDARDS, CURIOSITIES,  
MANIPULATIONS**



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# FOREWORD

This study is the result of more than 30 years of involvement with elections – as an election observer, international electoral law expert and university lecturer. It is intended to provide an easily understandable, informative and vivid insight into how national presidential and parliamentary elections are conducted in democracies and autocracies around the world.

To this end, it examines electoral law, election organisation and electoral systems. In addition to introductory electoral theory considerations, the publication contains a wealth of legal and practical overviews and country examples. The electoral regulations in Germany are also not left unmentioned. The basis for this is – going beyond the author’s own experience and studies – the thorough reading of constitutions, electoral laws, websites of electoral authorities, as well as countless reports by election observers and many helpful specialist publications.<sup>1</sup>

However, this study is not a textbook in the classical sense. The aim is rather to show in an illustrative way the diversity of electoral regulations and electoral practices worldwide, for the most part before the 2020 COVID-19 pandemic, including a number of curiosities, and some electoral manipulation. If the study is also easy to read, then it has fulfilled its modest purpose.

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1 For the sake of readability, detailed source references have been omitted. In particular, the many election observation reports of international organisations that were evaluated have not been specifically mentioned in footnotes or are only included in some cases. Instead, the appendix contains a comprehensive list of primary and secondary sources on the topic.

## NOT ALL ELECTIONS ARE THE SAME

In the early 1970s – for the time being the last peak of authoritarian rule worldwide – the number of democratically elected parliaments and governments was relatively small, being limited to Western industrialised countries and some countries of the »Global South«, such as Costa Rica, Venezuela, Mauritius, India and smaller island states in the Caribbean and South Pacific. An essential characteristic of democratically governed states was that they regularly held competitive multi-party elections. Autocracies<sup>1</sup>, on the other hand, did not allow people to vote or held elections in which no parties or only one party ran. At that time, very few authoritarian regimes allowed multi-party elections, without, of course, thereby questioning their claim to power and granting genuine electoral freedom.<sup>2</sup>

In the course of the »wave(s) of democratisation« which first swept through southern Europe in the mid-1970s, then Latin America and finally – under very different conditions – also Eastern Europe and other regions of the world in the 1990s, multi-party elections were the order of the day from a political point of view. In many places so-called »founding elections« were held, which were the beginning of a still uncertain democratic development.<sup>3</sup> Competitive elections served as important (though not the only) proof of a successful transition to democracy.<sup>4</sup> One or two peaceful changes in government through elections were sometimes prematurely considered to be evidence of a consolidation of democracy. At the same time, elections were an integral and initially priority component of external democracy promotion, which was virtually flourishing. Particularly from the 1990s onwards, a large number of national and international organisations

- 1 In political science, all non-democratic systems are understood as autocracies, i.e. both authoritarian and totalitarian political systems.
- 2 On elections in different regions of the world in the 20th century, see Nohlen/Krennrich/Thibaut 1999, Nohlen/Grotz/Hartmann 2003, Nohlen 2005, Nohlen/Stöver 2010.
- 3 Cf. the corresponding contributions by Richard Rose, Michael Bratton, Mark P. Jones and Stefan White on »Founding Elections« in various world regions in: Rose 2000: 104–116.
- 4 In the context of the third wave of democratisation, the term »transition« refers to the transition from an authoritarian regime to a political democracy. Studies on political transition processes were concerned with the causes, the course and the prospects of democratization, initially in Southern Europe and Latin America. The term »transformation« is more comprehensive. It gained in importance in the context of the far-reaching political, economic and social changes following the breakdown of the »real-socialist« regimes in Eastern and Central Europe.

engaged in election assistance and observation to assist the respective states in the organisation and conducting of elections. This resulted in electoral law reforms and a professionalisation of election organisation in many countries.

Not everywhere where multi-party elections have taken place in recent decades, however, have the elections met democratic standards, nor has it always been possible to overcome authoritarian structures. Many states that had undergone processes of political opening or democratisation at the end of the 20th century found it initially or continually difficult to shake off their authoritarian legacies and overcome the functional problems that limited the importance of democratic institutions and procedures. While in most (re)democratised countries in Latin America and later also in Eastern (Central) Europe elections once again or for the first time developed into a »democratic routine«<sup>5</sup>, in Africa multi-party elections were institutionalised across the board,<sup>6</sup> but only in some of the countries did democracies, let alone stable ones, emerge.<sup>7</sup> The same applies to South, South-East and East Asia.<sup>8</sup> Often, the power of incumbents could not be subjected to effective democratic and constitutional control. The trend towards democratisation also faltered worldwide in the 2000s. In many places, authoritarian regimes either persisted or re-established themselves after a period of political opening. However, the nature and strategies of authoritarian rule had changed.

Increasingly, »electoral autocracies« had emerged, which imitated democratic processes. They are characterised by universal suffrage and limited political competition. However, the elections are not democratic. Political competition is distorted to a greater or lesser extent in favour of the incumbent, and autocratic rules and practices have an impact on the electoral process. Even if popular autocrats mobilise considerable support during elections and there is no large-scale fraud on election day, an overall view of the electoral process and the broader electoral context usually does not allow the elections to be described as democratic. Hugo Chávez, for example, the late President of Venezuela, who after his third re-election in 2012 asked how commentators in Europe could still speak of a dic-

5 This is the title of an older article by the author on elections in Latin America; Krennerich 1999.

6 See e.g. Bratton/van de Walle 1997, Nohlen/Krennerich/Thibaut 1999, van Ham/Lindberg 2018, Bleck/van de Walle 2019.

7 In addition to the democratic early developers Botswana and Mauritius, these include Capo Verde, Ghana, Namibia, São Tomé and Príncipe, South Africa and, until 2019, Benin and Senegal.

8 Besides Japan and India, South Korea, Mongolia, Taiwan and Timor-Leste are among the countries with the best democratic profile in 2020. The majority of the South Pacific states are also governed democratically.

tatorship in his country, had to live with this flaw. In fact, between 1998 and 2012, the left-wing populist autocrat and the electoral movements supporting him had won around a dozen presidential and parliamentary elections and referendums. However, the arbitrary, authoritarian style of ruling and socio-political polarisation were detrimental to a democratic election process.

Certainly, the more elections in »electoral autocracies« permit competition and avoid open electoral fraud, the more difficult it is to distinguish democratic from non-democratic elections. The litmus test is the extent to which those in power are prepared to allow a fair electoral process and free elections and are willing to recognise non-favourable election results or even an election defeat. For example, do the elections in Turkey allow for democratic electoral competition? Or are they rather an expression of an autocratic strategy to maintain power? For the time being, the former is supported by the opposition's victory in Istanbul's local elections in 2019, which the government only recognised *nolens volens* after a re-run of the elections and in light of the opposition's clear election victory. The latter is underlined by the successful attempts of President Recep Tayyip Erdoğan to influence the national election processes in his favour in recent years, also by undemocratic means.

In less competitive autocracies, however, where despite multi-party elections the opposition hardly exists, the classification of elections is quite easy. Examples include Azerbaijan and the Central Asian autocracies, where political competition only exists at best in a rudimentary form. After the collapse of the Soviet Union and the proclamation of independent republics, the long-term presidents of Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan often won their elections with majorities of over 90% of the votes. Competing candidates for the presidency there are still mere »token candidates«, and the few opposition parties in parliament imitate parliamentary pluralism more than they come up with opposition strategies. The same is true of several autocracies in other regions of the world. Let us take the small, little-noticed Equatorial Guinea as an example: despite the introduction of multi-party elections in 1991, the autocratic president there, Teodoro Obiang Nguema, has ruled with an all-out majority government in the parliament since 1979, making him the world's longest-serving Head of State and Government. He and his party also always win elections with more than 90% of the vote.

## Functions of democratic elections

As the core of liberal democracy, elections are attributed various functions that have traditionally been developed on the basis of established democracies in

Western Europe and North America.<sup>9</sup> The experiences with democratic elections in other regions of the world, however, remained – with few exceptions – understated for a long time. It was only in the course of the wave(s) of democratisation at the end of the 20th century that elections there once again attracted greater attention. After the often only brief experiences with multi-party elections in the context of decolonisation in Africa and Asia and the suspension of competitive elections in many South American dictatorships, the question has now (again) been raised as to what functions democratic elections outside of Western Europe and North America (can) even take on. In order to answer such questions, however, a general understanding of democratic electoral functions was and is necessary.

In this sense, the catalogues of functions originally related to Western democracies cannot simply be disregarded. They serve as important points of reference from which – albeit taking into account the particular political, socio-economic and cultural conditions in each case – the functions of competitive elections can also be meaningfully considered in other regions of the world. This is necessary in order to link elections in the »Global South« to comparative electoral research. For example, surveys by the *Afrobarometer* show that the »demand« for liberal democracy in Africa is certainly high, even if the »supply side« leaves much to be desired.<sup>10</sup> At the same time, elections in Africa are not only, as has been often maintained, »ethnic censuses«, where voters cast their votes according to ethnicity, »typically« accompanied by vote buying and violence.<sup>11</sup> Elections are shaped by competing moral visions of voters and politicians.<sup>12</sup> In the states of Africa and other regions of the Global South, there are also serious efforts being undertaken to hold democratic elections which – despite their specific characteristics – are oriented towards the same basic functions as elections in established democracies. Four general functional complexes are of fundamental importance in this context:

1) Functions relating to the transfer of political power and the assignment of ruling and opposition positions: According to a liberal-pluralist understanding of democracy, the *demos* grants a constitutionally formulated »temporary mandate to rule« in democratic elections, and transfers political power to future rulers for

9 Cf. for example Rose/Massawir 1967, Nohlen 1978 and 2014, Harrop/Miller 1984, van der Eijk 1993, Powell 2000, Rosenberger/Seeber 2008, Behnke/Grotz/Hartmann 2017.

10 Cf. for example Gyimah-Boadi 2019.

11 See, for example, Paul Collier's (2008) exaggerated sweeping criticism of elections in Africa. Instead, see Bleck/van de Walle 2019: 15; cf. also Bratton/van de Walle 1997, Lindberg 2006.

12 See, for example, Cheeseman/Lyneke/Willis 2021.

a limited period of time. Democratic elections thus have the function of transferring political power and, to this end, provide persons – usually organised in parties or voter initiatives – with the authority to rule in the form of political mandates. This is true even when the function of forming a government, which is often emphasised in this context, is only apparent indirectly.<sup>13</sup> In democratic elections, however, not only is a mandate given to rule, but the parliament is also elected and the parliamentary opposition established, which, from a normative point of view, is specifically tasked with controlling the political exercise of power and being prepared for a change of government.

2) Closely linked to the transfer of political power is the legitimising function of democratic elections. Elections are used to legitimise the exercise of political power for a limited period of time. In free and fair elections, the electorate confirms or replaces its government or its representatives, thus expressing either consensus (which in a weak sense includes accepting or tolerating) or dissent in respect of the rulers and their policies. The legitimising function of democratic elections refers primarily to the holders of the political mandates granted either directly or indirectly through elections. A democratically elected government is widely regarded as legitimate in office, despite often justified criticism of its style of politics and policy content. From a normative perspective, however, the legitimating power also includes the opposition. The full recognition of the opposition is a particular feature of truly competitive elections. It is no coincidence that the opposition in the United Kingdom is traditionally referred to as »Her Majesty's Loyal Opposition«. Democratic elections legitimise not only elected representatives, but also the principle of political opposition – both *in abstracto* and in its concrete organisational and legal form, which is expressed, inter alia, in the granting of political rights also to the opposition. In this sense, elections can also reinforce or call into question the legitimacy of the political order and its »rules of the game«, depending on whether the procedural rules associated with democratic elections are accepted or rejected. If the elections are democratic, they also reflect a procedural consensus that includes the rights of the political minority. Finally, elections can also strengthen the legitimacy of the political community included in the electoral process.<sup>14</sup> For example, despite all the tensions beforehand, the first general and free elections in the Republic of South Africa in 1994

13 Unlike presidential and semi-presidential systems of government, in parliamentary systems of government national elections decide only on the composition of the parliament, which in turn elects the head of government.

14 Thereby all three essential objects of legitimation of classical political systems theory are named: political office holders, political order, and political community.

temporarily contributed to national unity in the post-apartheid era, even though the desired »Rainbow Nation« did not really emerge there later on.

3) Functions relating to the representation of diverse social groups, views and interests: While »governments of national unity«, which involve the relevant political powers of a country, are rare and usually only occur in post-conflict situations, elected parliaments in particular are supposed to represent social diversity and take this diversity into account appropriately in the parliamentary policy-making and decision-making process.<sup>15</sup> Sufficient political, social and territorial representation in parliament is therefore an important goal of democratic elections, without, however, making it impossible to form stable government majorities in parliament. This is not only a matter of a more or less proportional allocation of seats to political parties – depending on the electoral system – which corresponds to their share of votes in the electorate (which, of course, is deliberately restricted in plurality/majority systems in favour of the formation of government majorities). Equally important is a »balanced gender representation« or an adequate representation of social minorities or different regions in parliament. In view of the high average age of parliamentarians, there are now increasing calls for a stronger representation of young people in parliament, too.<sup>16</sup> If such an adequate representation of different social groups is to be guaranteed, the various conditions under which candidates compete, are nominated and elected must be considered.<sup>17</sup>

4) Functions relating to the design of policy content and alternatives: According to a liberal-representative understanding of democracy, the election is strictly speaking not a decision on content but a choice between persons. Elections do not primarily decide on factual problems, but on who will solve the factual problems. In this sense, the democratic electoral process is first and foremost a transfer of trust to persons or parties. Nonetheless, content-related and programmatic preferences come into play in the voting decision. Persons and parties standing for election usually stand for certain political positions, programmes and goals, and represent certain views and interests of the electorate. Insofar as elections represent a competition for political power on the basis of alternative policy programmes (which is not always the case), voters have the opportunity to influence at least the basic orientation of government policies. However, this is

15 See also Behnke/Grotz/Hartmann 2017: 14.

16 In Ecuador, for instance, there is not only a legislated gender quota for candidacies of 50%, but also a legislated candidate quota of 25% for young people (aged between 18 and 29 years), which was introduced by the 2020 electoral reform; see Ortíz Ortíz 2020.

17 See the chapters on representation of women and minorities.

usually a general mandate rather than a specific substantive mandate. At the same time, elections can also have a corrective function which accompanies the government. Since power is only granted for a limited period of time and is regularly subject to review under democratic competition conditions, the rulers – as well as the opposition as their challengers – are required to take the views and interests of the electorate into account appropriately. Political expectations are placed prospectively on elected officeholders in elections, and retrospectively their performance is assessed in elections.<sup>18</sup> The aim is to create a government that listens to public opinion and is committed to it.<sup>19</sup> Thus, democratic elections are about electoral responsibility and accountability. Importantly, accountability refers to the electorate as a whole and not only to the supporters of the government.

From the perspective of a liberal pluralist understanding of democracy, to a large extent the four functions determine the essence of democratic elections. Elections in liberal democracies are already of great importance in this respect in so far as they – in the same way as referendums – represent a form of political participation which in principle involves the entire electorate. In addition, the holding of democratic elections is already by definition linked to other opportunities for political participation in the immediate or broader context of the elections. This includes not only election campaign activities and the active participation in parties and voter initiatives, but also the use of political rights such as freedom of assembly, association and speech. Without such rights, democratic elections are simply not possible. The democratic content of elections is therefore closely linked to the democratic nature of politics and society in a country. This also puts the derogatory talk of pure »electoral democracies« into perspective, since if elections are to be truly democratic, they always require a democratic environment.

However, the normatively derived or ideal-typically developed attributions of functions should not gloss over the political conditions in liberal democracies. It is true that the well-known saying by the Sponti movement »If elections would change anything, they would have been banned long ago« is exaggerated. Nor are democratic elections merely »alibi events« that simulate competition, conceal social antagonisms and provide blanket authority for decision-making irrespective of consensus.<sup>20</sup> It is rather the case that elections can make a big difference to who governs and how. Unlike some of his successors, President Nelson Mandela, for example, came as a stroke of luck for the peaceful transition in the Republic of South Africa. Donald Trump, in turn, has been a burden, both for democracy

18 See also Rosenberger/Seeber 2008: 19.

19 See Sartori 1987.

20 Dieter Nohlen (2014: 34), for example, summarised such radical criticism of elections.

in the USA and, polemically speaking, for the rest of the world. There are also differences in the government programmes of many political parties. The political science question »do parties matter?« can often be answered in the affirmative, even if major social problems, from poverty to climate change, are not sufficiently addressed politically.

Thus, even if the fundamental criticism of the alleged meaninglessness of elections is exaggerated and does not ask what the political order would look like (or actually does look like) without a democratic electoral competition, there are many limitations to the democratic significance of elections. These include, for example, encrusted, elitist power structures and the weakness of representation of political parties, authoritarian attitudes and behaviour patterns, parochial political subservient cultures and illiberal governing practices, rampant corruption and deficiencies as regards the rule of law, media oligopolies and the exuberant influence of money on elections, or the remaining power of non-elected actors, such as the military or oligarchs. At the same time, in many places, social conditions, such as extreme poverty and pronounced social inequality, are not conducive to effective political participation of the population in elections.

The extent to which elections fulfil democratic functions largely depends therefore on the extent to which democratic institutions, procedures, courses of action and attitudes develop and are consolidated in young democracies, often under difficult conditions, and to what extent, even in established democracies, the elections help to produce responsible governments and to consolidate any further democratic opportunities for participation in politics and society. The development of a democratic and constitutional culture is usually a lengthy process, especially in socially polarised and ethnically fragmented societies. In countries in which winning elections not only means access to political office, but also the monopolising of the state apparatus, access to the country's economic resources and social supremacy, the stakes are high in elections, and losses are significant in the event of defeat. There, multi-party elections quickly become a zero-sum game at the expense of social and political minorities. Even under such difficult socio-economic and political-cultural conditions, elections can help to resolve conflicts of power and domination peacefully, but they do not necessarily do so. Sometimes they are also »new battlegrounds«<sup>21</sup> or even intensify power conflicts. The frequently mentioned pacifying function of competitive elections is therefore highly context dependent.

Democracies also have to pass the »stress test« they are currently facing due to the rise of populists. In many places, a confrontational type of majority de-

21 Söderberg/Kovacs 2018: 3.

mocracy<sup>22</sup> has emerged, in which – with reference to the »will of the people« or the voter majority – the concerns of political minorities are brusquely pushed aside. Negative campaigning and defamation, as well as disinformation and fake news, now have a significant influence on electoral decisions, even in established democracies. Moreover, obviously the scope for action of democratically elected governments is mostly much smaller than election campaigns would have people believe. The elected left-wing governments in Greece experienced this during the financial crisis there just as painfully as many other states that are heavily indebted or otherwise economically and politically dependent.

### Functions of non-democratic elections

»¿Para que sirven las elecciones?« – »What is the purpose of elections?« was the Spanish title of a now somewhat outdated study on elections in non-democratic systems.<sup>23</sup> Elections are more than just decoration, even in autocracies. Autocrats incorporate elections into their governing practices and use them to gain legitimacy in domestic and foreign policy, to co-opt support groups in politics, the economy and society, to divide the opposition or put it in its place. However, they were not and usually are not prepared to relinquish governmental power in elections.

1) Legitimacy through elections: Autocrats do not base their domestic political legitimacy on elections alone, but on other sources of legitimacy as well – such as personal charisma or traditional or religious claims to power.<sup>24</sup> Sometimes they can also distinguish themselves as guardians of national unity and security, especially in the face of possible separatist movements, terrorist threats or widespread criminality. They may also be seen as guarantors of the nation's well-being, economic progress or revolutionary achievements. Elections can be part of such legitimacy strategies. They provide resourceful autocrats with the opportunity to impressively underline their claim to leadership. Through elections, they can mobilise the population for their own political goals and demonstrate their support – real or perceived – among the electorate on all sides. The numerous elections under Alexander Lukashenko in Belarus (before 2020) and under the aforementioned Hugo Chávez in Venezuela are good examples of this. Not only a high level of approval of the incumbent, but also a high voter turnout are seen

22 This is how Kai-Olaf Lang (2015) described the political system in Hungary. At the time, he expressly did not yet classify it as an authoritarian regime.

23 Hermet/Rouquié/Linz 1986 (1978).

24 This addresses three classic sources of legitimacy, which Max Weber has already named.

as legitimising factors. To get citizens to the ballot boxes, autocrats sometimes use unusual measures – as in Russia during the 2018 presidential elections: »In Krasnoyarsk, Siberia, a car was raffled off, in Krasnodar, Southern Russia, it was an iPhone, and in Berdsk, Western Siberia, the best selfie would be adorning a billboard. Only those who take part in the election were eligible to participate.«<sup>25</sup> Calls for a boycott of elections in autocracies are often tried to be suppressed or, as in Belarus or Cambodia, are even expressly prohibited. Whether the holding of elections is accompanied by a gain in international legitimacy depends in turn on the extent to which the elections are internationally recognised. While election observation missions by independent international organisations, if indeed they are invited, regularly give a bad report on elections in autocracies, a number of rulers have taken to inviting groups of observers from friendly states, who then paint a positive picture of the elections. Such practices are well documented in Azerbaijan, Zimbabwe and Venezuela, for example.<sup>26</sup>

2) Co-optation of support groups: Beyond their possible legitimising function, elections can also be integrated into co-optation strategies from which support groups from politics, businesses and society benefit. Elections offer incumbents the opportunity to reaffirm the »pact« with the military, economic, religious and/or social elites supporting them. Moreover, the political appointments to posts and their replaceability during or after elections tend to ensure regime-loyal behaviour, at least by those who benefit or hope to benefit from it. Particularly in countries with distinctive clientelist structures, many voters tend to support the office holders.<sup>27</sup> To put it casually, many people want to be among the election winners, especially if they have something to distribute. While there are plenty of examples of such practices to be found in democracies, they are even more part of authoritarian power consolidation. At the same time, elections in autocracies offer the opportunity for re-arrangements within the authoritarian power apparatus, which in turn can contribute to system stabilisation. By means of elections, those in power can check the effectiveness of their control apparatus on the basis of campaigning behaviour, voter participation and voting preferences, uncover weaknesses in their own ranks and at the same time probe the oppositional spectrum.

3) Co-optation, repression and discrediting of the opposition: Co-optation in elections may also be possible for (moderate) parts of the opposition, for example by giving them parliamentary mandates and enabling certain organisational and operational possibilities. Co-optation is almost institutionalised, for example,

25 Katzenberger 2018 (translated from German).

26 Cf. Merloe 2016, Cooley 2015.

27 Cf. also Gandhi/Lust-Okar 2009: 412.

when, in the context of bonus electoral systems, parliamentary mandates are distributed between majority and minority parties according to a fixed distribution key, irrespective of the actual election result, as was the case for a long time during the Somoza dictatorship in Nicaragua.<sup>28</sup> Co-optation is also relevant, for example, in respect of the nine mandates (excluding constituencies) which the president allocates in Singapore to defeated opposition candidates.<sup>29</sup>

On the other hand, in autocracies, those opposition groups that can be dangerous to the government are often marginalised or persecuted. Autocrats are thus able to show the opposition the boundaries of what they are prepared to tolerate. This can lead to the exclusion of parties and individuals, making certain issues in elections absolutely taboo, and pressure to adjust on those opposition parties that wish to operate within the narrow legal institutional framework. If opposition parties cross such »red lines«, they are then persecuted, intimidated or simply prevented by bureaucratic constraints from promoting their political views. The lack of visibility of the opposition usually contrasts sharply with the omnipresence of incumbents in public and in the media they control.

Opposition groups therefore always have to decide whether to engage in unfair electoral competition, which allows them a limited degree of political activity, or whether to stay away from the elections in order not to give them legitimacy. Opposition groups often disagree on this, especially when the government plays them off against each other in line with the principle of »divide and rule« (*divide et impera*). Some parties then boycott the elections, whilst others take part in them. Sometimes, however, there is a general election boycott by the opposition – as happened, for instance, in the 2017 elections in Venezuela or, to cite a lesser-known example, in Djibouti in 2018. On the other hand, from the perspective of those in power, unfair elections provide the opportunity to portray the opposition as weak or even to discredit it. Proving the alleged insignificance of the opposition is part of the autocrats' election strategy. Conversely, an election boycott can also lead the opposition to fade into insignificance, because without parliamentary representation the possibilities of pursuing (some) opposition policy within a legal and institutional framework are severely restricted.

The overarching characteristic of elections in autocracies is ultimately that they are designed to safeguard rather than challenge the rule. From the perspective of the ruler, a change of political power is not really an issue. Sometimes this is not even expected, for example, when the elected president is perceived as the

28 Cf. Krennerich 1996a: 36 et seq., 1997.

29 See the chapter on electoral systems.

»father of the nation« and in parts of the population a subservient and welfare-oriented political culture prevails. Mikita Merzlou believed to have identified such a culture in Belarus in 2019<sup>30</sup> before mass protests against election fraud erupted there in 2020. Moreover, in some countries, from the outset only mandates for subordinate political offices are awarded, while the actual centres of power remain outside the elected institutions. Even where elected national parliaments exist, their political power can be severely limited, as was the case until recently in the Moroccan monarchy.

Occasionally, autocracies also reserve the right to fill some seats in parliament without elections, as in Myanmar, for example. In Thailand, although the 500-member lower chamber of parliament is now again elected by way of universal suffrage, the 250 senators of the politically important second chamber of parliament were appointed by a »National Council for Peace and Order« and thus by the military and its allies. Strictly speaking, this is a military regime behind a democratic façade.<sup>31</sup> Above all, however, autocrats use a variety of practices of electoral manipulation to ensure that their political power is not seriously jeopardised by multi-party elections.<sup>32</sup> It is, however, not only the election day itself that needs to be considered, but the entire election process and the overall context of the elections.

Despite all the control, multi-party elections nevertheless entail a certain »risk« for autocrats, since the associated electoral competition opens up political spaces for dissent to a limited extent and can trigger a momentum of its own. Cracks can emerge, for example, when authoritarian rulers overestimate their popular support or their ability to sufficiently control the electoral process. At best, opposition groups can use the elections to offer themselves as an alternative to the regime, especially if they present a united front. Occasionally, the opposition succeeds in winning the elections even under authoritarian conditions – and incumbents even accept the election results due to internal or external political pressure. There are some recent examples of such »opening elections«, for instance in Latin America in the 1980s.<sup>33</sup> Particularly spectacular were the 1988 constitutional referendum against a further term of office for Augusto Pinochet and the 1989 presidential and parliamentary elections in Chile, which were won by the opposition. In Africa, the 1991 elections in Benin, Cape Verde and Zambia can be mentioned. A more recent example is Gambia, where long-time incumbent Yahya Jammeh lost the 2016 presidential election. Under national and

30 See Merzlou 2019: 2.

31 Also Thompson 2019.

32 Cf. also Schedler 2002.

33 Cf. Nohlen 2014: 39.

international pressure, including from the Economic Community of West African States (ECOWAS), he finally resigned and went into exile in Equatorial Guinea.

In most cases, however, autocrats dominate the electoral process and resort to electoral fraud where necessary to avoid defeat or to gain an impressive majority of votes. However, outright electoral fraud can lead to mass protests. Governments in Georgia (2003), Ukraine (2004) and Kyrgyzstan (2005), for example, were overthrown by such protests. In the former »German Democratic Republic«, too, the blatant electoral fraud in the 1989 local elections gave the protest movement a boost. Often, however, even mass protests remain unsuccessful, as was the case in Iran in 2009, Russia in 2012 or Kazakhstan in 2019. In Belarus, election protests have already been violently suppressed several times, especially brutally following the presidential elections of 2006 and 2010.<sup>34</sup> Never before, however, have the protests lasted as long as in 2020.

34 Cf. Legal Transformation Center 2012.

## WHAT ARE »FREE AND FAIR ELECTIONS«?

With the increase in multi-party elections in democracies as well as in autocracies, the question arises as to when elections are »competitive« or »free and fair«. If one understands »competitiveness« not only in the strict sense as purely competition between parties, but more comprehensively as a characteristic of elections in democracies<sup>1</sup>, then the two concepts are almost identical and cannot simply be equated with multi-party elections. In both cases, it is a question of ensuring that universal suffrage, both active and passive, as well as freedom of association, assembly, expression and the press are guaranteed in law and in practice, and that the opponents can compete for votes on equal terms and as far as possible with the same chance of success. Those entitled to vote must also be able to decide freely. To this end, voting must be secret, and no undue pressure must be exerted on the electorate in the run-up to or during the elections. A correct, transparent and non-partisan organisation of the voting, counting and documentation of the election results should furthermore ensure that none of the candidates and parties are favoured or disadvantaged. Election complaints, on the other hand, must be investigated and sanctioned in a neutral manner. It is also important that the election decision is for a fixed period of time and that the electoral system does not »overturn« voters' choices (see Fig. 1; p. 22).

Such criteria for free and fair elections are also more or less clearly aligned with international standards, such as those applied to elections by the European Union (EU), the Council of Europe (CoE), the Organisation for Security and Cooperation in Europe (OSCE/ODIHR), the Organisation of American States (OAS), the African Union (AU) and the United Nations (UN). Relevant test questions can be found in election observation manuals produced by international organisations and in the materials of many non-governmental organisations that provide advice on or observe elections.<sup>2</sup>

1 See Nohlen 1978, 2014, Krennerich 1996a and 2000.

2 Cf. the Code of Good Practice in Electoral Matters of the European Council (CDL-AD (2002)023rev2-cor) as well as the electoral manuals of the OSCE/ODIHR (2012), the Council of Europe (CoE 2003), the European Union (2016), the Organisation of American States (OAS 2008) and the African Union (AU 2013) – as well as the manuals of a number of non-governmental organisations providing electoral advice and election observation, such as the Electoral Institute for Sustainable Democracy in Africa (EISA), International IDEA, the International Foundation for Electoral Systems (IFES), the Centro de Asesoría y Promoción Electoral (CAPEL) of the Inter-American

Fig. 1: Free and fair elections

Free	Fair
Before election day	
Freedom of information and expression Freedom of assembly Freedom of association Freedom of movement Universal right to vote and stand for election General registration of persons entitled to vote Free registration of parties and candidates	No preferential treatment or discrimination of electoral opponents in the electoral law Independent, transparent, and neutral election administration Impartial constituency boundaries Impartial election information Impartial registration of voters Impartial registration of parties and candidates Neutrality of public authorities towards candidates and parties Equal access to public media for candidates and parties Equal access for voters to political and election-related information No abuse of state resources for election campaign purposes Impartial and transparent party and campaign financing
On election day	
Possibility for all eligible voters to actually participate in the elections Secret ballot No undue influence on or intimidation of voters Peaceful election climate	Possibility to observe the elections Clear and neutral design of the ballot papers Neutral assistance of voters if necessary Correct and transparent determination, aggregation, documentation and publication of the election results Secure transport of voting material (ballot papers, ballot boxes etc.)
After election day	
Legal and actual possibilities for complaints regarding electoral irregularities, manipulation and fraud	Impartial and rapid investigation of election complaints Complete and detailed publication of the official election results Investigation and sanctioning of electoral law infringements

Source: own compilation, based on Elklit/Svensson 1997, Elklit 2000a.

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Institute for Human Rights (IIDH) or the International Human Rights Law Group, for which Larry Garber drew up guidelines for election observation as early as 1984.

They cover the entire electoral process, from the right to vote and the registration of voters, candidates and parties, through to the campaign, the casting and counting of votes and the handling of complaints. However, election observers usually no longer speak of »free and fair« elections, but of elections that meet international (democratic) standards.

Despite differences in detail, there is a remarkable consensus on the criteria or standards to be applied to democratic elections. Differences are more likely to occur in the concrete assessment of individual elections. It is particularly difficult to weigh up possible irregularities at the various stages of the electoral process and to combine them into a coherent overall assessment of the specific election, which also takes into account the overall electoral environment and reveals possible fraudulent intentions. Furthermore, there are major differences in the clarity with which criticism of the elections is to be expressed. For example, the 2016 Presidential elections in Uganda have been openly criticised by European Union and Commonwealth Election Observation Missions. The criticism of the African Union was already more restrained, but by contrast, election observation teams from some regional organisations, such as the East African Community, criticised hardly any failings.

While progress and regression are often mentioned in relation to the country in question, even critical election observation reports deliberately refrain from comparing elections in different countries. This is also politically appropriate to avoid playing one country off against another, especially since states often hold elections under very different starting conditions. The social sciences, on the other hand, in which indices are in any case popular, are not afraid of comparisons and rankings between many countries. The *Election Integrity Perception Index*, for example, translates experts' qualitative assessments of the respective elections into numerical values. The surveyed experts are asked to assign points to each of a total of 49 aspects concerning electoral laws, electoral procedures, district boundaries, voter registration, party and candidate registration, media coverage, campaign financing, voting process, vote counts, results and electoral authorities. A maximum of 100 points can be obtained. The numerical assessment in turn forms the basis for a five-point scale which distinguishes between »very high«, »high«, »moderate«, »low« or »very low« integrity of the election process from the experts' point of view.

The table below shows the cumulative result of the assessment in 166 states, based on a total of 3,861 assessments for 337 national presidential and parliamentary elections between 1 July 2012 and 31 December 2018. Small states with fewer than 100,000 inhabitants were not included, which excludes a number of European countries (Andorra, Liechtenstein, Monaco, San Marino) or Pacific island

states (Fiji, Kiribati, Samoa, Vanuatu, etc.) where competitive elections are held. States which either do not have provisions for parliamentary elections by way of direct universal suffrage (e.g. Brunei, China, Saudi Arabia, United Arab Emirates), or which did not hold any elections, at least during the period under review (e.g. Eritrea, Somalia, Southern Sudan), or in which no multi-party elections are held because only the regime party runs, are excluded here. Furthermore, some UN member states have not yet been included in the survey for technical reasons (such as the Democratic Republic of Congo).<sup>3</sup>

**Fig. 2: Integrity index of elections worldwide**

Integrity	Countries (points, maximum: 100)
very high	Denmark (86), Finland (85), Norway, Sweden (both 83) Iceland (82), Germany, Netherlands (both 81), Costa Rica, Estonia, Switzerland (all 79), Austria, Lithuania, , Slovenia (all 77), Czech Republic, Luxembourg (both 76), Canada, France, New Zealand, Portugal, Uruguay (all 75), Israel, Poland, Slovakia (all 74), Ireland, Latvia, South Korea, Taiwan (all 73), Belgium, Capo Verde, Chile (all 71), Australia, Benin (both 70).
high	Cyprus, Spain (both 69), Italy, Japan, Tunisia (all 68), Jamaica (67), Bhutan, Greece, United Kingdom (all 66), Argentina, Barbados, Croatia, Ghana, Malta (all 65), Brazil, East Timor, Mauritius, Mongolia, Tonga (all 64), Republic of South Africa (63), Lesotho, Peru, Vanuatu (all 62), Grenada, Oman, Panama, USA (all 61), Colombia, Namibia (both 60).
moderate	India, Micronesia (both 59), Botswana, Bulgaria, Georgia, Rwanda (all 58), Indonesia, Morocco, Solomon Islands (all 57), Bolivia, Nepal, Republic of Moldova (all 56), Armenia, Fiji, Romania (all 55), Albania, Bahamas, Guinea-Bissau, Kuwait, Liberia, Myanmar, Hungary (all 54), Belize, Burkina Faso, Central African Republic, Guyana, Kyrgyzstan, Nigeria, Sierra Leone (all 53), Maldives, Montenegro, Niger, São Tomé and Príncipe, Sri Lanka (all 52), Suriname, Ukraine (both 51), Ecuador, Paraguay, Philippines (50)
low	Iran, Jordan, Serbia (all 49), Antigua and Barbuda, Guatemala, Laos, Malawi, (North) Macedonia (all 48), Pakistan, Russian Federation (both 47), Bosnia and Herzegovina (46), Kazakhstan, Turkey, Zambia (all 45), Dominican Republic, Tanzania (both 44), Algeria, Kenya, Mali, Senegal, Sudan (all 43), Guinea, Lebanon, Madagascar, Swaziland (all 42), Azerbaijan, Venezuela (both 41), Egypt, Bahrain, Belarus, Cameroon (all 40)
very low	Angola (39), Bangladesh, Iraq, Mauritania, Togo, Uzbekistan, Zimbabwe (all 38), Honduras, Uganda (both 37), Azerbaijan, Nicaragua, Turkmenistan (36), Malaysia, Mozambique, Tajikistan (all 35), Afghanistan, Papua New Guinea, Vietnam (all 34), Haiti (32), Chad, Djibouti (both 31), Cambodia, Congo (both 30), Rep. Congo (29), Burundi, Equatorial Guinea, Ethiopia, Syria (all 24)

Source: own compilation based on: [www.ElectoralIntegrityProject.com](http://www.ElectoralIntegrityProject.com) (May 2019)

3 Norris/Grömping 2019.

In many respects, the index shows expected results: The established democracies in Northern, Western and Southern Europe, for example, are consistently confirmed to have a very high or high level of integrity. The Nordic countries Denmark, Finland, Norway, Sweden and Iceland perform best, followed by Germany and the Netherlands. Comparatively low for Western democracies, however, are Greece, Malta and the United Kingdom. The picture is more mixed in the countries of Central and Eastern Europe. There the integrity of elections is only rated very high (Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia and Poland) or high (Croatia) in a few countries, while in a number of others the integrity of elections is rated »moderate«. Belarus, not surprisingly, appears at the bottom of the table there. Among the states of the Caucasus and Central Asia, Mongolia and, to a lesser extent, Kyrgyzstan stand out positively in comparison, while Uzbekistan, Azerbaijan, Turkmenistan and Tajikistan perform particularly badly. In the rest of Asia and the Pacific, Bangladesh, Malaysia, Papua New Guinea, Afghanistan, Vietnam and Cambodia perform worst, while New Zealand, South Korea, Taiwan and Australia are considered to have a very high level of electoral integrity. In the Middle East, the elections in Israel, the only democracy in the region, stand out positively, and in North Africa the same goes for elections in Tunisia, a country whose democratic development is not yet complete. The picture in sub-Saharan Africa is also complex, ranging from remarkably democratic to openly rigged elections: according to the index, the elections in Capo Verde and Benin during the period under review (still) show a very high level of integrity, and the elections in Ghana, the Republic of South Africa, Lesotho and Namibia are at least high. In contrast, Burundi, Equatorial Guinea and Ethiopia perform extremely poorly. In America, the elections in Costa Rica and Uruguay and in Canada are rated very highly, unlike those in Venezuela, Honduras, Nicaragua and Haiti. The USA is falling behind in comparison to other democracies.

The index provides a first, potentially helpful overview of elections worldwide.<sup>4</sup> However, the transparency of the experts' country assessments, which are based on objective criteria but are nevertheless subjective, leaves much to be desired. Moreover, in places the index reveals assessments that are counter-intuitive, particularly in an inter-regional comparison. For instance, it is difficult to understand why the elections in Sudan receive far more points than the elections in Honduras and Nicaragua, which whilst certainly deserving of criticism are nevertheless more competitive. Country comparisons, especially across different regions of the world, must be treated with great caution, as the assessments are

4 For a discussion on the concept of the integrity of elections, on which the index is based, see, for example, Garrido/Nohlen 2019.

made against the background of the national and, at best, regional context, but not on the basis of a particularly interregional comparison. It should therefore always be examined which aspects of the elections were decisive for a better or worse evaluation and how specific evaluation variances can be justified. The aggregated country data provides little information in this respect. At the same time, the cumulative results may blur the differences in the integrity of elections in the same country. In some cases, elections that result in different assessments are not yet accounted for: In Benin, West Africa's almost 20-year-old model democracy, which received a very high rating for the period between 2012 and 2018, only two parties close to the government were admitted to the parliamentary elections in May 2019; five opposition parties (alliances), including that of former President Boni Yayi, were denied admission. Voter turnout dropped rapidly to around 23%, followed by serious clashes between police and demonstrators.

### **Election observation – now widely used**

International election observation plays a potentially important role in ensuring the transparency and integrity of the electoral process. Election observation not only helps to detect, but possibly also to prevent electoral irregularities and manipulation. Given the presence of election observation teams, political opponents may refrain from (blatant) electoral fraud. On the other hand, independent election observation missions can also testify that the elections were sufficiently free and fair. Evidence that the elections met international standards can strengthen the legitimacy of those elections, especially when this is called into question. Election observation can help build confidence, particularly in societies where there is a high level of mistrust between candidates and parties, for example after civil wars or in the context of democratisation processes. The same applies to countries in which distinct political or social polarisation makes a democratic election process difficult. Even in established democracies, recommendations by election observation teams can trigger reforms in electoral law or electoral organisation. However, there is no guarantee that international election observers assess elections accurately and, furthermore, improve the quality of elections.<sup>5</sup>

Between 1956 and 1990, the United Nations already sent around 30, mostly small election observation missions to the then decolonising countries of Africa and Asia. However, the United Nations supervised elections to the Constituent

5 See critically, for instance, Kelly 2012.

Assembly in Namibia in November 1989, which were followed by the country's independence in March 1990, marked a turning point in terms of scale: the *United Nations Transition Assistance Group* there comprised 8,000 people.<sup>6</sup> This was followed by the, until then, most internationally observed elections ever held in a sovereign state: the 1990 elections in Nicaragua, where the Sandinista revolutionary regime (1979–1990) surprisingly lost out having being victorious in elections in 1984 and relinquished power. The elections were part of the Central American peace process and were observed not only by the United Nations, but also by the Organisation of American States (OAS), which participated in more than 20 smaller election observation missions in the region between 1962 and 1990, and by a number of other international NGOs, such as the *Carter Center*. While the United Nations began to withdraw from election observation during the 1990s, the elections which followed in Nicaragua in 1996 saw the presence of the OAS, the European Union and a large number of international electoral organisations, NGOs, foundations, parties, embassies and parliamentarians. They contributed significantly to the integrity of the elections and to the renewed acceptance of the electoral defeat by the Sandinistas.

In the course of democratisation processes in other regions of the world, other institutions have developed continuous professional election observation. In the OSCE area with its 57 participating states, the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE is particularly worthy of mention in this respect. It sent its first long-term election observation team in 1996 and had carried out a total of 358 observations of elections and referendums by the end of 2018.<sup>7</sup> In turn, the EU sent a total of 197 election observation teams to so-called »third countries« up to the end of 2019, starting with a mission to Russia in 1993.<sup>8</sup>

Election observers from Germany were involved from the very beginning, since international election observation was considered an instrument of democratisation assistance at an early stage.<sup>9</sup> In the 1990s, their participation was coordinated directly by the German Foreign Office. Later, the German Center for International Peace Operations (ZIF), founded in 2002, took over the recruitment and training of German election observers. By the end of 2019, ZIF had placed a total of 4,306 short-term and 539 long-term observers with ODIHR election observation missions and 366 and 324 respectively with EU election observation

6 Cf. Borneo 2000. See also Harneit-Sievers 1990, Töttemeyer/Wehmhörner/Weiland 1996.

7 Data based on ODIHR Annual Reports.

8 Relevant data can be found on the website of the EU's European External Action Service.

9 See, for example, Mair 1994.

missions. These figures do not include persons employed directly by the OSCE or the EU. In addition, non-governmental organisations also sent election observers from Germany abroad.

**Fig. 3: Seconded election observers from Germany (ZiF)**

ODIHR	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
STOs	141	269	441	252	189	217	191	168	272	138	195	239	234	213	323	187	276	361
LTOs	15	32	34	25	24	27	31	18	33	19	38	19	31	31	47	27	42	46
EU	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
STOs	6	25	47	39	50	24	18	18	28	21	6	22	6	9	6	13	16	12
LTOs	2	14	26	34	38	27	25	20	17	21	8	16	17	8	8	12	18	13

Source: ZIF, compiled by Dominika Eichstädt. STO: Short-term observers, LTO: Long-term observers.

In addition to international election observation, the importance of election observation by national and local organisations within the respective countries, especially on the part of civil society there, has grown (domestic observers, citizens observers). In many countries there are also »observers«, »agents« or »proxies« of the candidates and parties.

An early example of comprehensive and successful national election observation is the 1986 presidential elections in the Philippines, which were an important element of the democratisation process there. They were observed by some 500,000 volunteers. The National Citizens Movement for Free Elections (NAMFREL) had undertaken nationwide efforts to prevent or document electoral fraud. NAMFREL served as inspiration for numerous other citizens' election observations in Asia. Examples include the Citizens' Coalition for Clean and Fair Elections (CCCCFE) in South Korea, founded in 1991, or in Bangladesh the Bangladesh Movement for Fair Elections (BMNA), also founded in 1991, and later the Fair Election Monitoring Alliance (FEMA), which was founded for the 1996 elections. In other Asian states such as Thailand, Nepal or Sri Lanka, where multi-

party elections were held for the first time in the first half of the 1990s, smaller or larger election observation organisations and networks were established, either temporarily or permanently.<sup>10</sup>

In other regions of the world, above all in Latin America, domestic election observations also became increasingly important from the late 1980s onwards. Civil society organisations such as *CIVITAS* in Chile, *Participación Ciudadana* in the Dominican Republic, *Alianza Cívica* in Mexico, the *Comisión Justicia y Paz* in Panama or *Transparencia* in Peru observed the elections in the (re-)democratised states of the region.<sup>11</sup> In the aforementioned 1996 elections in Nicaragua, the international election observation missions were supplemented by some 5,000 domestic election observers and between 30,000 and 50,000 party representatives. In Europe, a total of 13 independent civil society election observation organisations founded the European Platform for Democratic Elections (EPDE)<sup>12</sup> in December 2012. EPDE is a member of the Global Network of Domestic Election Monitors (GNDEM), in which numerous organisations and networks from Africa, Asia, Europe and Latin America are also involved.<sup>13</sup>

Even if election laws (especially those of established democracies) do not always contain sections on election observation, international and domestic observation teams are now accredited and present at many elections worldwide. This puts also electoral autocracies under pressure to act. It is therefore not surprising that autocratic governments allow international election observation teams into the country. Behnke, Grotz and Hartmann explain this by the fact that a refusal – if at all possible<sup>14</sup> – could easily be perceived as an intended deception.<sup>15</sup> Indeed, the non-admission or obstruction of international election observation often nourishes legitimate doubts about the government's political will to hold democratic elections. For this reason, autocrats have adopted a selective policy of inviting – in addition or exclusively – electoral observation groups from friendly regimes and supposedly independent organisations to provide a favourable picture of the elections. Examples already mentioned are Azerbaijan, Zimbabwe and Venezuela. In any case, as will be shown later, autocrats can influence (or, in the worst case, even determine) the outcome of the elections long before election

10 Cf. National Democratic Institute 1996.

11 Cf. Middlebrook 1998.

12 Cf. <https://www.epde.org>.

13 Cf. <https://gndem.org>.

14 The Copenhagen Document (1990) states that all OSCE participating States will issue a »standing invitation« to each other to observe elections. Seen in this light, an explicit invitation would no longer be necessary. In day-to-day political life, however, it has become common practice to issue such an invitation.

15 Behnke/Grotz/Hartmann 2017: 40.

day, so that blatant election fraud is no longer absolutely necessary on election day, the climax of short-term election observation.

The Russian presidential elections in 2018, for example, were attended by a large ODIHR election observation mission. With a total of about 1,500 foreign election observers, it was in fact the largest foreign electoral monitoring process in Russia's history. Among them, however, hundreds of Kremlin-friendly observers had been invited, mainly to confirm the »legitimacy« of the elections. Since the government was keen to ensure a high turnout, it also used domestic election observation groups loyal to the regime to encourage citizens to participate in the elections.<sup>16</sup> In contrast, independent domestic observers critical of the regime had a hard time before and during elections. Furthermore, the government ensured that the actual election day, towards which the main focus of short-term election observations was directed, was relatively calm and orderly, something which international election observation teams – despite some irregularities – also confirmed. However, the ODIHR made it clear that in the run-up to the elections their freedom and fairness had been unduly curtailed.

The fact that electoral autocracies are now deliberately trying to use favourable election observations to gain legitimacy for only semi-competitive elections can also be seen in other countries. In Cambodia, for example, questionable international and national election observation groups were supposed to compensate for the fact that several recognised international organisations did not send election observation teams to the parliamentary elections of 2018, which were already recognisably undemocratic in advance.<sup>17</sup> The ODIHR also questioned the political independence of some national election observation groups in the 2019 presidential elections in Kazakhstan and the 2020 parliamentary elections in Azerbaijan. This shows once again that those responsible in autocracies have learned to use elections for their own purposes. Nevertheless, international and national election observations, provided they are conducted seriously and independently, remain important guarantees for the holding of free and fair elections, especially in young and emerging democracies. They also have an impact on electoral competition in autocracies.<sup>18</sup>

16 The Russian electoral law allows candidates, parties, media and, since 2017, so-called civil chambers to appoint domestic election observers.

17 See Morgenbesser 2019: 168 et seq.

18 Cf. for example Roussias/Ruíz-Rufino 2018.

# THE ORGANISATIONAL AND LEGAL FRAMEWORK

## Who organises the elections?

»He who counts, wins« is an old dictatorial saying that can be confidently extended to the entire electoral organisation. The freedom and fairness of the election depends crucially on who conducts and controls the elections.

Since elections are an inherent act of state sovereignty, it is first of all important that national institutions take responsibility for organising elections. Only in special situations should international organisations be involved in the electoral organisation. This was particularly clear in Cambodia: following the Paris Peace Agreement of 1991, the United Nations Transitional Authority in Cambodia (UNTAC) organised the 1993 elections there, setting up an electoral infrastructure from scratch, so to speak.<sup>1</sup> Although the role of the international community in the peace process in Bosnia-Herzegovina did not go that far, international members, including the Head of the OSCE Mission, were involved in the Provisional Electoral Commission in the 1997, 1998 and 2002 elections. The 2006 national elections were the first to be held there without international participation following the break-up of Yugoslavia.

It is also important that the bodies responsible for organising elections operate independently, professionally, and transparently. In many established democracies where elections have a long tradition, elections are organised by authorities located within the executive branch. The Ministry of the Interior often plays an important role. A governmental model of electoral management is usually not a problem in the case of a professional, non-partisan administration. Nevertheless, some established democracies have introduced independent electoral commissions to strengthen independence *from* the government: Canada (1920), India (1950) and Australia (1984). Particularly in countries with a less developed democratic culture or an authoritarian electoral past, government-appointed electoral authorities subordinate to the executive are often inappropriate. In these cases, an independent model of electoral management is preferable, as otherwise there

1 See Sullivan 2016.

is a risk that the government will influence the conducting of the elections and do so in its favour. Accordingly, in the course of political opening and democratisation processes worldwide, non-governmental election commissions have been called for and (re-)introduced, also in Eastern (Central) Europe.

Latin America is leading the way here, where efforts to ensure clean elections were closely linked to the development of democracy in the 20th century. In fact, Latin America is a »paradigmatic region« for independent electoral commissions, which have been developed and professionalised in the course of (re) democratisation since the 1980s.<sup>1</sup> All Latin American countries that hold multi-party elections have independent electoral commissions, whose independence is usually guaranteed by the constitution. In some cases, they even function as a fourth constitutional power alongside the executive, legislative and judicial branches in the sense of a »*poder electoral*«. The electoral commissions in Latin America are often responsible for the entire electoral organisation – from voter registration to recognition of the elections – and have their own budget and are not accountable to the executive. In particular, their members are not appointed by the government. This distinguishes them from some electoral commissions in other countries, which have few powers. The »National Autonomous Electoral Commission« in Senegal, for example, merely monitors elections, but does not organise them itself.<sup>2</sup>

Formally independent election commissions now exist in many other countries around the world – from »A« for Afghanistan to »Z« for Zambia. The independence of the election commission was, for example, enshrined in Tunisia's constitution of 2014. Of course, this does not mean that formally independent election commissions actually always act independently,<sup>3</sup> and that is certainly not the case in electoral autocracies. Nor does it certainly suffice to simply put an »independent« in front of the name of the election commission, as was done in Uganda in 2015, in order to guarantee the independence of the election commission as demanded by the opposition there. In fact, African electoral commissions belonging to the independent model differ enormously in their autonomy and performance.<sup>4</sup> Furthermore, it is also necessary to check what tasks and competences the election commissions have in the conducting and supervision of the elections – and whether they share them with government authorities (mixed model). According to the Electoral Management Design Database of Internatio-

1 Zovatto 2017; see also: Jaramillo 1994, Valdés/Ruiz 2019.

2 Cf. Riedl/Samba Sylla 2019: 100.

3 For a conceptualization of the independence of electoral commissions see Cheeseman/Elklit 2020.

4 Cf. Elklit 2020.

nal IDEA, the electoral bodies in 215 states and dependent territories were based on an independent model (64%), a governmental model (20%) and a mixed model (14%). The remaining two percent did not hold national elections.<sup>5</sup>

While government-appointed electoral authorities are usually headed by administrative officials, the composition of independent electoral commissions is a political issue, especially in countries where there is significant mistrust among political opponents. Reform efforts are initially aimed at reducing the influence of the government on the composition of the commissions in order to ensure their independence. Indeed, in some countries, even in the case of supposedly independent electoral commissions, the government has been or is allowed to appoint a certain number of commissioners. The number of persons appointed by the government, however, should be kept to a minimum and the number of members close to the government should not be excessive. It also makes sense that at least some of the members are appointed by non-political institutions that are perceived as independent. These can be courts, provided they are not considered corrupt, or other institutions that enjoy trust in the country.

If all or some members of the electoral commission are appointed by Parliament, it may also be appropriate for them to be elected by qualified majorities, such as a two-thirds majority as in Tunisia. Where the electoral commission includes people nominated by political parties, a balance between government and opposition parties should be ensured. However, a party-based composition of the electoral commission, even if balanced, risks politicisation. Commissioners may act more in the interests of their party than in the interests of the electorate. In Albania, for example, where the Election Commission is dominated by the two largest parties in parliament, there has been a history of politicisation of electoral organisation problems.<sup>6</sup>

In any case, the electoral law should include clear and transparent rules for the nomination of commissioners. There is also an increased demand for adequate representation of women, who are often under-represented in the respective election commissions. The involvement of persons with disabilities is also recommended. A fixed term of office and clear rules on removal from office only under specific circumstances also constitute institutional measures to ensure independence. This is necessary as there may be attempts to remove undesirable commissioners from office.

Transparency and inclusiveness in the functioning of the electoral commissions are needed to enhance the legitimacy of the elections. The guidelines and

5 <https://www.idea.int/data-tools/data/electoral-management-design> (as of 28th November 2020).

6 See the respective ODIHR reports on the elections there.

decisions of the commissions should be publicly comprehensible and, if possible, be arrived at by consensus. At the same time, the persons entrusted with the election, especially at local level, need to be well trained, especially when new electoral rules or technologies are introduced. With the increased digitalisation of the electoral administration, the election authorities must also introduce measures to protect against attacks by hackers and ensure data integrity. Corresponding training programmes are carried out, if necessary, with international support, especially in young and emerging democracies. Ideally, comprehensive information on the elections or the election procedure is also provided there within the framework of so-called voter education programmes. The bodies responsible for organising the elections have a huge responsibility in this respect. It is important that the election information is also available in the language of national minorities and for persons with disabilities.

### **Election laws – clear, understandable and applicable?**

The holding of democratic elections requires a clear legal framework. Basic democratic electoral principles must be enshrined in the constitution, in which also usually the political institutions to be elected are specified. Most aspects of the electoral process are, of course, regulated by law. It is preferable that the key aspects be covered by a single electoral law rather than being spread across several laws, such as is the case in Italy, for example. In the United Kingdom, for instance, the legal basis for elections is also highly fragmented, unclear and difficult to apply.<sup>7</sup> Similarly, there should be no inconsistencies with other laws relevant to the electoral process, such as laws on political parties, the media or even criminal law.

In Germany, the comparatively thin Federal Elections Act, which regulates the conduct of the federal elections in just 52 valid sections, is substantiated by the Federal Electoral Regulation and supplemented by other laws, such as the Members of the Bundestag Act, the Law on Political Parties, the Law on the Scrutiny of Elections and the Act on Election Statistics. In addition, there is the Federal Voting Machines Ordinance. Individual provisions of the German Criminal Code and the Act on the Constitutional Court also form the relevant legal basis for the federal elections. With over 1,000 pages, the commentary on the electoral law is accordingly extensive.

Ideally, electoral legislation should cover the entire electoral process. Sometimes, however, electoral laws in democracies have loopholes or, as we shall see,

7 Cf. Law Commission of England and Wales/Scottish Law Commission 2020.

contain provisions that do not seem appropriate for emerging and young democracies. By contrast, the electoral laws of many non-consolidated democracies or even some electoral autocracies are often more comprehensive and regulate the electoral process in great detail. This is not least due to the efforts of election consulting and election observation organisations, which (have) repeatedly call(ed) for electoral law reforms. The idea behind this is that, in view of the absence or emergence of a democratic electoral culture, the law should be used to ensure that the elections meet democratic standards. The »European Commission for Democracy Through Law« is characteristically the name of the Council of Europe's »Venice Commission«, which has critically examined numerous new election laws in Central and Eastern Europe. In many cases this has led to a significant improvement in the legal framework of the elections, though sometimes over-regulation can also occur. Where everything is regulated in the smallest detail, there is no room for necessary adjustments by the – ideally independent and professional – election authorities and violations inevitably occur if compliance with the electoral rules is not practiced. This, in turn, can be used by authoritarian rulers to sanction political opponents for election violations.

Ultimately, electoral laws should be clear, understandable, and easy to apply. In the case of the electoral law in Albania, to pick up just one of many examples, the ODIHR criticised, for instance, a lack of clarity in some provisions. It is also important that the electoral laws are not changed continuously and not immediately before the elections unless serious shortcomings need to be remedied. In Italy, the electoral system is subject to constant change and electoral reforms were hastily implemented just a few months before the 2018 parliamentary elections. This is all the more problematic when short-term changes to election laws appear to benefit the ruling party, as was criticised, for example, in the run-up to the Turkish elections in 2018.<sup>8</sup> The Polish government's attempt, which ultimately failed, to use a last-minute switch to postal voting only in order to stick to date of the presidential election most favourable to them in May 2020 during the COVID-19 pandemic was also politically motivated and met with fierce criticism from the opposition. The many changes to the election regulations before the 2019 elections in Thailand were extremely confusing. After the coup in 2014, the military junta there not only postponed the announced election date several times, but also changed the requirements for a candidature application in various ways.

8 Cf. CDL-AD(2018)031.

## THE RIGHT TO VOTE AS A CIVIL AND HUMAN RIGHT

The right to vote is a fundamental democratic right. The German Federal Constitutional Court once praised it as being the »most noble right« of citizens in a democratic state. It is not only enshrined in most national constitutions, but also in the Universal Declaration of Human Rights (UDHR) of 1948 and in numerous international human rights treaties. In the UDHR, it is designated as a human right to which every person is entitled. Nevertheless, it comes with an important clarification regarding its territorial scope: Everyone has the right to vote and to be elected in his or her *own* country.

»Everyone has the right to take part in the government of his 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.« (Art. 21 UDHR)

In the wording of the International Covenant on Civil and Political Rights (ICCPR) of 1966 (in force since 1976) the right to vote is the only human right formulated only as a civil right:

»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; [...]« (Art. 25 ICCPR)

Other international human rights treaties also include the right to vote. After the 1953 UN Convention on the Political Rights of Women provided the same right to vote and to stand for election for women, this was again explicitly guaranteed in the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (in force since 1981). The UN Convention on the Rights of Persons with Disabilities of 2006 (2008) in turn obliges the state parties to ensure the equal and barrier-free use of the right to vote and stand for election for people with disabilities. Similarly, the regional human rights protection systems in Europe, America and Africa provide for the universal right to vote and

to stand for election, here as well understood as equal rights which every person exercises in his or her own country. However, there are also a number of non-binding recommendations to grant foreign residents the right to vote, at least at a sub-national level.

Irrespective of the provisions of public international law, not all states grant their nationals the right to vote, or they deny them the opportunity to exercise this right. Some states, such as Brunei, China, Qatar, Saudi Arabia and the United Arab Emirates, do not even provide for universal and direct elections to the parliament, while others, such as Eritrea and Somalia, have not (or have not for a long time) held them. Moreover, where they do take place, elections do not necessarily allow »the free expression of the will of the electorate« and often do not meet the standards which are now internationally accepted for free and fair elections. This is particularly true in autocracies, where the freedom and fairness of elections is already more severely impaired by the regime than in liberal democracies. But even in young democracies, irregularities in the conduct of elections occur time and again, and the overall political context is not always conducive to democratic functions of elections. Even in established democracies, there is sometimes a degree of disorder, with electoral law and practice sometimes exhibiting peculiarities that seem outdated or even undemocratic.

## THE RIGHT TO VOTE – STANDARDS, CURIOSITIES AND EXCLUSIONS

Today's democracies provide in principle for universal and equal suffrage. However, this has not always been the case. Historically, restrictions on voting rights based on factors such as wealth, income, education and gender had to be overcome before universal and equal suffrage became widely established. Exclusions from voting rights were partly justified by the fact that poor people, illiterate people and women were dependent and allegedly unable to make free and informed choices. However, this was based on solid power interests and patriarchal social structures, some of which still exist today.

The first country to (almost) introduce universal suffrage for women was New Zealand in 1893, but Maori men and women were excluded from voting for a long time. In Europe, Finland led the way in 1911, followed by Germany and Austria in 1918, and it is hard to believe that Liechtenstein was the last Western European state to introduce women's suffrage in 1984. In Andorra and Switzerland (at federal level) women have only been eligible to vote since the early 1970s. In the Swiss canton of Appenzell-Innerrhoden, women were denied the right to vote, not in national but in cantonal elections, until November 1990. Only then was an end put to the situation there as well whereby Swiss men were allowed to decide whether or not Swiss women should be granted the right to vote.

The situation was quite different in the Philippines in 1937, when *only* women voted in a plebiscite on whether they should be given the right to vote. The question was decided positively and in 1938 women were able to participate in the Philippine parliamentary elections for the first time.<sup>1</sup> In many other Asian and African states, universal suffrage for men and women was introduced in the course of decolonisation in the 1950s or 1960s. In the Latin American countries, most of which had already gained independence in the 19th century, voting rights for men and women were not introduced simultaneously. While some men were allowed to vote as early as the 19th century (with the »usual« restrictions at the time), starting with Ecuador (1929), women were given the right to vote almost everywhere in the region in the 1930s, 1940s or 1950s. Paraguay was last (1961).<sup>2</sup> However, in many countries of the »Global South«, which were at times ruled by

1 Nohlen/Grotz/Hartmann 2001: 13.

2 Cf. Nohlen 2005, Bareiro/Soto 2019b.

authoritarian regimes, no, or at least no competitive elections were later held for long periods of time.

Moreover, participation in elections is usually no longer tied to assets or income, even though in some countries such as Benin, Cameroon and the Central African Republic, for example, debtors who have not paid of their debts are excluded from the right to vote. Nor do educational requirements generally apply to the right to vote. In some countries, however, the exclusion of illiterate people from the right to vote was lifted remarkably late. While in Costa Rica, for example, the restrictions on ownership and education were abolished with the constitutional reform of 1913, illiterate people were only allowed to vote for the first time in Chile in 1970, in Ecuador in 1980 and in Brazil in 1988. Even today, political observers point out the connection between education and democratic elections. »Can't read but can vote? Can that work well«, Jan Ross asked in the German weekly newspaper *DIE ZEIT*, for example, before the parliamentary elections in India in 2014.<sup>3</sup> The country is a test case for the self-government of people, he said, who are qualified to do so only by the fact that they are human beings. The author himself did though point out that the »experiment« has not led to a fiasco since the first independent parliamentary elections in 1952, when around 85% of India's electorate could neither read nor write.

Ultimately, universal and equal suffrage is an expression of the equality – if not de facto, then at least legal – of citizens to participate in shaping the *res publica*. It is based on the idea that all nationals are in principle capable of expressing their political will in elections. However, the right to vote is not an absolute right. There are still exclusions, even in democracies, but these must be examined to see whether they are legitimate and proportionate. For example, the – at least blanket – deprivation of voting rights for prisoners and people with mental disabilities or under guardianship or in care is criticised in terms of human rights. By contrast, voting rights requirements such as citizenship, residence requirements or minimum age are widely regarded as unproblematic, although there are objections to this which should be taken seriously and deviations when it comes to regional and local elections.

Before we go into such exclusions and conditions in detail, we should mention a not so rare and problematic regulation: the exclusion of active members of the armed and security forces from voting. In some Latin American countries, for example, conscripts (Brazil), active members of the military (Guatemala) or, in addition to soldiers, police officers (Dominican Republic, Honduras, Colombia, Paraguay, Peru) are excluded from the right to vote. In Paraguay, the ban even af-

3 DIE ZEIT, article from 8th May 2014, p. 8 (translated from German).

fects trainees at military and police schools. In Tunisia, Lebanon, Jordan, Turkey and Indonesia, for example, members of the armed forces, conscripts and/or cadets are not allowed to vote either. On the surface, this may be a measure to avoid politicisation of armed forces or to ensure the independence and secrecy of the election, which can easily be restricted, especially for military personnel. However, it excludes a significant proportion of nationals from the right to vote. As an alternative, legal and organisational measures could be taken to ensure that the elections are open to everyone, such as a strict ban on canvassing by superiors, and that members of the armed forces do not vote in barracks but in ordinary polling stations (preferably not in troop numbers). Accordingly, both the Venice Commission and the Parliamentary Assembly of the Council of Europe stressed that the need for democratic control over the military should not be used as an excuse to automatically deprive military servicemen of their voting rights.<sup>4</sup>

Another peculiarity should also be mentioned: Thailand still adheres to the constitutional exclusion of Buddhist monks, novices, ascetics and priests from the right to vote, which is rooted in the religious and cultural tradition and existed in Laos until 1967, for example. In Myanmar, the constitution excludes members of religious orders from the right to vote.

### **Voting only with citizenship?**

The right to vote in elections, although enshrined in international human rights conventions, remains, as has already been mentioned, the only human right explicitly linked to it being exercised in a person's home country or to citizenship. Consequently, it is compatible with international human rights conventions for states to link the right to vote to citizenship, as is customary. However, this is not the case if the right to citizenship is not structured in a way that conforms to human rights. In Liberia, a state previously founded by freed slaves, the constitution, for example, only grants citizenship (and thus the right to vote) to those persons »who are negro or of negro descent« by birth or naturalisation. A considerable number of people born in the country who do not meet this condition are thus denied the right to vote. A similar provision is contained in the constitution of Sierra Leone.

It is equally problematic if only men but not women can pass on their citizenship to their spouse, as is the case in Nepal, for example, or if citizenship is linked to the fact that both parents were or are citizens, as in Myanmar. It is also objectionable when persons who have two citizenships are not allowed to vote,

4 See PACE Res. 1459 (2005), para. 9.

as is the case in Gambia and some other African states. In Europe, the European Convention on Nationality stipulates that persons with dual nationality must have the same rights as other nationals. The electoral law in Portugal stands out as a positive example. It explicitly states that Portuguese citizens with a second citizenship do not lose their right to vote. However, in Germany there is a debate about whether these persons will then be favoured.<sup>5</sup> Furthermore, the right to vote should be granted immediately after naturalisation. Even in democratically governed Costa Rica, the constitution stipulates that this only happens ten years after obtaining citizenship.

Irrespective of the sometimes problematic conditions of citizenship,<sup>6</sup> it is true that not all people living in the country, but usually only nationals, are granted the right to vote at the national level. Only in some European countries, for historical and political reasons, are non-nationals resident in the country allowed to vote in national parliamentary elections: In Ireland this applies to resident British citizens and in the UK to Irish and Commonwealth nationals resident there. The latter also enjoy the right to vote (but not to stand for election) in some English-speaking Caribbean countries. In addition, since 1975, for example, resident foreign nationals have been allowed to vote in New Zealand after one year of permanent residence, which, according to some authors, has led to a »uniquely inclusive political community«<sup>7</sup> there. In Chile and Ecuador, non-nationals resident in the country can obtain the right to vote in national elections after five years, in Malawi after seven years and in Uruguay after 15 years. In Luxembourg, on the other hand, a proposal to grant the right to vote in national elections to non-citizens who have been permanent residents for more than ten years was rejected in a referendum in June 2015.

Otherwise, the states grant the right to vote to non-citizens at most in subnational elections.<sup>8</sup> In Latin America, for example, this is the case in Bolivia, Paraguay and Venezuela, combined with certain residence requirements. Within the states of the European Union (EU), resident EU foreigners already enjoy both European and municipal voting rights under current EU law. Non-EU citizens, so-called third-country nationals, are allowed to vote in local and/or regional elections after a certain minimum period of residence in the country, for example in Sweden, Denmark, Iceland, Finland and Norway, the Netherlands, the Repu-

5 The »Expert Council of German Foundations on Integration and Migration« (SVR), for example, has proposed making a »generational cut« for dual citizenship; cf. SVR 2017.

6 For further details on the question of citizenship, see, for example, Shachar et al. 2017.

7 Reilly/Torresi 2016: 401.

8 Cf. also Arrighi/Bauböck 2017.

blic of Ireland and now also in Belgium, Estonia and Luxembourg. Germany, on the other hand, is one of the stragglers, where even the right to vote at local level is still linked to citizenship of the state or the European Union – despite demands to the contrary from many integration advisory boards, migrant organisations and a corresponding convention of the Council of Europe<sup>9</sup>.

Worldwide, however, a general »residential citizenship« with voting rights is not yet in sight. However, as long as the right to vote in national or subnational elections remains restricted to nationals, naturalisation – which is handled more or less restrictively – is a prerequisite for participation in elections at the national level. Compared with extended voting rights for foreigners, Andreas Funke even sees the advantage of acquiring citizenship in Germany in that non-citizens would not only have access to elections after naturalisation, but also to public offices, i.e. to positions in administration and the judicial system. Thus, he does not view the right to vote in isolation, but instead sees it as part of a comprehensive complexity of citizenship rights that ultimately belong together. Funke points out that the »naturalisation potential« in Germany is hardly ever exploited: The proportion of naturalisations in relation to the number of persons who would be eligible for naturalisation is low, he said.<sup>10</sup> This in turn suggests that for many people it is obviously a significant personal step to take on a new citizenship, especially if by doing so they then have to give up their old one. Surveys show that the necessity of giving up one's previous citizenship at the time of naturalisation is one of the main obstacles to naturalisation.<sup>11</sup> However, if the right to vote is understood as a means of integration, it could also prepare for naturalisation.<sup>12</sup>

A particular problem situation arises for those groups of the population who, in post-Soviet states such as Estonia and Latvia, did not automatically receive citizenship after independence and, without naturalisation, did not have the right to vote or stand as a candidate in parliamentary elections. In Estonia, although the proportion of such »persons without defined citizenship« has fallen from 32% to 6% over the past 25 years, there were still some 75,000 persons denied the right to vote and stand as a candidate in the 2019 parliamentary elections.<sup>13</sup> Most of them belonged to the Russian minority, which makes up about a quarter of the population. In Latvia, with a similarly large proportion of the population

9 Cf. Convention on the Participation of Foreigners in Public Life at Local Level from 1992 (in force since 1997). However, only nine states have ratified the Convention to date; Germany is not among them.

10 Cf. Funke 2016.

11 Cf. SVR 2017 and the literature listed there.

12 See also Dormal 2016: 386.

13 Cf. ODIHR report on the 2019 elections in Estonia.

belonging to the Russian minority, the number of such »non-citizens« was still just under 229,000 in 2018, i.e. 11% of the population, of whom about 227,000 were of voting age.<sup>14</sup> The problem also affects all those millions of people worldwide who – for various reasons – do not hold citizenship of any country under national laws.

## Right to vote for nationals resident abroad?

Probably every country in the world has nationals who live abroad permanently. Should they also be granted the right to vote? How much solidarity and familiarity with the political community should be demanded so that citizens resident abroad can participate in the political decision-making process in their »home country«? After all, by voting they are making a decision which does not directly affect them abroad. Such considerations were decisive for the fact that in Germany and many other western democracies, for a long time the right to vote or the exercise of that right was linked to the condition that the nationals were resident in the electoral area. In the *Hilbe v. Liechtenstein* case, among others, the European Court of Human Rights (ECtHR) confirmed that the residence requirement was compatible with the right to free elections as enshrined in Article 3 of the First Protocol to the European Convention on Human Rights (ECHR). The Council of Europe’s *Code of Good Practice* in Electoral Matters and the OSCE/ODIHR election standards are also based on this. However, it is problematic when such residence requirements are disproportionately long. The OSCE/ODIHR and the Venice Commission, for instance, criticised Montenegro’s electoral law, which requires voters to live in the country for the 24 months preceding the elections.

Despite the absence of an international electoral standard, most European countries, like many countries outside Europe, now grant their nationals living abroad the right to vote, albeit sometimes with restrictions or for a limited period of time, such as in Canada for a period of five years and in the United Kingdom for 15 years after leaving the country. Withdrawal of the right to vote there after 15 years was not considered by the ECtHR as a violation of the right to free elections.<sup>15</sup> The ECtHR reached the same conclusion in the case of Greece’s decades-long failure to implement a constitutional provision providing for the right to vote abroad.<sup>16</sup> It was not until 2019 that Greek citizens resident abroad (provided they had lived in Greece for two of the previous 35 years) were granted the right

14 Cf. ODIHR report on the 2019 elections in Latvia.

15 Cf. *Schindler v. the United Kingdom* (2013).

16 Cf. *Sitaropoulos and Giakoumopoulos v. Greece* (2002).

to vote abroad. Only a few years earlier, Hungary had introduced the right to vote abroad on Orbán's initiative, from which the ruling party Fidesz then benefited massively in the 2014 elections, receiving around 95% of the votes of the approximately 380,000 Hungarians who voted abroad. Romania followed in 2015 with a corresponding legislative reform. In the parliamentary elections there in 2016, around 609,000 Romanian citizens abroad were registered on the electoral register. Only a few member states of the Council of Europe still withhold the right to vote from their citizens living abroad or restrict it to a very limited category of persons (e.g. Armenia, Ireland, Malta) or grant it only to those who are temporarily abroad (e.g. Denmark, Liechtenstein, Northern Macedonia, Serbia).

In Latin America, the number of countries granting the right to vote to foreign nationals increased from three to 16 countries between 1990 and 2019.<sup>17</sup> Colombia led the way there in 1961 (first applied in 1962); Guatemala was the last country in the region to introduce the right to vote abroad in national elections in 2016; it was first applied in 2019. Exceptions include Nicaragua and Uruguay, where a referendum failed in 2009. In the majority of Latin American countries, the right to vote abroad exists for presidential elections (and referendums), while it is less common for parliamentary elections. In Africa, too, more than half of the states there grant their nationals living or staying abroad the right to vote in presidential and/or parliamentary elections, at least formally.<sup>18</sup> However, the extent to which the organisation of elections ensures that they can actually exercise their right to vote should be examined. For example, despite appropriate legal regulations (and a separate constituency for voters abroad), no out-of-country elections were held in the 2017 elections in Angola. In total, the International IDEA database lists 124 states and dependent territories where out-of-country voting rights for parliamentary elections exist. For presidential elections – with a smaller number of countries holding direct presidential elections – this applies in 88 countries.<sup>19</sup> However, the list also includes some countries, such as Ireland and Liechtenstein, which in principle make voting rights conditional on *permanent residency*, but provide for exceptions for certain categories of persons.

In any case, the integrity of the voting and counting process remains a prerequisite for granting the right to vote abroad. Inadequate control mechanisms for this purpose are repeatedly met with international criticism. The specific provisions of international voting rights also vary from country to country, for example with regard to registration and voting, which often has to be done in person,

17 See Navarro Fierro 2016, 2019.

18 According to the International IDEA database, Africa has foreign voting rights in 30 countries for presidential elections and 28 countries for parliamentary elections.

19 <https://www.idea.int/data-tools/data/voting-abroad> (as of 29 November 2020).

mostly in diplomatic missions. In Latin America, Mexico was the first country to introduce absentee postal voting for citizens resident abroad by means of an electoral law reform in 2005. It should be mentioned, however, that many foreign residents do not take advantage of the opportunity to register and vote. In Ukraine, for example, only about 2% of citizens abroad took part in the 2019 parliamentary elections.

Finally, there are also differences in the way votes in parliamentary elections are allocated to constituencies. Those Latin American countries that allow voting abroad in parliamentary elections have their own foreign constituencies or reserved seats for voting abroad, as is also the case in Portugal, Croatia, North Macedonia, Romania, Guinea-Bissau and, since recently, in Lebanon. In other countries, votes are allocated to domestic constituencies, such as the capital (as in Latvia), on the basis of previous residence (as in Germany) or arbitrarily (without connection to a constituency) by the drawing of lots (as in Russia). The allocation to constituencies does not apply in countries where voters vote in their national constituency or where foreign voters may only participate in presidential elections but not in parliamentary elections. The latter may be due to the fact that proportional representation in Latin America is mainly carried out in constituencies to which non-national voters may no longer have any connection. However, different electoral provisions for the same national elections are not entirely convincing.

## Too young to vote? The voting age

Age requirements for exercising voting rights are generally recognised. The idea behind this is that people need a certain »intellectual and life maturity«<sup>20</sup> in order to exercise their right to vote in a self-determined and responsible manner. Despite all the findings of developmental psychology, however, the setting of a minimum age for the right to vote is ultimately arbitrary, as is the age of majority, on which the voting age is usually based. Strictly speaking, it would have to be checked from time to time whether it still corresponds to the developmental maturity and the life situation of young people.

Many Latin American states lowered the voting age to 18 early on.<sup>21</sup> In Germany, the minimum voting age was reduced from 21 to 18 in 1970 and was applied for the first time in Bundestag elections in 1972. Japan only managed to set the minimum voting age at 18 in 2015 (previously 20). In South Korea, the voting age

20 Cf. Schreiber 2017: 308.

21 Cf. the respective country contributions in: Nohlen 2005.

was reduced from 19 to 18 in the run-up to the 2020 elections. 18 is currently the international standard for national elections, although in a few countries, mainly in Asia, the minimum voting age is higher. This can be up to 20 (e.g. Taiwan) or even 21 (e.g. Malaysia, Singapore).

In some Asian countries, however, it is also lower: in Indonesia and East Timor, voters need only be 17 years old. In Greece, too, the Tsipras government (2015–2019) lowered the voting age from 18 to 17. In Malta, Austria and Slovenia, the minimum age for national elections is only 16, as in Nicaragua, Brazil, Ecuador and Argentina (although naturalised Argentine citizens must be 18). As in Nicaragua, there are sometimes political motives behind the lowering of the minimum age. The Sandinistas who ruled in the 1980s and toppled the dictator Somoza in 1979 recruited their supporters specifically from the mobilised youth. In 1984, in the midst of the US-initiated and US-financed Contra war against the Sandinistas, when they had the president and parliament elected, they declared that whoever can fight should be allowed to vote. Curiously, a similar argument also played a role in 1971, in the middle of the Vietnam War, when the voting age was lowered from 21 to 18 in the USA.

From today's perspective, in Indonesia there is another peculiarity: Married persons enjoy the right to vote regardless of the general minimum age of 17. In the Dominican Republic, married persons do not have to reach the general minimum age of 18 either, but are granted full citizenship rights and thus the right to vote even before that. In some other Latin American countries, too, a distinction was once made in respect of voting age between unmarried and married persons (e.g. Mexico until 1969) or women (e.g. El Salvador until 1950), while in Bolivia the minimum voting age was 21 for single people and 18 for married people until the constitutional reform of 1994. A similar gradation can even be found in Europe, particularly in Hungary, where men were already allowed to vote at the age of 24 in the 1920s, but women were not allowed to vote until they were 30 there.<sup>22</sup> Today, the general minimum voting age is 18, but only 16 for married persons. Behind such distinctions lies not only a traditional view of the family, but also the idea that people who take responsibility for a family should also be able to vote. However, it contradicts international standards to make the voting age dependent on marital status.

In Germany, Lower Saxony was the first federal state to lower the voting age in local elections to 16 in 1996. This was followed by Saxony-Anhalt and Schleswig-Holstein (both 1998), Mecklenburg-Western Pomerania and North Rhine-Westphalia (both 1999), Berlin (2005), Bremen (2007), Brandenburg (2011) and

<sup>22</sup> See Grotz 2000: 14.

Hamburg (2013). In Bremen (since 2011), Brandenburg (since 2012), Hamburg and Schleswig-Holstein (both since 2013) the reduced voting age even applies to state parliament elections. In Hesse, the government reversed a corresponding reform in the late 1990s. For the federal elections, however, corresponding initiatives in the *Bundestag* have so far been unsuccessful. A more recent motion by the Green party (*Bündnis 90/Die Grünen*)<sup>23</sup> followed the approach taken in the UN Convention on the Rights of the Child and saw the lowering of the voting age at all political levels as an important element in ensuring that young people can represent their interests independently. This would also increase common good sense, strengthen cohesion and intergenerational dialogue, and promote integration and justice. *Bündnis 90/Die Grünen*, along with The Left (*Die Linke*) and the Social Democratic Party (*SPD*), had also included the lowering of the voting age to 16 in their election programmes for the 2017 federal elections. The electoral programme of the Pirates (*Piratenpartei*) even envisaged a reduction to 14 years. The Christian Democrats (*CDU, CSU*) and Liberals (*FDP*), on the other hand, are sticking to the previous voting age for the federal elections. Legislative proposals to change the minimum voting age to 16 in the Basic Law and the Federal Elections Act did not find a majority in the *Bundestag* during the 19th legislative period.<sup>24</sup>

Incidentally, the cross-factional motions for a »voting right from birth«, according to which parents should cast their votes for their children in trust, were (and still are) unsuccessful.<sup>25</sup> In the academic community, the »voting right from birth« or family voting rights have been the subject of some debate for years.<sup>26</sup> However, such a »right to vote by proxy« is probably not compatible with German constitutional law, as it violates the principles of equality of votes (one person, one vote) and the requirement of personal voting in the election.

## Citizens behind bars

In addition to the electoral law requirements that need to be met, constitutions and laws usually provide for exclusions to the right to vote. The question, for example, of the extent to which restrictions to the right to vote are legitimate and lawful in respect of criminally convicted persons has been discussed in acade-

23 In der 18th legislative period, for example BT-Drs. 18/3151, 12th November 2014. See previously already: BT Drs. 16/6647, 10th October 2007.

24 Cf. BT-Drs. 19/13512 and 19/13513, both from 24th September 2019.

25 See BT-Drs. 16/9868, 27th June 2008, BT-Drs. 15/1544, 11th September 2003.

26 Cf. the numerous references to literature in Schreiber 2017: 309.

mic discourse for many years.<sup>27</sup> In the meantime, the European Court of Human Rights (ECtHR) has also been involved on several occasions. Beginning with the case *Hirst v. the United Kingdom* (2005), the ECtHR made it clear in its established case-law concerning the United Kingdom<sup>28</sup>, but also concerning Russia, Turkey and Bulgaria<sup>29</sup>, that the *blanket* exclusion of prisoners from the right to vote violates Article 3 of Protocol No. 1 of the European Convention on Human Rights.<sup>30</sup> According to the ECtHR, the disenfranchisement would require a court decision taking into account the nature of the offence. However, just like the governments of Russia and Turkey to this day, the British governments were for a long time unwilling to make the necessary legislative amendments so as to implement the relevant ECtHR judgements in their election law. Despite some reform debate, there was a significant level of political unwillingness in London. Behind this is not only the conviction that prisoners who have violated the basic rules of society should not participate in decisions about society. The discussion also revolves around the UK's relationship with the ECHR and the question of the extent to which ECtHR judgments may encroach on the UK's parliamentary sovereignty. In December 2017, the Committee of Ministers of the Council of Europe, which oversees the implementation of the ECtHR rulings, finally accepted a compromise whereby at least prisoners out on temporary licence would be entitled to vote in national elections in the UK.<sup>31</sup>

Several European states continue to withdraw the right to vote for prisoners, though rarely in a generalised manner, as in Bulgaria, but mostly for citizens who have been sentenced for certain crimes or to a certain period of imprisonment. In the case of *Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde*, the European Court of Justice (ECJ) ruled in October 2015 that the current French law, which denies certain convicted offenders the right to vote in European Parliament elections, does not violate EU law and is proportionate because it takes into account the nature and severity of the offence and the length of imprisonment. Numerous other European states, in turn, do not deprive prisoners of the right to vote at all. These include Denmark, Finland, Ireland, Latvia, Lithuania, Croatia, Northern Macedonia, the Republic of Moldova, Switzerland,

27 Cf. for example Ewald/Rottinghaus 2009, Foster 2009, Mauer 2011, Holste 2015.

28 Cf. for example *Greens and M.T. v. the United Kingdom* (2010), *Firth and Others v. the United Kingdom* (2014), *McHugh and Others v. the United Kingdom* (2015).

29 Cf. for example *Frodl of Austria* (2010), *Söyler of Turkey* (2013), *Anchugov and Gladkov of Russia* (2013), *Murat Vural of Turkey* (2014), *Kulinski and Sabey v. Bulgaria* (2016).

30 Under the terms of the Treaty, the State Parties undertake »to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislative«.

31 Cf. Johnston 2020.

Serbia, Slovenia, Spain and Ukraine. Throughout the world, such »liberal« regulations are rather the exception, and can be found, for example in Israel, Canada and the Republic of South Africa. In many other states – from Argentina, Brazil and El Salvador to Kyrgyzstan, Mongolia and New Zealand – prisoners are denied the right to vote, either in general or in specific circumstances.

In some cases, the exclusion from the right to vote even after release from prison remains (temporarily) in effect. In the USA in particular, this is also politically significant. In the US presidential elections of 2016, an estimated 6.1 million people, or 2.5 % of citizens of voting age, were not able to vote because they had been convicted of a criminal offence at some time in their lives. In 2020 – despite reforms – this still applied to almost 5.2 million. Only in the District of Columbia, Maine and Vermont are felons allowed to vote. While in 16 states felons only lose their voting rights during imprisonment, in 21 states it is not only prison inmates who are affected, but also people on parole and/or probation. In 11 states, felons are disenfranchised indefinitely for some crimes, or voting rights must be restored by a governor's pardon. African-American males are disproportionately affected by disenfranchisement.<sup>32</sup> The political system of the United States is also responsible for the fact that the voting rights of prisoners and former offenders in the United States are not regulated on a federal level, which means that voting rights are granted differently in each state. This does not correspond to international standards.

In Germany, the Federal Elections Act allows for the exclusion of voting rights by judgement of a court. On the one hand, the Federal Constitutional Court decides on the forfeiture of basic rights and can in this context also deprive persons of the right to vote, eligibility to stand for election and the ability to hold public office. On the other hand, the German Criminal Code expressly provides that the courts may, at their own discretion, deprive convicted persons of the right to vote for a period of two to five years, for example, in the case of the following crimes: offences against peace, high treason and endangering democratic state under rule of law, treason and endangering external security, offences against constitutional organs and in context of elections (electoral fraud, etc.), and offences against national defence (sabotage etc.).

Court-ordered disqualification from voting aims to protect elections and the democratic state and is therefore directed specifically against persons who have committed a crime against constitutionally protected rights. Critics, however, see it as an outdated »relic of the criminal law based on honour« from times when

32 Uggem et al. 2016, 2020, National Conference of State Legislature 2020.

people could still be deprived of civil rights.<sup>33</sup> According to criminal prosecution statistics, however, hardly anyone in Germany is denied the right to vote due to criminal offences. The situation is different when it comes to the loss of the right to stand for election, which we will discuss later.

### **Restrictions on voting rights due to (or as) disabilities**

In many countries around the world, people who are mentally handicapped or have no legal capacity or who are subject to partial or full guardianship or care are excluded from the right to vote either as a general rule or on the basis of a judicial decision. This also includes a number of European states. It is true that some states have recently partially or completely withdrawn their policies on exclusion from elections. In Denmark, in December 2018, the parliament made it possible for at least some – but not all – people under guardianship to obtain the right to vote. In the same month, two articles – 3(b) and (c) – were deleted from the Spanish electoral code to give people with disabilities the right to vote. However, only a few European countries, such as Sweden, Italy, Ireland, Austria, the United Kingdom, the Netherlands and, more recently, Slovakia, Germany and Spain, have no formal legal restrictions.<sup>34</sup> The legal situation in the USA is completely inconsistent, with only a few states not providing for any such restrictions. The exclusion of people with mental impairments or under guardianship, which still exists in several European and many non-European countries, violates the human rights ban on discrimination.

In Germany, the Federal Constitutional Court ruled in 2019 that the *blanket* exclusion of people under full custody and patients in forensic psychiatry is unconstitutional. Until then, the Federal Election Act (section 13, subsections 2 and 3) had disqualified a person from voting if a custodian has been appointed to attend to *all* his or her affairs and if he or she was accommodated in a psychiatric hospital under an order pursuant to the Criminal Code. According to a study carried out in 2016, 85,550 people, or 0.14% of those eligible to vote, were affected by the exclusion, of whom 81,220 were receiving full support and 3,330 were in psychiatric institutions.<sup>35</sup>

For quite some time constitutional and human right doubts had been submitted as arguments against both reasons for exclusion provided for in section 13 (subsections 2 and 3) of the Federal Election Act.<sup>36</sup> However, the *Bundestag* had

33 Cf. for example Oelbermann 2011.

34 Cf. Schönhagen 2016: 368 and ODIHR election reports.

35 Cf. Lang et al. 2016.

36 Cf. Palleit 2011, DIMR 2016, Schreiber 2017.

rejected corresponding objections concerning the validity of the 2017 federal elections. Ultimately, an appeal against the *Bundestag* resolution was lodged with the Federal Constitutional Court. According to the court's ruling, exclusion from the right to vote may be constitutionally justified if a certain group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs. However, the Federal Constitutional Court considered the blanket exclusions from the right to vote in the electoral law to be unconstitutional.<sup>37</sup> As a result, the governing coalition initiated a change in the electoral law for federal and European elections. Since this did not come into force until 1st July, the Federal Constitutional Court decided, by means of an emergency petition, that those affected could submit an application to already participate in the European elections on 26 May 2019.<sup>38</sup>

The European Court of Human Rights has also so far only objected to a *blanket* exclusion of people under guardianship from voting rights, though it has not completely ruled out such an exclusion. In 2010, in the case of *Alojos Kiss v. Hungary*, it held that such an exclusion could be a legitimate objective to ensure that only those persons who are able to assess the consequences of their decisions and take conscious and legally binding decisions are involved in public affairs. However, the ECtHR could not accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, fell within an acceptable margin of appreciation. The court found it to be problematic to treat such people as a single group and made it clear that the restriction of their rights needed to be carefully examined. The court held that indiscriminate deprivation of the right to vote without individual judicial examination and based solely on partial guardianship, could not be sufficiently justified.

The UN Committee on the Rights of Persons with Disabilities, which monitors the UN Convention on the Rights of Persons with Disabilities (CRPD), argues far more rigorously. It rejects any restrictions on the right to vote and stand for election for people with disabilities. It has repeatedly urged the states parties to withdraw such provisions in constitutions and electoral laws that deny disabled people the right to vote. Following an examination of the German country report, in its »concluding remarks« in 2015 the Committee had accordingly expressed its concern about the exclusion of persons with disabilities from the right to vote still provided for in (section 13, subsection 2 and 3 of) the Federal Election Act (and in various state laws) at the time, as well as about practical barriers preventing persons with disabilities from exercising the right to vote on

37 BVerfG, Decision from 29th January 2019–2 BvC 62/14.

38 BVerfG, Judgement from 15th April 2019–2 BvQ 22/19.

an equal basis with others. The Committee recommended to Germany at that time »to repeal all laws and regulations that deprive persons with disabilities of the right to vote, as well as reduce barriers and put in place appropriate support mechanisms«.<sup>39</sup>

Interestingly, the UN Committee on the Rights of Persons with Disabilities also decided – after the ECtHR – on a complaint from Hungary: six persons who had been placed under (partial or full) guardianship by a court order on the grounds of »intellectual disability« were automatically removed from the electoral register there. The government claimed that, in accordance with the new Hungarian constitution, which entered into force in January 2012, disqualification from voting was preceded by an individual judicial examination. The requirements of the ECHR had thus been met. However, the UN Committee considered the automatic removal from the electoral register as a result of the (albeit) judicial decision on guardianship as a violation of the CRPD. Nevertheless, 49,259 persons with mental disabilities were denied the right to vote in the 2018 parliamentary elections in Hungary.<sup>40</sup> To mention another (rather peculiar) case: the UN Committee on the Rights of Persons with Disabilities also criticised a unique regulation in Paraguay, which under certain conditions deprives deaf people (*sordomudos*)<sup>41</sup> of the right to vote.<sup>42</sup>

However, despite national resistance, international pressure is increasing to refrain from exclusions of voting rights in respect of persons with mental disabilities or those who lack legal capacity. The UN Human Rights Council already issued a recommendation to this effect in 2011.<sup>43</sup> In the same year, the Committee of Ministers of the Council of Europe recommended enabling all people with disabilities to use the right to vote without discrimination »[...] through the removal of restrictions on legal capacity, the abolition of voting tests, the introduction of legal provisions, specific forms of assistance, awareness raising and funding«.<sup>44</sup> Following on from the demands of the UN Committee on the Rights of Persons with Disabilities, ODIHR election observation reports now regularly recommend that the still existing electoral exclusions due to »mental incapacity« of »legal incapacity« be abolished, regardless of whether they are imposed generally or by

39 CRPD/C/DEU/CO/1, 13th May 2015, para. 54.

40 Cf. the ODIHR report on the 2018 elections in Hungary.

41 Literally translated: »deaf-mute«. It is more appropriate to speak of »deaf people«, as supposed »deaf-mutes« have their own languages and can communicate very well in them. In New Zealand, sign language is even the third official language.

42 CRPD/C/PRY/CO/1, 15th May 2013, para. 69. See also the OAS report on the 2018 elections in Paraguay.

43 UN Doc A/HRC/RES/19/11, 23rd April 2012.

44 CM/Rec(2011)14.

court order. At the same time, there is an increasing number of countries that are abolishing such exclusions of voting rights.

## **Compulsory voting – rather the exception than the rule**

Should universal suffrage be accompanied by compulsory voting? Compulsory voting is relatively widespread in Latin America. It exists – at least on paper – in Argentina, Bolivia, Brazil, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Uruguay. There, compulsory voting is part of a constitutional tradition. In some cases, compulsory voting was introduced in the first half of the 20th century and is still largely politically uncontroversial today, even though it has been abolished in Venezuela (1998) and Chile (2012). In Latin America, however, compulsory voting is sometimes understood more as a civil duty than as a legal duty to be sanctioned, as is most likely still the case in Argentina, Bolivia, Brazil, Peru, Ecuador and Uruguay.<sup>45</sup> Nor is it always applied to all age groups. Once the voting age had been lowered, 16 and 17-year-olds in Argentina and Brazil obtained the right, but not the obligation, to vote. By contrast, voting remains compulsory for voters aged 18 and over – at least up to a maximum age of, say, 60 (Brazil) or 70 (as in Argentina and Peru). In Brazil and Ecuador, both disabled and illiterate people are exempt from the obligation to vote.

In other regions of the world, compulsory voting is quite rare. The exceptions in Europe include Belgium since 1893, Luxembourg since 1919, Liechtenstein since 1922, Greece since 1952, and the canton of Schaffhausen in Switzerland. In Bulgaria – contrary to the international trend – compulsory voting was introduced in 2016, but the constitutional court there found that sanctions for infringements of the obligation to vote to be unconstitutional. Cyprus abolished compulsory voting in 2017 just as the Netherlands had done in 1967 as well as Italy and Austria at the beginning of the 1990s. In Austria compulsory voting was introduced in 1918 as a package together with universal suffrage for women: The Christian Socialists had feared at the time that the Social Democratic Labour Party would benefit unduly from the right to vote for women, because its supporters were easier to mobilise than conservative women, who tended to stay at home during elections. The compulsory voting was intended to compensate for this disadvantage.<sup>46</sup>

Outside Latin America and Europe, we find compulsory voting in Australia, where it has been compulsory since 1924, and in Nauru, Singapore and Thailand

45 Cf. Ortíz 2019: 333.

46 Cf. Rosenberger/Seeber 2008: 39, Rosenberger 2019.

(before 2014), Lebanon and Turkey, as well as in a few African autocracies such as Egypt, Gabon and the Democratic Republic of Congo. In these countries, too, compulsory voting is not always compulsory voting. Compliance is not always (strictly) controlled and sanctioned. The differences in voter turnout (which, of course, also depends on other factors) are correspondingly large: Latin American countries with compulsory voting sometimes have a high turnout of more than 80% (e.g. Bolivia, Ecuador, Peru, Uruguay), and sometimes a much lower turnout (e.g. Costa Rica, Mexico, Paraguay). There is also a wide gap between European countries with compulsory voting: turnout in Belgium and Luxembourg is very high across the board, while it is low in Bulgaria and Greece. Among the democratic countries with compulsory voting, Australia and Nauru lead the way with turnout rates of over 90%.

Although compulsory voting has comparatively few international supporters, the proposal to increase voter turnout by means of compulsory voting is regularly put forward in Germany.<sup>47</sup> Proponents assume that this will increase voter turnout and bring groups that are far removed from politics back to the ballot box. This would increase the legitimacy of the elections and – in view of the social selectivity of the elections so far<sup>48</sup> – (better) fulfil the political equality promise of democracy. They also hope to have a political educational effect on those entitled to vote. While supporters see voting as a democratic duty, which a democracy can also demand, opponents place the freedom of choice in the foreground, which includes the freedom not to vote.<sup>49</sup> Irrespective of democratic-theoretical arguments for or against a statutory duty to vote, the introduction of an obligation to vote in Germany, especially if it were to be combined with sanctions (e.g. fines), would probably meet with constitutional objections, since according to German constitutional understanding, it would contradict the principle of free elections and free voting if those entitled to vote were obliged to take part in the electoral process against their will.

Politically, the proposal to introduce compulsory voting also falls short: to get non-voters into the polling station, it is necessary to arouse interest in politics. Ideally, this includes political education, an appealing way of communicating politics, convincing profiles of the parties standing for election, both in terms of content and their candidates, as well as a policy that tackles and overcomes social problems. The growing strength of diverse social movements highlights deficits in credibility and a lack of action in respect of policymaking by parties, parliaments and governments, and stands for alternative forms of political par-

47 Cf. for example Faas 2012, Bröning 2017, Kaeding 2017.

48 Cf. Schäfer 2015.

49 See also New 2017.

ticipation. At the same time, the decline in voter turnout compared to the 1970s also reflects social change. Not only has party identification declined, but also the »sense of civic duty« when it comes to voting. The days when voters dressed in their Sunday best to fulfil their civic duty on election day are simply over for many people. However, the idea of enacting such a law and sanctioning non-compliance is difficult to convey socio-politically. A study from 2014 already showed only a low acceptance for the introduction of a compulsory voting system in Germany, especially one coupled with sanctions.<sup>50</sup>

## The registration of voters

To exercise universal suffrage, voters must normally be registered. Only in exceptional cases – such as the first post-apartheid elections in South Africa in 1994 – may they vote without prior registration on presentation of identity documents. It is equally exceptional that Latvia, for example, has no electoral register for parliamentary elections. Eligible voters can vote at any polling station throughout the country, irrespective of their place of residence, on presentation of their passport (which is then stamped) or a voting card (in the absence of a passport). They are entered in handwritten form on voting lists there. This is contrary to the recommendations of the Venice Commission of the Council of Europe.<sup>51</sup> Elsewhere, permanent electoral registers are the norm, but there are possibilities for supplementary lists which allow additions to be made in the event of inadequate registers, or which make it possible to include persons who have changed their place of residence or have reached the legal voting age only after the final publication of the lists. On the other hand, a general, additional option for registration on election day is viewed critically.<sup>52</sup>

All in all, the creation, maintenance and updating of electoral registers are among the particularly difficult problems of electoral organisation. The art is to ensure that as many voters as possible are registered and able to vote, while at the same time avoiding the existence of erroneous, unamended electoral registers (with multiple registrations and the notorious »dead«) which allow for electoral fraud. In extreme cases, the holding of proper elections can even fail due to poor registration procedures. Registration of voters is particularly difficult in (post-)conflict states with a high number of internally displaced persons, especially if they do not (or no longer) have valid identity documents. Such difficulties

50 Cf. Klein/Ballowitz/Holderberg 2014.

51 Cf. CDL-AD(2002)023rev2-cor, para. 1.2.

52 Cf. for example the ODIHR report on the 2020 parliamentary elections in Azerbaijan.

arose in particular during the elections following the civil wars in former Yugoslavia.

However, it is precisely the participation of internally displaced persons in elections that is essential for reconciliation and peaceful development.<sup>53</sup> The UN Guiding Principles on Internal Displacement from 1998, a recommendation of the Committee of Ministers of the Council of Europe from 2006<sup>54</sup> and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) from 2009 also call upon or oblige states to enable internally displaced persons to exercise their right to vote. Corresponding efforts were made in Ukraine after 2014, for example. The problem is that in the parallel voting system used there<sup>55</sup> at that time, internally displaced persons who had been given a temporary electoral address outside their original constituency were not allowed to vote for candidates in the constituency, but only for the mandates on the party lists that were to be allocated proportionally.<sup>56</sup>

With the exception of the United Kingdom, Ireland and Cyprus, in Europe voters are registered passively on the basis of the registers of residents, which are ideally updated continuously. There, only voters who live abroad may have to make an effort to actively register. In the states of the former Soviet Union and a number of other countries around the world, too, the electoral registers are compiled from the registers of residents, including the sources of error that go with this practice, such as failure to delete people who have died or moved. A highly exceptional arrangement can be found in Albania, where voters over 100 years old are automatically struck off the electoral register, presumably to remove any deceased persons from the list. If these elderly people are still alive (and wish to vote), they must actively seek to be reinstated on the electoral register.

In some other countries, however, active registration for elections is generally required – and in some cases, such as in Cyprus, it is even compulsory. Those entitled to vote must then be entered in permanent registers, or in registers drawn up or updated specifically for the elections. In the United States, for example, voters can register in person, by mail or through an authorised person actively in the respective federal states. Depending on the state, different personal identification documents are accepted, from social security cards to driving licences and (according to hearsay) membership cards of the National Rifle Organisation. Online registration is now also possible in many states. However, it is not unusual when active registration is required that some eligible voters do not register. In

53 Cf. for example Durnyeva/Jepsen/Roberts 2019.

54 CM/Rec(2006)6.

55 See the chapter on electoral systems.

56 Cf. Durnyeva/Jepsen/Roberts 2019.

the USA, this affected an estimated 35 million out of a total of 220 million voters in the 2016 elections. This is partly due to a lack of will on the part of voters, but also to insufficient information and organisational problems with registration.

Even in India, the »largest democracy in the world«, the almost 900 million voters have to actively register to vote. They are increasingly registering online but can also do so by post or at designated registration offices.<sup>57</sup> Despite calls to do so, however, not all eligible voters are responding to the request. A comparison of the census with the voter lists showed, for example, that in the 2019 elections, about 21 million Indian women of voting age were not registered, so that they were unable to use their right to vote. Beside technical problems, this was attributed not least to family and social resistance from a male-dominated social environment.<sup>58</sup>

If voters do not appear on the regular electoral register shortly before or during the elections, in some places they can be entered in supplementary voter lists or cast provisional votes. Especially in the case of unreliable registers, such a procedure makes it possible to guarantee the exercise of universal suffrage, but also increases the risk of inadmissible multiple voting. As a standard procedure for countries where reliable electoral registers are (or should be) available, registration at the polling station, at least where this takes place without additional security measures, is therefore a cause for concern. Accordingly, the OSCE/ODIHR criticised such a possibility in the presidential elections in Belarus in 2015 and in Russia in 2018, both countries in which governments are interested in a high voter turnout to legitimise the elections.

For data collection and verification purposes, a central electoral register is recommended so that the data, which are mostly collected in a decentralised manner, can be recorded and compared throughout the country. These do not exist everywhere, even in western democracies. The USA, the United Kingdom and Ireland, for example, do not have such a central register. Even in countries which register voters passively, the registration itself is sometimes only decentralised, in Europe for example in France and the Czech Republic. In many places, however, centralised electoral registers are now common practice. In Ukraine and Serbia, they were introduced before the 2010 and 2012 elections respectively at the insistence of the OSCE/ODIHR and the Council of Europe. The new draft

57 Cf. instructions of the Election Commission of India, Systematic Voters' Education and Electoral Participation (SVEEP): *How do I Register and Vote. A Guide for General Voters*, New Delhi: SVEEP, available online.

58 The study (Roy/Sopariwala 2019) is not yet available in English, but see the interview with the authors in the Indian magazine »Outlook« of 7th March 2019; <https://www.outlookindia.com/magazine/story/books-its-a-shame-21-million-women-cant-vote/301268>.

election law in Uzbekistan from 2018 has also taken up corresponding recommendations. The creation and updating of central electoral registers is greatly facilitated by the computer technologies available today. However, digital data collection and continuous data reconciliation are technically quite demanding and must be accompanied by appropriate security measures.

It is also internationally recommended that the (provisional) electoral registers be made available for verification by those entitled to vote. In many countries, such lists are displayed or hung up for public inspection. This serves not only to check the electoral registers, but also to provide voters with guidance. If the lists are not accessible to the public, this is sometimes met with criticism in the country or even, as in the case of the 2019 elections in Guinea-Bissau, is done retrospectively, in this instance at the instigation of the Economic Community of West African States (ECOWAS).<sup>59</sup> In other countries, voters can check the accuracy of information about themselves and/or others on request only. In any case, voters should be able to have incorrect entries corrected and, if they are not registered, to have themselves entered on the register, if necessary by way of administrative or legal proceedings. However, the relationship between democratically desired public control and the need for individual data protection varies from one country to another. In the respective countries, for example, the requirements differ as to who can inspect or obtain copies of electoral registers, what information these contain, what information is withheld for reasons of personal privacy or security, and whether there are restrictions on the commercial use of the data.

In Germany, data protection is given a comparatively strong weighting. For data protection reasons, public access to the electoral rolls for general inspection was abolished in 2001 and replaced by a right to individual inspection. In this way, voters in Germany are allowed to check the accuracy or completeness of their *own* data in the electoral register during a certain period of time. Voters only have the right to inspect the data of *other persons* if facts can be established according to which the incorrectness or incompleteness of the register can be deduced. In addition, the right to check the register is not applicable to voters who have had a non-disclosure notice attached to the register of residents, for example because of danger to life, health or other concerns worthy of protection.<sup>60</sup> The Federal Registration Act (*Bundesmeldegesetz, BMG*), however, allows group information to be provided from the register of residents if this is in the public interest. In order to provide voters with voting information, political parties that are running for

<sup>59</sup> Cf. the report of the AU Observer Mission for the 2019 elections.

<sup>60</sup> Cf. Schreiber 2017: 374 et seq.

office are therefore permitted to obtain registration information (name, address) for a fee from the registration offices before the elections.

Rights of access to information are comparatively far more comprehensive in the USA. In many of the US states, individuals, political parties and other organisations have the right to receive copies of directories free of charge or for a fee. In some US states, the information even includes the party affiliation of those eligible to vote. This allows political parties to use the data made available for specific election campaign purposes. While it is considered legitimate in the US and also in some European countries (e.g. Ireland, Monaco, Spain) the voter lists are generally made available to the parties and candidates (in their respective constituencies), the ODIHR and the Council of Europe have criticised, for example, the draft electoral register law in Ukraine, which gave political parties the right to receive electronic copies of the registers.<sup>61</sup> Also in North Macedonia there were concerns that political parties were using the data to exert pressure on eligible voters. Nevertheless, in the vast majority of countries, even in the USA, the use of electoral registers for commercial purposes is prohibited. But even there, there are exceptions, depending on the state.

61 CDL-AD(2007)026, para. 40.

## THE RIGHT TO STAND FOR ELECTION – STANDARDS, CURIOSITIES AND EXCLUSIONS

Eligibility conditions for members of parliament and even more so for directly elected presidents are usually more demanding than those for exercising the right to vote. This is based on the basic idea – understandable, but in individual cases subject to discussion – that elected representatives should meet certain minimum requirements if they are to be in control of the destiny of the state in the public interest. These relate not only to citizenship, voting age and the suspension of civil rights for convicted criminals, which will be discussed again separately. The exclusion of people with mental disabilities from the right to stand for election, which is quite common, is often accepted without question, as is the non-eligibility of illiterate people (e.g. Brazil) and educational requirements for candidates in several states. For example, parliamentary and/or presidential candidacies in some countries – such as Egypt, Kazakhstan, Tajikistan, Turkey, Uganda and Indonesia – require a higher educational qualification.

Sometimes candidacies are also legally linked to a command of one of the official languages, for example in Sierra Leone (English), Cameroon (French or English) and Djibouti (French or Arabic). At first glance, this is an understandable requirement, but in multi-ethnic states with a great variety of languages, it may be accompanied by the unintentional or deliberate exclusion of certain population groups from the right to stand for election. In line with ODIHR recommendations, recent constitutional amendments abolished the state language proficiency requirement in Georgia. In Kazakhstan, in contrast, candidates for the presidency must be proficient in the Kazakh language, although not all citizens speak it and Russian is also the official language there.

In Kazakhstan, a rule was also introduced in 2017 – completely contradicting international standards – that presidential candidates must have served in the civil service or in an elected government office for at least five years. This requires not only administrative or government experience, but *de facto* loyalty to the regime. Similarly, in Singapore, where presidential candidates must have served as cabinet members or high-ranking government officials, only one candidate met

these strict requirements in the 1999 and 2005 elections.<sup>1</sup> It is also problematic if the granting of the right to vote is linked to the fulfilment of certain obligations, such as compulsory military service, as required of presidential candidates in Turkey.

Ultimately, religion can also play a role: In Iran's theological autocracy, the list of candidates for the parliamentary elections is examined by the »Council of Guardians« – half of which are clergymen – and was cut by almost half in 2016. In the 2020 elections, almost all known candidates from the ranks of the reformers, even the moderate conservatives were excluded from the election. In Argentina's democracy, until the constitutional reform of 1994, there was still the peculiarity that presidents had to belong to the Roman Catholic Apostolic Church and that he or she had to swear his or her loyalty to God and the Holy Gospels. In Indonesia, candidates for the presidency and parliament must profess a religious belief. In many other countries, on the other hand, priests are expressly not eligible for election. In Nicaragua, for example, spiritual dignitaries must have given up their office at least twelve months before the elections in order to be eligible to stand as a candidate. In Thailand, the exclusion of Buddhist clergymen applies not only to the right to vote but also to the right to stand for election.

Until the Electoral Rights Amendment Act 2011, the so-called »Habsburg Article« constituted a real curiosity in Austria. Until then, »members of ruling houses or such families who formerly ruled« were excluded from eligibility for the office of president, thus, prohibiting members of the Habsburg family from running for the Austrian presidency. This restriction was historically determined and dates back to the abolition of the monarchy in Austria after the First World War. Also based on historical experience in Latin America, for example, persons who participated in coups d'état or took over government offices after coups d'état are sometimes excluded from eligibility for election, as is the case in Nicaragua. (Of course, this does not apply to successful revolutionaries there).

In Lithuania, all those who have been removed from public office are banned from standing for life. In Latvia, persons who have worked as paid members of the security forces and secret services of a foreign country or the former Soviet Union are not allowed to stand in parliamentary elections. The same applies to former members of the Communist Party of the Soviet Union or the Republic of Latvia. In 2006, the European Court of Human Rights did not consider the exclusion of former communists to be a violation of the European Convention on Human Rights, but it did call on Latvia to keep the necessity of this provision

1 Cf. Croissant/Lorenz 2018: 269.

under constant review.<sup>2</sup> However, the Latvian Constitutional Court confirmed the constitutionality of the exclusion in 2018.

A *de facto* exclusion of eligibility to stand for election can also result from incompatibility regulations. This is the case when certain categories of persons (e.g. civil servants) whose posts are incompatible with an elected mandate are not only forced to take leave of absence or step down from their position when campaigning or after being elected, but also to resign long before the elections in order to be allowed to stand as a candidate. Strictly speaking, it is then no longer just a question of incompatibility of offices, but already a question of ineligibility. To give an example: In Mongolia – a country that has experienced an astonishing democratic opening – a parliamentary candidacy can fail not only because of debts, previous convictions or failure to complete military service. Civil servants who wanted to run in the parliamentary elections in June 2016 had to resign at the beginning of the election year, i.e. long before the actual candidate nomination.<sup>3</sup> In Sierra Leone, the required period is even longer: there, candidates have to resign from their public offices twelve months before the presidential and parliamentary elections. In Liberia, the period is even two to three years before the presidential elections, depending on rank. Such requirements are contrary to international electoral standards.

In Germany, incompatibility restrictions do not entitle office holders to be excluded from eligibility. For example, civil servants, public sector employees, regular soldiers and judges may in principle apply for a *Bundestag* mandate, but if they are elected, they must choose between office and mandate. Those concerned are able to choose between office and mandate and to keep open the decision to acquire and carry out a mandate.<sup>4</sup> Incompatibilities exist in Germany in this respect, for example between a *Bundestag* mandate and membership of the government of one of the *Länder* or the European Parliament.<sup>5</sup>

## Citizenship and naturalisation

It is widely recognised that election to the national parliament or presidency is linked to citizenship. However, there are subtle differences: In the USA, for example, presidential candidates must not only have US citizenship but must also be »natural born US citizens«. (For this reason, former Governor Arnold Schwarzenegger, for example, a native of Austria, would not be able to run for

2 *Zdanoka v. Latvia* (2016), *Adomsons v. Latvia* (2008).

3 Cf. the ODIHR report on the 2016 parliamentary elections.

4 Schreiber 2017: 60, 359.

5 See in more detail Schreiber 2017: 690 et seq.

the presidency there). Similar rules apply to presidential candidacies in a number of other countries, including the semi-presidential democracies of Finland and Lithuania in Europe. In Mexico and the Philippines, not only presidential but also parliamentary candidacies are reserved for those born as nationals. In Thailand, candidates must be born not only in the country but also in the constituency if they stand for election in that constituency. In Sierra Leone, they must also be of »negro-African origin«. The same applies to citizenship and the right to stand for election in Liberia. As already mentioned, the latter violates international electoral and human rights standards.

Moreover, persons with dual nationality are sometimes denied the right to stand for election, for example in Armenia, Azerbaijan, Bulgaria, Malta and Lithuania in parliamentary elections and in Georgia, Azerbaijan and Ukraine in presidential elections. Such a prohibition now also exists in Tajikistan. Citizens of these countries who were born there but who live abroad, for example, for political reasons, and have since taken on another citizenship, can no longer stand for election. It should be borne in mind that eligibility requirements based on citizenship can also be used to exclude political opponents.

After Frederick Chiluba won his country's competitive elections in Zambia in 1991 against the long-time sole ruler Kenneth Kaunda (1964–1991), thus initiating the democratisation of the country, he prevented Kaunda's candidacy in the subsequent elections in 1996. To this end, he introduced a constitutional reform which stipulated that the parents of presidential candidates must also be Zambian by birth or descent.<sup>6</sup>

Curiously, the question of citizenship has not only been used against former but also incumbent presidents. Thus, before his re-election in 2016, the autocrat Ali-Ben Bongo in Gabon was confronted with the accusation that he was not a native of Gabon as the adopted child of his father, the long-term autocrat Omar Bongo. However, the Constitutional Court, presided over by his mother-in-law, recognised his candidature as being valid.<sup>7</sup>

## Residence requirements for candidatures

It is also not unusual for candidates to be required to be resident in the country. While this makes sense in that they should live in the country whose political destiny they wish to help shape as elected representatives. In terms of the universal

6 Cf. the Zambia contribution by the author in: Nohlen/Krennerich/Thibaut 1999, 939–962, here: 943.

7 *Deutsche Welle*, 27th August 2016. Online at: <https://www.dw.com/de/wahlen-in-gabun-kaum-hoffnung-auf-wandel/a-19485795>.

right to stand for elections, however, the required period of residence should not exceed a certain length, which according to the Venice Commission's *Code of Good Practice* in Electoral Matters should be a maximum of six months (except for the protection of national minorities<sup>8</sup>). In Lithuania and Georgia, however, presidential candidates must have lived in the country for five years, and in Georgia three of those years must have been immediately before the elections. In Azerbaijan, the Republic of Moldova, the Czech Republic and Ukraine, ten years are required, sometimes specified as ten (or ten out of 15) years immediately before the elections. In the United States, the President must have been a resident of the U.S. for at least 14 years. In Kazakhstan it is 15 years, in Myanmar 20 years. The 2020 constitutional reform in Russia even provides for an increase from 10 to 25 years. In Africa, already the 10-year requirement, as it exists in Angola and Liberia, was met with reservations, here by the African Union, which feared that the right to stand for election of some potential candidates could be undermined. In fact, such regulations might be problematic – especially since they can be used specifically against political opponents if they have temporarily settled abroad. In states from which many people have previously fled, they also prevent returnees from participating in the political reconstruction of the country.

### Old enough to be elected?

While in a number of countries, also in Germany<sup>9</sup>, the minimum age for the right to vote and stand as a candidate in parliamentary elections does not differ, in several other countries a higher age is required for parliamentary candidacies, albeit without any explicit justification. This is not only the case in Austria, Malta and Slovenia, where nationals may vote from the age of 16 but may only stand as a candidate from the age of 18. Among the Council of Europe states, Bulgaria, Estonia, Ireland, Latvia, Poland, Russia, San Marino, Slovakia, the Czech Republic, Ukraine and Cyprus require a minimum age of 18 for the right to vote but 21 for the right to stand as a parliamentary candidate. In Romania, the latter requires a minimum age of 23, and in Armenia, Italy, Lithuania, Monaco and, until recently, Georgia the required age is 25. The gap is widest in Greece, where the minimum voting age is 17, but to stand for election candidates must be at least 25.

8 On the protection of minorities, see the decision of the European Commission of Human Rights: *Polacco and Garafalo v. Italy (r. Trentino-Alto Adige)* (1997).

9 In Germany, the minimum age for the right to vote was lowered from 21 to 18 in 1970 – and was first applied in 1972. However, the minimum age for the right to stand for election was not brought into line with that of the right to vote until 1974, when the age of majority was lowered (from 21 to 18).

Also in other regions of the world, the minimum age for election to parliament or the lower chamber is generally between 18 and 25. Exceptions include Jordan with 30 and Tajikistan, where – against the trend – the minimum age has recently been raised from 25 to 30. For senatorial and presidential elections, even stricter requirements exist in respect of the age and thus also the life experience of candidates. In direct presidential elections, candidates throughout the world must usually be at least 35 or 40 years old. France and Finland stand out as exceptions where the minimum age for becoming president is 18. Outside Europe, the lowest age of eligibility for presidential office is probably in Nicaragua, at only 25.

Age restrictions »upwards« are unusual. In Uganda, an age limit of 75 years for presidential candidacies was introduced in 2005, in return for the abolition of the head of state’s limitation to two terms of office. However, Yoweri Museveni Kaguta, who has ruled the country since 1986 and is now an ageing long-term president, had the age limit abolished in a controversial constitutional reform (December 2017), so that he was allowed to stand for office again in 2021. Also in the Republic of Congo (Brazzaville), President Denis Sassou Nguesso, who had already led the country under authoritarian rule from 1979 to 1992 and had his presidency confirmed in non-democratic elections following his return to power (1997), simply had the constitutionally enshrined age limit of 70 years lifted in 2015.

## **Exclusion due to criminal prosecution?**

»The conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.«<sup>10</sup> So what about the eligibility of prisoners, who are already deprived of the right to vote in many places? Indeed, in most countries, whether democracies or electoral autocracies, persons who have committed crimes and are serving prison sentences are not eligible to stand for election. Again, it is important to know whether these are blanket disqualifications or whether they depend on the nature and seriousness of the offence, whether they apply only to those who have been convicted of crimes or also to those on remand in custody, and whether the ban on standing for election continues to apply after the prison sentence has been served.

10 *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, CDL-AD(2002)023rev2-cor-e, 25th October 2018, p. 14.

In Germany, exclusion from the right to stand for election is not only accompanied by an exclusion from the right to vote, which must always be expressly ordered by a court (and extremely rarely occurs) on account of certain offences (high treason, treason of the state, electoral fraud, sabotage, etc.). The right to stand as a candidate is also automatically forfeited for five years as a »side effect« of a court judgement if a person has been convicted of a crime (i.e. has received a prison sentence of at least one year). However, a permanent withdrawal of the right to stand as a candidate, at least beyond the period of imprisonment, requires strong justification. It is true that the legitimacy of elections and the institutions elected may be undermined if the persons standing for election include convicted persons, especially if they have committed crimes which have endangered the democratic community. However, an exclusion from eligibility for election which is based only on the length of prison sentences and continues long after the sentence has been served may constitute a serious and possibly disproportionate interference with the right to stand as a candidate.

In addition, such electoral exclusions can easily be politically abused by criminalising political opponents. In electoral autocracies, criminal proceedings are often instigated against members of the opposition in order to prevent them from running for office. This is particularly the case when the criminal courts are politically influenced, they impose long prison sentences and the criminal records are not deleted for many years – such deletion being a prerequisite for eligibility for election in Belarus, Kazakhstan and Tajikistan, for example. The same applies to Russia. In the 2018 presidential elections there, even citizens with deleted criminal records were not allowed to stand as candidates for another 10 or 15 years, respectively, for serious or extremely serious criminal offences. The rules allow the Russian authorities to exclude convicted dissidents from the elections. In 2018, Putin's strongest opponent, Alexander Nawalny, was also affected by this, so that only six male candidates and one female candidate, all of whom were without a chance, ran against the president. Nawalny appealed unsuccessfully to the Supreme Court against his ban on running for office.

To give examples also from other regions of the world: In Cambodia, opposition leaders – such as Sam Rainsy and Kem Sokha from the »Cambodian National Rescue Party« (CNRP) – have been prosecuted on several occasions and thus excluded from political activities. In Bangladesh, there was a veritable wave of detentions of opposition members before the 2018 elections, apparently with the aim of keeping them out of the elections.<sup>11</sup> In Senegal, neither the popular mayor Dakars Khalifa Sall nor the son of former President Abdoulaye Wade, Ka-

11 Cf. Human Rights Watch 2018.

rim Wade, were allowed to run in the 2019 elections, as they had already been convicted of embezzlement of public funds and corruption. This put two of the strongest rivals of incumbent President Macky Sall out of the race. Some observers believe that the judiciary there was politically selective at the behest of the government.<sup>12</sup>

## Term limits – protection against dictatorships

The terms of office of directly elected presidents are usually four to six years, those of elected members of parliament usually four to five years. Longer terms of office, especially for directly elected presidents, should attract attention. It is no coincidence that countries with officially seven-year terms of office of politically powerful presidents, such as Azerbaijan, Equatorial Guinea, Gabon, Cameroon, the Republic of Congo (Brazzaville) and Rwanda<sup>13</sup>, are governed by authoritarian regimes.<sup>14</sup> This is all the more true if there is no ban on re-election in the countries concerned or if it has been specifically abolished.

In order to prevent long-term dictatorships, many countries prohibit directly elected presidents from standing for re-election after one or two terms of office. Such bans on re-election can be for successive or a fixed number of terms of office. Such restrictions are compatible with international standards, as confirmed by the Venice Commission of the Council of Europe.<sup>15</sup> Moreover, in a number of countries, such bans on re-election are stipulated in the constitution. These include (still) a number of Latin American states where direct re-election is not possible (e.g. Chile, El Salvador, Guatemala, Mexico, Panama, Paraguay, and Uruguay). In El Salvador, the ban on re-election is even linked to a constitutionally guaranteed right of resistance. In Costa Rica – just like in Mexico until 2014 – there is also the peculiarity that members of parliament may not be re-elected directly, but only after a term of office has expired. In Latin America, the ban on direct re-election has traditionally served to protect against dictatorial practices of rule, but it can also impair the continuity of – ideally successful – government policy. From this point of view, however, a limitation to two successive terms of office would seem more appropriate, as is possible in Argentina, Brazil or the USA

12 Cf. Riedl/Samba Sylla 2019: 96 et seq.

13 In Rwanda, although the 2015 constitutional reform has now reduced the term of office of the president from seven to five years, the constitutional reform will not enter into force until 2024.

14 In Ireland's democracy, although the term of office is also seven years, the presidency there has very little political power.

15 CDL-AD(2018)10.

(even if, in view of the presidents Jair Bolsonaro and Donald Trump, the argument may not be that convincing for the time being). Finland and France, to cite two European examples, have introduced such a rule.

If such term restrictions are lifted or circumvented, it is important to carefully examine whether they are based on authoritarian strategies to maintain power. In Venezuela, a constitutional referendum in 2009 enabled the populist Hugo Chávez, who won four presidential elections in total, to be re-elected indefinitely. Daniel Ortega in Nicaragua followed in his footsteps. During the Sandinista revolutionary regime, Ortega had already held the elected presidency between 1985 and 1990. After his election in 2006, he was able to be re-elected in 2011 and 2016. Prior to that, he had successfully appealed to the Supreme Court against the ban on re-election and finally achieved unlimited re-election by way of a constitutional reform in 2014. Both countries drifted into authoritarianism. In the neighbouring country of Honduras, too, the Supreme Court there ruled in 2015 that the constitutional ban on re-election<sup>16</sup> was not applicable, so that the incumbent president Juan Orlando Hernández was able to run again in the 2017 elections. In Ecuador, the constitutional reform of 2015 allows an unlimited number of re-elections of the president from 2021 onwards – after former president Rafael Correa was denied re-election in 2017. In Paraguay, President Horacio Cartes did not abandon the plan for re-election in 2017 until after strong protests from the citizens. Evo Morales, who governed Bolivia from 2005, had, however, with the help of the Constitutional Court, bent the constitution to be able to run in the presidential elections in 2019 for the fourth time in a row, thus ignoring the result of a constitutional referendum in 2016 not to remove the term of office restriction. However, he failed in his attempt to be declared the winner in the first round of voting. As a result of mass protests against alleged electoral fraud and at the instigation of the military, he resigned.

The Venice Commission also argued that there was a danger of autocratic development when it welcomed the restriction on the term of office in Kyrgyzstan and criticised its removal in Belarus and Azerbaijan. After Belarusian President Lukashenko, elected in 1994, had already extended his five-year term of office to 2001 in 1996 by means of a constitutional referendum (recalculated when the constitutional reform came into force), he had the constitutional restriction to two terms of office lifted in 2004 by means of a new referendum. In 2015 he was elected for the fifth consecutive term. In Azerbaijan, Ilham Aliyev held a referendum in 2009 and took up his fourth term of office after the 2018 elections.

<sup>16</sup> Article 4 of the 1982 Constitution stipulates that a change in the exercise of the office of president is obligatory.

Vladimir Putin took a more subtle approach in Russia: After two successive terms of office between 2000 and 2008 as elected president, he took over as prime minister between 2008 and 2012, leaving Dmitri Medvedev with the presidency. Afterwards, the two switched positions in office and Putin was able to have himself re-elected as president in 2012 and 2018 in accordance with the constitution. The constitutional reform of 2020 now allows him to run for re-election in 2024 and 2030. The presidents in the Central Asian autocracies of Tajikistan, Turkmenistan and Uzbekistan, on the other hand, are now allowed unlimited re-election – unlike in Kyrgyzstan. In 1999 in Turkmenistan, the parliament even appointed the then president for life, almost »in a North Korean manner«. <sup>17</sup> However, he passed away in 2006. In the Far Eastern Philippines, where the president is also directly elected, it remains to be seen whether Duterte really will not run for re-election in 2022, in accordance with the constitution. <sup>18</sup> After all, he has a comfortable parliamentary majority behind him for a constitutional amendment. As in Indonesia, for instance, the term of office is still limited to two terms.

In sub-Saharan Africa, the introduction of multi-party elections in the 1990s led to re-election bans in the majority of countries, including in a number of electoral autocracies. Posner and Young showed »... that of the thirty-six heads of state that faced a two-term limit between 1990 and 2015, twenty accepted the limit and voluntarily retired, while sixteen either ignored the provision or attempted to amend the constitution to permit the continuation of their rule.« <sup>19</sup> Of these sixteen, eleven were successful and five failed in their efforts. Positive examples include Ghana, where since the reintroduction of multi-party elections in the 1990s there have been several changes of government, including a change of power by election, and Namibia, where the presidents of SWAPO, which has been in power since 1989, have adhered to the term limits. Even the incumbents in Angola, Mozambique and Tanzania have observed the ban on re-election after two terms of office, despite all the restrictions on political rights. Attempts to lift the ban on re-election have failed in Zambia, for example, where after two successful elections (1991, 1996) Frederic Chiluba tried unsuccessfully to amend the constitution to allow him to run for a third term. In Burkina Faso, mass protests in 2014 prevented the attempts of long-time president Blaise Compaoré to obtain a further term of office through constitutional reform. There, a new president, Roch Marc Kaboré, was elected in 2015, and re-elected in 2020. A new draft constitution provides for a limitation to two consecutive terms of office. This was also introduced in Côte d'Ivoire in 2016 by constitutional reform.

17 Hartmann 2006: 246.

18 For example, Thompson 2019: 150.

19 Posner/Young 2018: 261.

Even in Togo, the parliament adopted an amendment to the constitution in 2019 that provides for a limitation to two terms of office (which was abolished in 2005), but this does not apply retroactively. President Faure Gnassingbé, who has been in power since 2005, could be re-elected in 2020 and may run again in 2025. The Gnassingbé family, which has ruled the country for over 50 years (as the longest dynasty in Africa), will thus continue to rule. As in Burundi (2015), other autocrats simply ignored the ban on re-election despite all the protests, or, as in Uganda (2005), Congo-Brazzaville, Rwanda (both 2015), and Guinea (2020) removed it by constitutional reform. The presidents there are already celebrating their third and fifth (elected) terms of office respectively. In Chad, too, Idriss Déby has now begun his fifth term of office following the 2016 elections. In Cameroon, a ban on re-election was and is not even in sight. Paul Biya, the long-term president there since 1982, was first elected in single-party elections (1984, 1988) and then in non-democratic multi-party elections (1992, 1997, 2004, 2011, 2018). In North Africa, Egyptian President Fattah al-Sissi, who was elected in 2014 and 2018 with (a suspicious) 97% of the vote in each case, only recently lifted the constitutional ban on re-election after two terms of office. A constitutional reform, adopted in a referendum in April 2019, extended his second term of office, which was supposed to end in 2022, by two years and allows him to be re-elected for another six years.

It could now be argued that in Germany, too, former chancellors were sometimes in office for a very long time and the current chancellor is no exception. Konrad Adenauer (1949–1963) served for 14 years, Helmut Kohl (1982–1998) even for 16 years, and Angela Merkel (since 2005) will also have served for 16 years at the head of government, if she remains in office until 2021. Indeed, such long periods of government are worth a critical discussion. However, heads of government in parliamentary systems already differ from directly elected presidents in presidential systems in that they are always dependent on the trust of parliament and *de facto* also on the parties and party alliances that support them. They can also be removed at any time for political reasons, in Germany for example by means of a constructive vote of no confidence. As long as the parliaments in parliamentary systems fulfil their democratic electoral and control functions, an analogy to re-election bans in presidential systems is therefore not appropriate.<sup>20</sup>

In contrast, presidential systems are characterised »during normal operations« by the fact that the presidents have independent legitimacy, i.e. they do not depend on a parliamentary majority and cannot be removed from office by parliament, except through a procedure of impeachment. However, such an impeach-

20 See also: CDL-AD(2018)010

ment procedure usually requires qualified parliamentary majorities and should only be used in exceptional situations (e.g. abuse of office) – even though it has admittedly been used to remove the president in Latin America on several occasions.<sup>21</sup> But even there it represents an extraordinary attempt to overcome a political crisis by way of a (constitutionally sometimes controversial) application of an institutional control procedure. Moreover, there is rarely the possibility of recall referendums, which are briefly discussed at the end of the book. In combination with the often significant power of presidents as heads of state and government in presidential systems, bans on re-election serve to prevent a long-term concentration of power.

Finally, one minor peculiarity should be pointed out: Since it can be a clever manoeuvre to have family members elected to the highest offices in order to secure power within the family or to circumvent re-election bans, there are nepotism clauses in some countries. In Guatemala, for example, the spouse of a current or former president is not allowed to run for office. Only after her divorce from former president Álvaro Colom (2008–2012) was Sandra Torres able to run in the 2018 presidential elections there, albeit without success. In contrast, in Argentina, for instance, Nestór Kirchner (2003–2007) and his wife Christina Fernández de Kirchner (2007–2015) alternated in the presidential office not so long ago. Fernández Kirchner was also re-elected as Vice-President in 2019. Indeed, in many states around the world, elections are virtually »family affairs«. These include democracies like India and especially numerous autocracies. In Tajikistan, to name just one example, President Rahmon has placed his entire family in influential positions to secure his legacy – and his impunity.

## The admission of political parties

It is essential for democratic elections that people who have the right to stand for election are *de facto* able to become electoral candidates. In national elections, and especially parliamentary elections, they are usually organised in political parties or supported by voters' initiatives. The right to stand for election is therefore closely linked to freedom of association. Voters must be able to organise themselves freely in political parties and voters' associations.

Prior to the actual registration of parties for election, the question arises as to the legal status of political parties in the respective countries and the conditions under which they are recognised. Usually, democracies (and formally many electoral autocracies) have not only constitutionally guaranteed freedom of associa-

21 Cf. Krennerich 1999, Pérez-Liñán 2007.

tion, but many constitutions now also make explicit reference to political parties. The process of such »party constitutionalisation«<sup>22</sup> has – with just a handful of exceptions such as Belgium, Denmark, Ireland and the Netherlands – covered most European countries. However, the constitutions differ considerably in the extent to which they refer to parties. While the constitutions of some states only briefly mention parties (e.g. Iceland, Latvia), elsewhere (e.g. Portugal, Greece) they contain numerous provisions on them. Among the »early starters« of the constitutionalisation of political parties in Europe (Iceland, Austria, Italy, Federal Republic of Germany), the German Basic Law specifically clearly enshrines political parties. »Political parties shall participate in the formation of the political will of the people« is the first sentence of Article 21 (1) of the Basic Law, which is followed by a number of general regulations for parties. What is striking is that, particularly in European states with an authoritarian or totalitarian past, many constitutions already emphasise the importance of political parties for democratic principles such as participation, pluralism and popular sovereignty.<sup>23</sup>

Party laws<sup>24</sup> are also a comparatively recent phenomenon around the world.<sup>25</sup> Here the Political Parties Act (1967) of the Federal Republic of Germany played a truly pioneering role, even if it was not the first of its kind in the world. Credit for this is probably due to the *Ley de Partidos Políticos, Reuniones Públicas y Manifestaciones* (1964) in Venezuela.<sup>26</sup> Similar to the »constitutionalisation« of political parties, the number of party laws in Europe increased, especially during the independence and democratisation processes in Eastern and Central Europe. However, not all democracies (or electoral autocracies) in Europe and other regions of the world have their own laws on political parties. This is not necessarily essential for a functioning democracy, however, as long as necessary provisions, for example on party and election campaign financing, are statutorily regulated elsewhere, it is guaranteed that people are allowed to organise themselves freely in political parties, and that political parties can effectively participate in the democratic decision-making process. Pluralistic party competition, especially in elections, should be guaranteed and should not be unduly restricted either *de jure* or *de facto*. Lean party laws can even be advantageous in this respect, because party laws not only contain rights which enable political parties to be founded and

22 By »party constitutionalisation« van Biezen (2014: 94) understands the explicit reference to political parties, whether as direct or indirect subjects, in national constitutions.

23 Van Biezen 2014: 103 et seq.

24 This refers to designated party laws in the narrower sense, and not to legal regulations on parties that can be found in other laws.

25 Cf. Karvonen 2007 and for Latin America: Bareiro/Soto 2019a.

26 Cf. Casal Bértoa et al. 2014: 122.

operate freely, but usually also rules which can be used to prevent parties from being registered or even banned.

The requirement that political associations must register in order to obtain legal status as a political party is not in principle a violation of freedom of association. Such a requirement is particularly useful where political parties enjoy legal privileges, for example in connection with elections, and receive state subsidies which other associations do not receive. However, registration conditions must be procedurally and substantively appropriate. In particular, the grounds for non-recognition of parties must be defined in a legally binding way and must pursue legitimate objectives.

In the Federal Republic of Germany, as the »heartland of Party Law«<sup>27</sup>, the Political Parties Act confirms that the parties are »integral to the free democratic basic order and required under the Constitution« (section 1 (1), first sentence). At the same time, the Basic Law also requires the parties to ensure that their internal order conforms to democratic principles and that they publicly account for the origin and use of their funds and assets. In accordance with the wording of the Basic Law, they may not, either in their objectives or in their conduct, impair or eliminate the free democratic basic order or endanger the existence of the Federal Republic of Germany. The Political Parties Act recognises as parties only those »associations of citizens which, on a continuing basis or for a longer period of time, wish to influence the development of informed political opinion at the federal level or in any of the *Länder* and to participate in representing the people in the German *Bundestag* or a *Land* parliament (*Landtag*), provided that they offer a sufficient guarantee of their sincerity in pursuing that aim, as evidenced by their actual overall situation and standing, especially as regards the size and strength of their organisation, their membership numbers, and their visibility in public.« (section 2 (1)). According to the Political Parties Act, foreign nationals may be party members, but they may not form the majority of members or the party executive, if the association is to be recognised as a party. Furthermore, the association may not have its registered office or its management outside Germany. An association loses its legal status as a party if it has not participated in a *Bundestag* or *Landtag* election for six years with his own election nominations or if it has not submitted accountability statements for six years. Furthermore, the Political Parties Act contains a number of provisions, which for example concern internal order, the nomination of candidates and accountability.

27 Müller/Sieberer 2005: 435.

The constitutions, party laws or other registration rules for political parties within and outside Europe<sup>28</sup> often cover similar areas, but they tend to differ considerably in terms of content, scope and the degree of regulation. This starts with party labels. For example, party names that are similar to existing names or those that incite violence or racism in their name may be expressly prohibited.<sup>29</sup> Certain symbols, such as those of a national or religious nature, are also sometimes not permitted. In some countries, such as Albania and Bulgaria in Europe, »ethnic parties« are prohibited. Elsewhere, such as in Romania and Hungary, parties of national minorities are explicitly permitted by law.<sup>30</sup> Usually, parties must also submit their statute and programme. These may include guidelines on the internal structure of the party, its members and its decision-making processes. As in Germany, a democratic internal structure is required in the Czech Republic, Spain, Poland and Portugal. The same applies to a number of Latin American states, some of which make internal party elections compulsory.<sup>31</sup>

In many democracies throughout the world, political parties are also required to make a programmatic commitment to democracy, and anti-democratic orientation is prohibited. Often, the recognition of parties is also subject to the condition that they do not propagate hatred or violence and do not endanger constitutional order or national unity. Furthermore, the legal status of political parties is often dependent on them competing in elections, obtaining a minimum number of votes or proving they have a certain number of members or supporters. In some cases, this is accompanied by proof of a certain geographical presence in the country in order to counteract regionalism and promote national parties. Possible economic requirements, on the other hand, concern – in addition to the payment of registration fees – for example accountability obligations or the prohibition of foreign support. Foreign financing and exceeding income or expenditure limits during election campaigns can lead to the withdrawal of legal party status in some countries.

While the legal provisions governing parties can be either liberal or restrictive to a different extent, this is even more true of the application of such laws. Excessively strict or provisions notably open to interpretation may have been used to restrict party competition inadmissibly. For instance, the regulations in

28 For Latin America in detail: Bareiro/Soto 2019a.

29 However, in the case of the Communist Party of Turkey, the European Court of Human Rights ruled that an inappropriate name was not sufficient to justify a party ban; *United Communist Party of Turkey and Others v. Turkey* (1998).

30 See Rashkova/Spirova 2014 and the chapter on representation of national minorities. Nor should this hide the fact that the Roma minorities in both countries are otherwise subject to massive discrimination.

31 For Latin America in detail: Freidenberg 2019.

Rwanda, which is governed by Paul Kagame with a firm hand, are susceptible to abuse. Following the 1994 genocide, political parties there are banned »from basing themselves on race, ethnic group, tribe, lineage, region, sex, religion or any other division which may lead to discrimination«.<sup>32</sup> In addition, the provisions of the Political Parties Act, which are subject to considerable interpretation, make it possible to prohibit parties there, for example if they damage Rwanda's image, express themselves in a discriminatory manner, promote intolerance in their speeches or represent a »genocide ideology«.<sup>33</sup>

## Party bans – only with good reasons

Party bans in the narrower sense are more far-reaching than the non-granting or withdrawal of party registration. They concern not only the legal status of the parties, but their entire existence. Whereas in the former autocracies all parties (with the exception of the regime party) were often banned, party bans are applied far more selectively in today's electoral autocracies. Autocratic rulers often cite reasons which can also be used in democracies as the legal basis for party bans, such as the threat to peaceful order and national unity posed by extremist parties. In Tajikistan, for example, various opposition parties have been banned as extremist and terrorist organisations in recent years.<sup>34</sup> However, in autocracies, such bans usually do not meet any test of proportionality, and the reasons are often put forward to prevent even peaceful criticism of the regime.

Cambodia provides us with a clear example of a legally obtained but politically motivated ban on political parties. In 2017, Prime Minister Hun Sen, in office since 1985, had the law on political parties amended. As a result, all those political parties that allegedly incite national disintegration and undermine liberal multi-party democracy can be dissolved. A further amendment to the law prohibited parties from using »the voice, image, written documents or activities« of a person convicted of a criminal offence and from supporting conspiratorial plans of persons who stand against the interests of the Kingdom of Cambodia. In November 2017, the Supreme Court subsequently disbanded the main opposition party, which had won 55 of 123 parliamentary seats in 2013. Although 19 opposition parties participated in the 2018 elections, no serious opposition took part and the ruling party won all 125 seats. According to Morgenbesser (2019), this sealed

32 Art. 7 (1), Organic Law N°10/2013/OLOF 11/07/2013 Governing Political Organizations and Politicians, Official Gazette no Special of 12/07/2013.

33 Ibid. Art. 39.

34 Cf. the ODIHR report in the run-up to the 2020 parliamentary elections.

the deal on the move from a »competitive authoritarianism« to a »hegemonic authoritarianism«. <sup>35</sup>

In view of the authoritarian practice of banning unpopular parties, it is all the more important, particularly in democracies, that the justification and proportionality of party bans – as the most serious encroachment on the right to freely associate in parties – be subject to particularly strict scrutiny. In Europe, there is a common democratic legacy that political parties are not prohibited and dissolved, except in very exceptional cases. The European Court of Human Rights in its case-law has established that prohibiting and dissolving political parties must fulfil the following requirements: 1) The measures must be exceptional, justified only in extreme cases of advocating the use of violence and endangering the democratic political order or citizens' fundamental rights. 2) The measures must be proportionate to the aim pursued, being a last resort, and less radical measures should be taken, if possible. 3) The measures must not be used arbitrarily and meet judicial guarantees of fair and due process. Taking into consideration the fundamental role of political parties in the functioning of a democracy, these principles are also reflected in Council of Europe resolutions and reports. <sup>36</sup>

In the Federal Republic of Germany, only the Federal Constitutional Court (at the request of the *Bundestag*, the *Bundesrat* or the Federal Government) can decide on the unconstitutionality of a party, and thus a party ban. The requirements are, however, very strict: for a ban to be imposed, proof must be furnished of an aggressive, combative attitude towards the fundamental principles of the free democratic basic order of the Federal Republic of Germany and of active actions which aim to eliminate this basic order. In the history of the Federal Republic of Germany, the Federal Constitutional Court has so far issued two party bans, namely against the Socialist Reich Party (SRP) in 1952 and against the Communist Party of Germany (KPD) in 1956. <sup>37</sup> National Democratic Party (NPD) bans have not yet been successful. The NPD judgment of 2017 emphasised that the objectives of a party alone are not sufficient, but that it is specifically the fact that its actions pose a real threat that counts. <sup>38</sup>

Most other European countries have also adopted legal measures to ban political parties which pose a serious threat to public peace, democratic order or the unity of the state. In a number of cases, such parties have also been banned. In some cases, these reflected a break with the totalitarian or authoritarian past: in

35 The term »competitiveness« has been used here in the sense of the existence of party competition, but not – as in this book – as an expression for democratic elections.

36 See the documents quoted in the Venice Commission compilation: CDL-PI(2016)003.

37 BVerfGE 2,1; BVerfGE 5, 85.

38 BVerfG judgment from 17th January 2017–2BvB 1/13.

Austria and Italy, National Socialist parties were banned after the Second World War and later corresponding proceedings to ban individual successor parties were conducted or envisaged. In Norway, Belgium and the Netherlands, bans affected some parties that had cooperated with the Nazis and later (in the latter two countries) other extreme right-wing parties. Individual far left parties were banned in Greece, France and Romania. The post-communist states of Latvia, Lithuania, Moldova and Ukraine banned pro-Soviet communist parties in 1991 because they saw them as a threat to the consolidation of the newly independent states. In Croatia a Serbian party was banned in 1995. Secessionist tendencies were countered by the banning of a party belonging to the Macedonian minority in Bulgaria (2001) and the banning of two parties in Ukraine (2014), which advocated the (partial) integration of the country into the Russian Federation. Accusations of supporting separatist and/or terrorist organisations led to the banning of individual parties in France, the UK and Spain. In Turkey in particular, however, a number of parties were and are banned because they allegedly promoted Kurdish nationalism or terrorism and threatened national unity. A number of judgments of the European Court of Human Rights have found that the bans there constitute a violation of the ECHR.<sup>39</sup>

## The electoral registration of candidates and parties

Even if there is some overlap between the registration rules for the recognition of parties and for the participation of parties in elections, the two processes must, systematically speaking, be kept separate. Accordingly, the number of parties registered and the number of parties admitted to elections is often not identical. As in the case of party registration, there are a number of similarities but also a number of differences between countries as regards admission to elections.

For example, even democratic states already differ in whether political parties have a monopoly on the nomination of candidates, as is still the case in Latin America, for example in Argentina, Brazil, Costa Rica and Uruguay, while in other countries in the region, including Bolivia, Chile, the Dominican Republic, Honduras, Colombia, Panama and Paraguay, such a monopoly has now been broken, in Paraguay even on the basis of a Supreme Court ruling. More and more Latin American countries are allowing independent candidacies for presidential and/or parliamentary elections, although they differ as to whether they are allowed to

39 *Socialist Party and Others v. Turkey* (1998); *Freedom and Democratic Party (ÖZDEP) v. Turkey* (1998); *Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey* (2002); *HADEP and Demir v. Turkey* (2010); *Party for a Democratic Society (DTP) and Others v. Turkey* (2016).

run themselves (*candidatos independientes*) or must be drawn up by voters' associations (*candidatos no partidarios*).<sup>40</sup> The advantages and disadvantages of a party monopoly on running for office are controversial in the region: While on the one hand the breaking up of the monopoly is seen as creating a risk that political parties and their representativity are weakened (even more), on the other hand reference is made to the right to stand for election, the use of which should be possible even without party affiliation. In 2008, in the case of *Castañeda Gutman v. Estados Unidos Mexicanos*, the Inter-American Court of Human Rights held both variants to be compatible with the American Convention on Human Rights. In the Republic of South Africa, in contrast, the Constitutional Court recently declared the Electoral Act of 1998 unconstitutional to the extent that it requires that citizens may be elected to the National Assembly (and Provincial Legislatures) only through their membership of political parties.<sup>41</sup>

ODIHR Election Observation Missions are also calling for individuals to be allowed to stand as candidates in national elections. They can refer to the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* from 1990. In this document, the CSCE/OSCE states undertook to »respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination« (paragraph 7.5). Depending on the electoral system, however, independent candidacies of individuals may be unlikely to win parliamentary seats.<sup>42</sup> In a proportional election with closed party lists in large constituencies or at the national level, for example, individual candidates have virtually no chance of being elected. In countries where parliamentary mandates are allocated in whole or in part to single-member constituencies (or small multi-member constituencies), however, non-partisan candidacies by individuals will be more reasonable.

This is especially true for presidential elections, where individuals are elected. Here too, functional aspects, according to which it makes sense for presidential candidates to be able to rely on nominations by parties or electoral alliances and thus on their political backing, can conflict with the right to stand for election. In this sense, the EU Election Observation Commission recently recommended that El Salvador, for example, allow independent nominations for the presidential elections.<sup>43</sup> Even where parties have a monopoly on running for office, this should not be applied too strictly. The regulation is particularly restrictive and problematic in Indonesia: after the 2019 presidential and parliamentary elections

40 Cf. Fernández Segado/Cuéllar/Rodríguez R. 2019.

41 Constitutional Court of South Africa, Case CCT 110/19, 11 June 2020.

42 See the chapter on electoral systems.

43 See the EU EOM press release on the 2019 presidential elections in El Salvador.

were held together for the first time, only parties or party coalitions that achieve at least 20% of the parliamentary mandates or that achieved 25% of the votes in the *previous* parliamentary elections are allowed to nominate presidential candidates. Conversely, however, it is also problematic if the electoral law only allows non-partisan candidates to stand as candidates, as is the case in the elections in Singapore, for example.

In many cases, the parties and persons running in elections must show a certain degree of support by citizens. While such proof is often no longer required from parties represented in parliament, extra-parliamentary parties often require a certain number of signatures from eligible voters. However, according to international electoral standards, the required number should not be too high in order not to create unacceptable obstacles to election applications. One percent of the electorate at the national or constituency level is the limit set – admittedly arbitrarily – by the Council of Europe’s Venice Commission, for example.

It is controversial, however, whether voters may only sign on one or on several support lists at the same time. Endorsing a candidate’s or party’s effort to stand for election, however, is not the same as voting for that candidate or party. It rather strengthens the pluralistic nature of elections. Thus, it is in line with international good practices that a voter can sign in support of more than one candidate or party. Otherwise, political pluralism might be limited and voters’ privacy might be affected, as authorities would have the possibility to check their political affiliation. Thus, the ODIHR and the Venice Commission have repeatedly recommended removing the provision restricting citizens to being able to sign the nomination papers of only one candidate, for instance, in Bulgaria, Denmark, the Republic of Moldova, Montenegro and Serbia. The same provisions exist, for instance, in Belgium and Norway. In Azerbaijan, inconsistently, voters could not support more than one candidate to run in the presidential elections (of 2018), while they were allowed to do so in the parliamentary elections (of 2020).

In some countries, the required number of signatures is higher than one percent, such as in Montenegro, where signatures of 1.5% of registered voters are required for presidential candidacies, or, to provide some Latin American examples, as is the case in Peru, Ecuador and Venezuela, where between four and five percent of registered voters are earmarked for independent candidacies. In order not to undermine the right to stand for election, it is often advisable to lower the candidacy requirements. In Russia’s already restrictive registration process, where around 109 million voters were registered in 2018, the necessary number of signatures in support of presidential candidacies was reduced, for example, from two million to 300,000 for self-appointed candidacies and to 100,000 for candidacies from extra-parliamentary parties at the instigation of the ODIHR in May

2012. Candidates of parties represented in parliament, however, did not require any corresponding proof. From the perspective of universal suffrage, however, excessive differences in requirements between parliamentary and non-parliamentary parties are problematic, even if this is intended to ensure that candidates enjoy a minimum level of social support.

This is all the more true when considering that the verification of support signatures is not only time-consuming but also susceptible to abuse. This is particularly the case if not all, but only a percentage of signatures required by the electoral law are verified and the entire list is nullified if a certain percentage of signatures is found to be invalid. In view of often incomplete information or other minor technical errors on the signature lists, this can quickly lead to disqualification from running for office and can be abused by autocratic rulers to »structure« the election competition in their favour. Thus, provisions should be made to allow for the correction of any formal or minor errors in the nomination and registration process. As for the presidential elections of 2018 in Azerbaijan, for instance, the law did not foresee the possibility of nominees to address such shortcomings. Also in the case of the 2019 parliamentary elections in the Republic of Moldova, ODIHR electoral observers criticised the fact that the law did not allow for the re-submission of signatures to correct errors, even if the period of candidate registration was still open. Over 10% of the total of candidate applications in single-member constituencies were rejected due to various signature irregularities, there.

The planned presidential elections in Algeria in July 2019 represent a unique case. After the long-term ruler there, Abdelaziz Bouteflika, had resigned due to mass protests, the elections scheduled by the »Algerian Constitutional Council« for 4th July 2019 had to be postponed as only two (hardly known) candidates had registered their candidacy, and neither of them was able to provide the necessary signatures. The problem was, however, less to do with the excessively high candidacy requirements, namely the support of 60,000 citizens or 600 officials. Rather, a section of the population rejected an election under the aegis of the old elite. Accordingly, protests were held during the repeated elections in December 2019, in which five candidates, all of them confidants of the former ruler, ran for office.

In any case, it should be remembered that with their signature voters reveal which persons or parties they support. This can be problematic, especially in authoritarian contexts. An alternative, as practised in a number of states, is that candidates and parties do not present support signatures, but have to pay a non-refundable fee or (much more often) a deposit, which they receive back if they obtain a specified minimum number of votes. This is also to ensure that the can-

didature is serious and not a »fun candidature«. As it avoids the problems of support signatures, this procedure is sometimes preferred by international election observers. However, the possibility of running for office then becomes dependent on financial possibilities and not on political support. Therefore, the fee or deposit should not be too high, neither should the share of votes needed for the deposit to be returned.

In Sierra Leone, however, for example, the fees for candidacies are so high that, combined with the unequal financial resources of parties and candidates, they obviously favour large parties, wealthy individuals and men.<sup>44</sup> The same applies to some other countries, such as Lebanon. Especially high deposits are also required in Malaysia and Singapore.<sup>45</sup> To make it easier for women to run for office, Malawi has taken interesting measures: There, the fees for female candidates were reduced by 50%. A local grassroots campaign (»50–50 campaign«) also reimbursed women in some constituencies.<sup>46</sup> In contrast, the candidacy requirements are particularly low, for example, in the United Kingdom, Ireland and Malta. In Malta, a candidature for the parliamentary elections in 2016 required the support of only four people in the constituency and a deposit of 90 Euros; in the United Kingdom, the 2019 parliamentary elections required the support of ten registered voters and a deposit of 500 British pounds, in Ireland in 2020 the requirement was 30 voters and a deposit of 500 euros.

The decision on whether the conditions for the registration of candidates and parties for elections are met is usually taken by the electoral authorities, although the decision is or should be open to judicial review. However, in countries where the electoral authorities and courts do not operate professionally or cannot make independent decisions, politically motivated disqualifications from running for office can easily be the result. With regard to the conditions of the right to stand as a candidate and the admission of candidates, electoral autocracies often severely restrict electoral competition long before election day. Russia is a convincing example of this. This was confirmed once again by the local and regional elections in 2019, in which a number of people who wanted to run were not allowed to stand due to alleged formal errors. Until recently, political competition has been much more limited in Belarus. In the early parliamentary elections there in 2019, even the only two female opposition politicians in parliament were denied a new candidacy – officially also because of »formal errors«. The restrictive admission of candidacies already ensured in the run-up to the elections that the parliament

44 See the EU report on the 2018 elections in Sierra Leone.

45 Barnes, Jordan: »Malaysia's elections process explained«, *malaymail*, 23rd March 2018, and Croissant/Lorenz 2018: 269.

46 See the African Union report on the 2019 elections in Malawi.

was fully staffed with members loyal to the regime. There was no longer any need for electoral fraud on election day. However, the situation was somehow different in the 2020 presidential elections, in which several candidates, among them opposition leader Serge Tikhanovski, were denied the possibility to stand for election after being arrested. His wife, Svetlana Tikhanovskaya, ran as the main opposition candidate, and widespread fraud was necessary to ensure the victory of President Lukashenka with officially 80% of the vote.

Sometimes candidates are also de-registered. Electoral authorities can cancel registrations even shortly before the elections, because of actual or alleged violations of the electoral law. This may involve, for example, allegedly false information concerning the assets and income to be disclosed, or alleged violations of election campaign rules. It can also happen that candidates who have already registered withdraw following intimidation and threats. In northern Kosovo, for example, according to international observation missions for the 2017 elections, Kosovo Serbs intimidated individual candidates and urged them to withdraw their candidacy and not to stand against the *Spraska Lista*, which was supported by the Serbian government in Belgrade.<sup>47</sup> However, it can also be a »strategic withdrawal«, as in the Hungarian parliamentary elections of 2018, where a total of 194 opposition candidates withdrew their candidacy in the single member constituencies shortly before the elections in order to enable a common front against the ruling party. The deadline for this was only one day before the elections. The names of those who withdrew their candidacy had to be struck off the ballot papers and published on posters at polling stations to inform the electorate.<sup>48</sup>

One curiosity should also be mentioned: while in a number of countries voter registration and/or voting is compulsory, there is usually no obligation to register as a candidate or even to be elected. A most unusual exception to this can be found in Norway: There, a person who is entitled to vote (and who is not disqualified or exempt) is obliged to accept both nomination and election. While this provision is accepted as a tradition tied to civic duty and, in practice, largely obsolete, it is still in the electoral law.

47 Cf. the EU Election Observation Report on the elections in Kosovo.

48 Cf. the ODIHR report on the 2018 parliamentary elections.

# CONSTITUENCY BOUNDARIES, EQUALITY OF VOTES AND GERRYMANDERING

Where parliamentary seats are allocated to constituencies<sup>1</sup>, the drawing of boundaries is important for the equality of the vote. In order to ensure that each vote counts the same and that candidates do not require very different numbers of votes to win seats depending on the constituency, it is necessary to ensure that the ratio between the number of inhabitants/voters and the number of seats in each constituency is as equal as possible.<sup>2</sup> This requires regular adjustment of constituencies to population trends. Problems arise if such a review and adjustment is not carried out: In Grenada, for example, the last constituencies redrawing took place in 1974, which formed the basis for the nine elections held until 2018.<sup>3</sup>

According to the Council of Europe's *Code of Good Practice in Electoral Matters*, the maximum deviation (from the allocation criterion) should not exceed 10% and in no case 15%, and constituency adjustments should be made at least every ten years – preferably outside election times (to reduce the risk of political manipulation). However, in a number of countries, both within and outside Europe, there is a malapportionment, i.e. an imbalance between the number of voters and seats in the respective constituencies. In the 2019 parliamentary elections in Spain, for example, the population in more than 30 constituencies deviated by more than 15% from the average. In Turkey, in 2018, with an average of 93,871 re-

- 1 This applies not only to plurality/majority voting systems, but also to PR in multi-member constituencies and mixed-member systems; see the chapter on electoral systems.
- 2 It should be noted that all the votes should count in the same way («count value»). They do not necessarily lead to the same success («success value»), which varies according to the electoral system. In plurality or majority systems, for example, all those votes that were not cast for the winner in the respective constituencies are ultimately disregarded when it comes to the allocation of mandates. Even in proportional representation systems, the distribution of mandates does not take into account the votes for those parties that fall under the legal threshold clauses or do not overcome the «natural thresholds» that result from the size of the respective constituencies. Only in «pure proportional representation» – a rather rare phenomenon – where the mandate is ultimately awarded on the basis of the total national vote (and thus in the national constituency), is there, as far as mathematically possible, an equal success value of votes.
- 3 See the OAS report on the 2018 elections there.

gistered voters per constituency, the numbers in the constituencies ranged from 32,145 to 117,301.<sup>4</sup> Even more unequal is the value of votes counted in Malaysia. In the 2018 parliamentary elections, the largest single member constituency had nine times as many eligible voters per mandate as the smallest single member constituency. However, attempts to create constituencies of as equal a size as possible can also harbour considerable potential for conflict. As discussions in the UK show, even if independent and impartial Boundary Commissions are responsible for boundary reviews, boundary changes always have partisan effects that are hotly debated.<sup>5</sup>

In some other states, the (re-)drawing of constituencies is even more conflictual. Gerrymandering is particularly problematic. It consists in the manipulative drawing of constituency boundaries in favour of a particular party. Such allegations have been made, for example, with regard to the parliamentary elections in Malaysia and Singapore<sup>6</sup> and also in Hungary.<sup>7</sup> In the course of a fundamental reform of the electoral system, the Orbán government there had apparently used the redrawing of boundaries specifically for its own benefit. In the USA, too, where constituencies are (or are supposed to be) redrawn every ten years on the basis of a national census, there have been and still are repeated accusations that party-political considerations have been incorporated into the process of redrawing constituency boundaries. This has sometimes led to »bizarre borderlines« in individual constituencies.<sup>8</sup> The number of so-called partisan gerrymanders is said to have risen noticeably, especially when the boundaries of constituencies were redrawn after the 2010 census.<sup>9</sup> The aim was not only to create as many secure constituencies as possible for the parties' own candidates, but also to waste as few of their own votes as possible – and, conversely, to ensure that their political opponents do just that. Such wasted votes occur when a party achieves either an overwhelming majority of votes or a narrow minority of votes in a single member constituency. In the first case (for example if a party obtains 80% of the votes in the constituency), many votes are not necessary to win the mandate in a

4 Cf. the respective ODIHR election reports.

5 Cf. <https://boundarycommissionforengland.independent.gov.uk/2018-review/>.

6 Instead of many: Croissant/Lorenz 2018: 157 and 270.

7 See the ODIHR election report.

8 Denkler, Thorsten: »So werden unerwünschte Wähler vom Wählen abgehalten« (This is how unwanted voters are deterred from voting) in: *Süddeutsche Zeitung*, article from 6th November 2018. Online at: <https://www.sueddeutsche.de/politik/usa-midterms-wahl-wahlmanipulation-1.4192865>.

9 Adorf 2019 (here: 859). There you will also find corresponding rulings of the US Supreme Court on the topic and a balanced assessment of the effects of constituency boundaries, which is sometimes exaggerated in discussion.

plurality election in the single member constituency. In the second case, all the votes which the losing party achieves in the single member constituency are lost.

In Germany, the party composition of the *Bundestag* can hardly be influenced by the drawing of constituency boundaries, especially since any overhang mandates were compensated for by equalising mandates in the 2013 and 2017 elections.<sup>10</sup> At most, constituency boundaries are important for small parties and independent candidates, since only those parties that have cleared the 5% threshold or won three constituency seats can benefit from the proportional distribution of seats. Moreover, votes for independent candidates are not taken into account when seats are allocated proportionally to the respective party lists. However, for the equal count value of votes in the constituencies the constituency divisions are still important in Germany as well. The electoral law stipulates that the population of a constituency should not deviate by more than 15% (up or down) from the average population of the constituencies as a whole; if the deviation is more than 25%, a new boundary must be drawn.<sup>11</sup> The foreign resident population is not taken into account when determining population figures.

However, the same weight of votes is sometimes deliberately not adhered to in order to ensure representation of national minorities or low-population constituencies. This is the case, for example, in Canada, which uses the plurality system in single member constituencies in parliamentary elections. Canada's electoral law allows for relatively large constituency variations, for instance to protect indigenous groups or to take account of historically developed administrative units. The so-called »grandfather clause« also guarantees the provinces at least as many seats in the House of Commons as they had in 1985, which also leads to imbalances. To mention another example, in Malaysia the election commission is urged to enable proportionally larger representation in sparsely populated constituencies.

10 See the chapter on electoral systems.

11 Section 3 (1) 3 of the Federal Election Act (BWahlG).

## THE ELECTION CAMPAIGN

The election campaign is at the heart of political competition. It is intended to enable candidates and parties to communicate their political programmes and objectives to the electorate. It should also encourage political participation and make voters aware of the importance of their choice. It is therefore all the more surprising that the electoral laws of some established democracies contain little or no provision for election campaigns. However, in the course of political opening and democratisation processes in an increasing number of states, legal parameters for election campaigns have been established.<sup>1</sup> These include, for example, the prohibition of election advertising of an anonymous nature or by certain groups of people (public officials, police and military personnel, religious dignitaries, etc.) or the prohibition of certain forms of election advertising. However, it should be borne in mind that excessively strict election campaign rules can also be used to obstruct or harass the opposition. On the whole, the level of regulation of election campaigns varies considerably from one country to another.

### The campaign period

This already applies to the duration of the election campaign, which is regulated in very different ways or, in rare cases, not at all. However, it is useful to specify the period of time for the official election campaign. On the one hand, it should not be too short in order to give the candidates and parties sufficient opportunity to attract votes. An official election campaign period of nine days, as is the case in Singapore, for example, is completely inadequate. Short campaign periods, especially in autocracies, tend to favour incumbents, who are also strongly present in political life and the media outside the election campaign. On the other hand, it makes sense to limit the duration so that the country does not sink into a permanent election campaign. In most cases, the campaign period does not exceed three months. The official election campaign in the Czech Republic, for example, is comparatively long at six months.

In addition, in order to allow for free elections and a free choice of candidates, most countries – from Latvia to Lesotho to Indonesia – prohibit the holding of election campaigns on or just before election day. In Latin America, this *período*

1 For Latin America: Crespo Maretínez/Villaplan Jiménez 2019: 798.

*de reflexión* or *período de descanso* lasts between one day (Dominican Republic) and five days (Honduras), but is usually two or three days.<sup>2</sup> A few states in Europe, such as Denmark and the Czech Republic, refrain from such »election campaign breaks« and allow campaigning on election day, though not at the polling station. The Lebanese electoral law, which regulated the 2018 elections there, did not generally prohibit election advertising on election day at the end of the three-month campaign period, but only inside and near polling stations. The same applies to Namibia, where no election campaign period is prescribed by law.

In many other countries, although the period for the official election campaign is fixed and election campaigning on election day is taboo, political opponents do not always adhere to it. In the 2017 parliamentary elections in Malta, for example, election observers complained that candidates from the two leading parties sent text messages to voters on election day and party supporters campaigned outside polling stations. In the 2018 presidential elections in Cyprus, voters reportedly received telephone calls on election day.<sup>3</sup> In any case, it is common practice in many countries, for example in Latin America and Africa, for committed party supporters to go to the polls in their party's colours. In contrast to the quiet voting proceedings in Germany, there is a lot of hustle and bustle in some places with voters often leaving no doubt about who they are voting for, even on polling day. Above all, the break in campaigning is often not respected on internet and social media platforms, which are now of great importance in election campaigns. If such campaigning-free periods are to be maintained, there is a considerable need for regulation and action.

## **Level playing field – equal opportunities for election contestants**

A democratic election campaign and its rules must be based on the principle of equal opportunities for candidates and parties, even if, in practice, there will never be complete equality of opportunity. For a fair election campaign to emerge between opponents, a »level playing field« is needed, as the British say. In rugby, for example, this prevents one team playing uphill and the other team playing downhill. These include: state neutrality in the election campaign, the undisturbed exercising of political rights, a political climate as free as possible from disinformation, hate speech and violence, freedom of the media and balanced reporting, as well as party and campaign financing that is committed to the principle

2 Crespo Martínez/Villaplana Jiménez 2019: 787.

3 See the ODIHR reports on the respective elections.

of equality. All these aspects will be addressed below. Before doing so, however, it should be mentioned that national minorities should also be allowed to campaign in their own language, as is possible and practised in Albania, for example. This also promotes the participation of minorities in public affairs. For this reason, for instance, an article of the electoral law in Bulgaria was criticised, which prescribes the use of the Bulgarian language in election campaigns.<sup>4</sup>

### **State neutrality and misuse of public resources**

It is not compatible with the principle of fair elections if incumbents and their supporters use state resources for their election campaign. An International IDEA database identifies 113 states in which the use of public resources for or against a candidate party or person is expressly prohibited.<sup>5</sup> It is nevertheless common practice in many countries, especially in those with a strong political clientelism. The elections under Presidents Chávez and Maduro in Venezuela, in which state institutions and resources were blatantly used for campaign purposes, can once again serve as clear examples in Latin America. Also in sub-Saharan Africa, where there is a large number of neo-patrimonial regimes, access to state resources during the election campaign is considered to be one of the reasons why incumbents, when they run again, usually win the elections.<sup>6</sup>

The elections in Uganda are a good example. In the multi-party elections there, the incumbent was re-elected in 2001, 2006, 2011 and 2016. The ruling party was inextricably linked to the state, was openly supported by the military and public institutions and made extensive use of public funds for the election campaign. Curiously, the electoral legislation for the presidential elections there, while prohibiting any candidate or party from using public funds for campaign purposes, explicitly excludes the incumbent president from the prohibition insofar as he uses the funds in the course of his official duties: »[...]a candidate who holds the office of President may continue to use Government facilities during the campaign, but shall only use those Government facilities which are ordinarily attached to and utilised by the holder of that office. »<sup>7</sup> Thus, the president not only used the fleet of vehicles and the air force during the campaign, but also made extensive use of public funds. That same year, the African Union Election Obser-

4 CDL-AD(2011)013.

5 <https://www.idea.int/data-tools/data/political-finance-database> (as of 5th December 2020).

6 Cf. Grauvogel/Heyl 2017: 4.

7 Commonwealth Observer Mission 2016: 15.

vation Mission to Zambia bluntly pointed out that »the abuse of incumbency in particular contributed to the absence of a levelled playing field.<sup>8</sup>

However, international election observers in the countries of the Council of Europe also regularly criticise the misuse of public offices and resources for election campaigns, with the result that the Venice Commission and ODIHR have developed their own »*Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral process*«. <sup>9</sup> The problem was clearly visible in recent elections in Albania, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Poland, Russia, Serbia, Turkey and Ukraine. Particularly for autocrats such as Alexander Lukashenko in Belarus, Ilham Aliyev in Azerbaijan or Shavkat Mirsiyoev in Uzbekistan, to name a few more examples, recourse to state resources during election campaigns is normal practice. Nor did the Turkish president Erdoğan shy away from using the state apparatus to a large extent for the purpose of his re-election in the 2018 presidential elections. Accordingly, the ODIHR election observation mission called for a strict separation between the state and the ruling party, effective punishment of misuse of public funds during the election campaign and the guarantee of equal campaign conditions. Even though Erdoğan's opponents were able to conduct an active election campaign, they were ultimately at a severe disadvantage compared to the ever-present president. The same applies to Hungary, where (defamatory) government campaigns and election advertising by the ruling party overlapped strongly in the 2018 parliamentary elections. At the same time, the government announced shortly before the elections that it would distribute vouchers to pensioners and reduce utility costs for households.<sup>10</sup> The distribution of government benefits to the population or even the launching of prestigious government projects immediately before elections is a popular strategy of incumbents to increase their chances of being elected.

In some countries this is expressly prohibited. For example, Argentina's electoral law – and, since a reform in 2017, Panama's as well – prohibits inauguration ceremonies of public buildings by candidates for a certain period before elections.<sup>11</sup> The same applies to Spain.<sup>12</sup> However, this is and still remains common practice in many places. It is not uncommon for governments to distribute generous election gifts shortly before election day. »*Elecciones de guaro y nacatamales*« was once the name given to the elections under the Somoza dictatorship (1936

8 African Union Commission report on the 2016 elections in Zambia.

9 CDL-AD(2016)04.

10 Cf. the ODIHR report on the 2018 elections in Hungary.

11 Cf. Crespo Martínez/Villaplán Jiménez 2019: 794 et seq. and the OAS report on the 2019 elections in Panama.

12 See Article 50 of the Spanish Electoral System Act.

to 1979) in Nicaragua, because influencing voters with liquor and food was one of the common election campaign measures at the time. The traditional ban on the sale of alcohol (*»ley seca«*), which is already in force in many Latin American countries before election day, serves not only to maintain order, but also to prevent the buying of votes.

There are laws against illegal election gifts in other regions of the world as well. In Uzbekistan, for example, a new draft election law explicitly prohibits the distribution of free goods and services as well as cash during election campaigns.<sup>13</sup> But such laws do not solve the problem, either in Uzbekistan or in other countries where governments use state resources to ensure the good conduct of voters. Take Zimbabwe as an African example. Even in the 2018 elections, in which the long-time autocrat Mugabe did not run for the first time in 37 years, the ruling party ZANU-PF still made full use of state resources and selectively distributed food, seeds and fertiliser among its supporters in rural areas. Traditional chiefs and some religious leaders also received »incentives« for supporting ZANU-PF.<sup>14</sup>

In the Federal Republic of Germany, the Federal Constitutional Court and the constitutional and administrative courts of the *Länder* have confirmed the state's fundamental neutrality obligation, particularly during the election campaign. This is based on the idea that official influence on elections runs counter to an open, democratic process of opinion-forming in the run-up to the elections and at the same time impairs the equal opportunities of candidates and parties and the freedom of those entitled to vote. In legal and political practice, it is not always easy to draw the distinction between permissible official public relations work and inadmissible state electoral advertising, or between official and private actions by officeholders. However, if officeholders obviously do not conduct election advertising as party members and private individuals, but instead do so in their official capacity (on official letterhead, in official journals, with public budget funds etc.), then this is inadmissible.

From that democratic point of view, it is highly problematic that US President Trump has encouraged senior officials to use their government positions and official resources to boost his re-election chances in 2020, thus, potentially violating the so-called »Hatch Act« in the United States.<sup>15</sup>

13 Cf. CDL-AD(2018)027.

14 Cf. Magaisa 2019 and the EU report on the 2018 elections.

15 See, U.S. Office of Special Council (<https://osc.gov>) and the allegations raised by the Citizens for Responsibility and Ethics in Washington (CREW) ([www.citizensforethics.org](http://www.citizensforethics.org)).

## Restrictions on political rights and pre-electoral violence

A manifest expression of undemocratic elections is when the rights of the opposition are curtailed in the run-up to the elections and during the election campaign. This includes not only restrictions on opposition parties' campaigning and advertising, but also legal and *de facto* restrictions on freedom of association, assembly, expression and information before, during and after the elections.

Such restrictions are usually a fundamental problem with elections in autocracies, from A for Azerbaijan to Z for Zimbabwe. In the case of the parliamentary elections in Azerbaijan in 2020, for example, the ODIHR election observation mission stated unequivocally that the legal and political framework – despite a large number of candidates – prevented the holding of genuinely competitive elections. The situation is particularly serious, for instance, in Equatorial Guinea and the Central African Republic as well as in Tajikistan and Turkmenistan, where civil and political rights are severely restricted and the legal and political space for political opposition in the context of elections is virtually non-existent. In many other countries, elections take place in a climate of repression, whether in Egypt, Venezuela, or now even in Tanzania. Even in the case of the Russian presidential elections of 2018, the ODIHR criticised restrictive regulations regarding political assemblies and non-governmental organisations as well as anti-terrorism laws that allowed far-reaching encroachments on political rights.

Turkey was also criticised for such restrictions, especially during the regularly prolonged state of emergency following the attempted coup in July 2016, which was still in force for the 2018 elections. In a quarter of the provinces, particularly in the east and south-east of the country, governors restricted freedom of assembly, expression and movement during the election campaign. The climate surrounding the elections was also adversely affected by the fact that around 100,000 people were arrested and around 150,000 were dismissed from public sector positions after the attempted coup. Several members of the Kurdish »Democratic Party of the Peoples« (HDP) were also imprisoned.

State repression and violence in the context of elections is a method of election manipulation.<sup>16</sup> Statistical analyses indicate that election violence increases the chances of victory for incumbents – but also the likelihood of protests after the elections.<sup>17</sup> A climate of political violence is always detrimental to free and fair election competition. In electoral autocracies, violence often emanates from state and para-state actors. In Bangladesh, violence escalated before the 2018

16 Hermet/Rouquié/Linz already in 1978; cf. also, inter alia, Schedler 2002a, Birch 2011, Bekoe 2013, Bhasin/Gandhi 2013, Daxecker 2014.

17 Cf. Hafner-Burton/Hyde/Jablonski 2016.

elections, shortly after the candidate lists were confirmed and the election campaign began, with the opposition being particularly affected by violence.<sup>18</sup> However, violence can also be perpetrated by members of the opposition or groups boycotting the elections. Sometimes, as in Mexico, other violent actors, such as drug gangs, are involved. According to official sources, more than 100 political activists were murdered in the nine months leading up to the congressional and local elections on 1st July 2018.<sup>19</sup> In addition to that, candidates there repeatedly complained about threats and intimidation. A similar situation can be reported from several other countries where violent conflicts exist or where political opponents and their supporters undertake violent measures to influence the outcome of the elections.

Electoral violence is particularly prevalent in Africa, although there are, of course, peaceful elections too. In more than half of the African states, however, violence in connection with elections has occurred since the 1990s, often even before election day. Researchers at the *Nordic Africa Institute* (NAI) in Uppsala (Sweden) have recently published an anthology dealing specifically with »everyday politics of electoral violence in Africa«, namely in Kenya, Uganda, Côte d'Ivoire, Burundi, Sierra Leone, Nigeria, Liberia and northern Ghana.<sup>20</sup> »Electoral violence« is understood as »violent or coercive acts carried out for the purpose of affecting the process or results of an election«. <sup>21</sup> However, there are also a number of positive examples of how peaceful election campaigns are possible even after civil wars, such as in Liberia in 2017 and in Angola in 2017, even though there were protests there after the elections.

### **Defamation, negative campaigning and hate speech**

Political violence in election campaigns is fuelled not least by lies, defamation and hate speech used to attack political opponents. Not only in electoral autocracies, but also in many democracies, candidates in national presidential and parliamentary elections are engaged in downright mudslinging. In 2018, the OAS election observation team observed with concern how some candidates used a language full of racist, misogynist and homophobic stereotypes during the Brazilian election campaign. In particular, the victorious presidential candidate, right-wing populist Jair Bolsonaro, virtually demonised his political opponents. In the USA, Donald Trump in particular stands for a brutalisation of political culture in

18 Cf. Human Rights Watch 2018.

19 OAS 2018: 3.

20 Söderberg Kovacs/Bjarnesen 2018.

21 Söderberg Kovacs 2018: 5.

the election campaign with his degrading, poisonous tweets. There, the majority of election campaigning is now of a negative nature and pervaded by malice and defamation.

In Europe, Victor Orbán in Hungary is a good example. »To equate oneself and one's own politics with the whole country and thus defame the fragmented opposition as traitors – this populist orchestration has worked again and hardly anyone in Europe masters it as well as Victor Orbán,« Martin Kolb wrote in the *Süddeutsche Zeitung*.<sup>22</sup> Prior to the 2018 parliamentary elections, which were exaggerated as a »fateful election« and in which the future of Hungary and the Christian West was supposedly once again at stake, Orbán had set up the Hungarian-born investor, philanthropist and Holocaust survivor George Soros as an enemy stereotype (although he did not even take part in the elections) and denigrated opposition members all around as bought Soros mercenaries. Both the government and the ruling party went on blatant racist and anti-Semitic rants against refugees and their support groups, against Soros, and against the European Union and the United Nations.

It is particularly problematic when outright hate speech enters the election campaign. Taking action against hate speech is a human rights obligation arising from the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, Art. 4) and the International Covenant on Civil and Political Rights (ICCPR, Art. 20 para. 2) as well as (indirectly) from other global and regional human rights treaties. At the national level, the constitutions of some countries explicitly exclude incitement to violence and hatred from the right to freedom of speech, or even, as is the case in Fiji, explicitly require the state to protect individuals and groups from hate speech. A number of countries, such as Canada, Norway and the Czech Republic, have also explicitly criminalised hate speech. In Germany, the criminal offence of incitement of masses (section 130 of the Criminal Code, StGB) applies here where appropriate. The offences of insult (section 185 StGB), malicious gossip (section 186 StGB), coercion (section 240 StGB), threatening commission of a serious criminal offence (section 241 StGB) and the use of symbols of unconstitutional organisations (section 86a StGB) may also be affected.

As important as clear prohibitions are, however, criminal law, as the sharpest sword of justice, should be applied with great caution in election campaign periods, and only with strict adherence to proportionality. Freedom of expression

22 »Victor Orbán – Meister der populistischen Inszenierung« (Victor Orbán – master of populist staging), *Süddeutsche Zeitung*, article from 9th April 2018. Online at: <https://www.sueddeutsche.de/politik/viktor-orban-meister-der-populistischen-inszenierung-1.3937051>.

is all too important in election campaigns, and the risk of abuse is particularly high, especially, but not only, in authoritarian regimes. This is all the more true when »incitement to hatred« is equated with support for terrorism and extremist violence. Anti-terrorism and security laws are now often used by autocrats to prevent regime criticism. Bans on insults, defamation and libel are used in many places to sanction regime criticism, while at the same time incumbents and government candidates continue to denigrate political opponents and critical media workers. International election observation missions are therefore often critical of the relevant criminal law provisions and their application. Even in the case of hate speech, milder, regulatory measures can be introduced below the level of criminal law if necessary, as was suggested in Germany, for example, in the case of racist election posters.<sup>23</sup>

In addition, there are a number of non-legal measures that make it possible to address not only criminally relevant but also other verbal excesses in the election campaign. To establish or guarantee rules of conduct for the election campaign, political opponents can, for example, commit themselves to legally non-binding codes of conduct. Before the 2019 parliamentary elections, even in tranquil Denmark with its traditionally rather moderate election campaign, the parties agreed to such a code of conduct for the first time. There too, the rise and strengthening of right-wing populist parties had led to the tone becoming harsher. With the code of conduct, Denmark adopted a practice which has already gained a foothold in many other countries throughout the world. In Latin America, for example, Panama and Uruguay can be mentioned here. In Malawi there were even three codes of conduct for the 2019 elections, one for the parties, one for the media, and one for the traditional »chiefs«. However, corresponding voluntary commitments not only apply to parties and the traditional media, but also to social platforms, which would have to assume far greater responsibility than is currently the case.

Much would also be gained if hate speech incidents were systematically documented and if election authorities, governments, political parties, prominent public figures, religious authorities, the media and civil society took a clear position against hate speech (instead of potentially promoting it). No less important are short-term campaigns, help for those affected, and long-term educational work. The Council of Europe has founded a »No Hate Speech Movement« specifically to reduce the acceptance of hate speech on the Internet and stop its »normalisation«. It focuses in particular on human rights education. However, whether such measures are taken and whether they actually work greatly depends on the

23 Cf. for example Schmahl 2015, Cremer 2017.

political will of the stakeholders and the political culture in the country. Scepticism, especially in respect of isolated measures, is warranted in many places. In El Salvador, for example, a pact to guarantee the rights of Salvadoran women in the 2019 elections signed by all political parties by no means prevented verbal, sexist aggression against female candidates during the election campaign.

Containing hate speech on the Internet is particularly difficult. This has led the government in Germany to pass a »Network Enforcement Act« (NetzDG), which has attracted a great deal of international attention and may find imitators in other (possibly also autocratic) countries. The NetzDG, which came into force on 1st January 2018, obliges providers of large social networks (such as Facebook, Twitter and YouTube) to remove or block »obviously illegal content« within 24 hours of receiving a complaint. There is a 7-day deadline for non-obvious illegal content. In Germany, a fierce debate has flared up as to whether the NetzDG is proportionate, appropriate and effective to combat offences such as insult, defamation and incitement of masses on the Internet. In the meantime, the Federal Government has decided to tighten the NetzDG. Accordingly, death threats, incitement of masses and other serious offences must in future not only be deleted, but also reported to the Federal Criminal Police Office (BKA). However, it must be emphasised that it is not only a matter of prosecuting statements relevant to criminal law; not everything that is not punished under criminal law should be politically accepted in democracies. It is also a matter of the lack of social and political responsibility of those who engage in, propagate and consume harassment on the Internet, thereby contributing to a brutalisation of political culture.

## Cyber attacks and disinformation

Cyber attacks can not only damage the technical infrastructure of electoral processes and thus impair the availability, security and reliability of the electoral technologies used, such as voter registration, Internet voting, electronic vote counting or the transmission of voting data.<sup>24</sup> Hacking and the publishing of confidential data of candidates and parties (doxing), as well as targeted defamation and malinformation/disinformation disseminated online, can also influence electoral competition and the legitimacy of elections.

But how should »fake news»<sup>25</sup> – or rather disinformation – be dealt with, which can also be found in traditional media, but which circulates mainly on the Inter-

24 Cf. van der Staak/Wolf 2019.

25 The term is not only vague, but has been and is used by politicians, notably Donald Trump, to undermine the reputation and credibility of critical journalists and media.

net and especially via social media where it can be easily distributed? According to the German Federal Government, disinformation refers to information that is demonstrably false or misleading and is disseminated with the aim of deliberately influencing or deceiving the public.<sup>26</sup> In the case of the US presidential elections in 2016, such manipulation attempts from Russia aimed to damage the presidential candidate Hillary Clinton and the Democratic Party. In the 2017 elections in France, compromising false information about Emmanuel Macron that had previously circulated on the Internet was later disseminated online, including via Russian TV portals. Less prominent examples of cyber-manipulation in elections concern, for example, some Baltic and Eastern European states, above all Ukraine.

Online disinformation campaigns, both domestic and foreign, are often seen as a danger to the balanced and objective formation of public opinion, especially in the context of elections. »Disinformation distorts democracy« was a striking statement in a UNESCO report.<sup>27</sup> However, the possibilities of using international law to get a grip on the problem are limited,<sup>28</sup> especially since it is often difficult to prove who is ultimately behind cyber attacks. Many states have therefore started to take countermeasures at a national level.

This is partly expressed as programmatic determination. For example, a *Digital Charter* adopted in Canada states that the government will defend freedom of expression and protect against online threats and disinformation aimed at undermining the integrity of elections and democratic institutions.<sup>29</sup> Institutional efforts to improve cyber-protection are expressed in the formation of working groups or other units, mostly at the (inter)ministerial level. In Australia, for example, an Election Integrity Assurance Task Force was set up specifically for elections in 2018 to detect potential cyber attacks and foreign influence on the elections.<sup>30</sup>

Concrete measures to limit the impact of digital disinformation campaigns at home and abroad include flagging, labelling and blacklisting of disinformation. Disinformation is also increasingly being countered with fact checking. Websites like »*Stop Fake News*« in Belgium serve this purpose.<sup>31</sup> In other countries and regions of the world, too, fact-checking websites are now operated by public and private parties. Such reactive measures can be combined with preventive awareness

26 German *Bundestag*, BT-Drs. 19/17073.

27 Cf. UNESCO 2019.

28 Cf. for example Sander 2019.

29 Cf. [https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00108.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html).

30 Cf. [www.aec.gov.au](http://www.aec.gov.au).

31 [www.stopfakenews.be](http://www.stopfakenews.be)

raising and education of the public (keyword: media and information literacy). In Australia, for example, a »stop and consider« campaign is designed to help voters to critically examine sources of information and thus make an informed choice. The »Report with Recommendations on Dealing with Fake News and Disinformation« (2018), which the EU Commission commissioned, also focuses on transparency, strengthening media competence and empowering users and media professionals. However, the report does not propose laws to combat disinformation.

Nevertheless, a number of countries, both within and outside the European Union, have introduced or tightened legislation. A legislative package adopted in France in 2018, for example, provides that within three months before a national election, persons and parties running for office can defend themselves against the public dissemination of false information and have it stopped by way of expedited judicial decisions. It also requires internet service providers such as Facebook and Twitter to be more transparent about the paid distribution of content and to provide tools to report misinformation and prevent its further distribution. Media regulators can also stop the distribution of foreign-funded television channels if they try to influence the outcome of the election by providing false information.

However, laws against »fake news« are not unproblematic – especially from the point of view of the human right to freedom of expression, which not only includes the expression of opinions in the narrow sense, but also the communication of facts, even if they are incorrect assertions. While stressing in a joint statement that certain forms of disinformation and propaganda can violate the reputation and privacy of individuals and incite violence and discrimination, the Special Rapporteurs on freedom of expression of the United Nations, OSCE, OAS and the African Commission on Human Rights rejected general prohibitions: »General prohibitions on the dissemination of information based on vague and ambiguous ideas, including »fake news« or »non-objective information«, are incompatible with international standards for restrictions on freedom of expression, [...] and should be abolished«. <sup>32</sup>

Accordingly, the Council of Europe is also critical of a draft law in Ukraine announced in January 2020 on »combating disinformation and regulating media activities that restrict freedom of expression«. <sup>33</sup> Although this Bill is primarily aimed at curbing disinformation from Russia, it could also, in the opinion of the

32 »Joint Declaration on Freedom of Expression and »Fake News«, Disinformation and Propaganda«, 3rd March 2017. Online at: <https://www.osce.org/fom/302796?download=true>.

33 Cf. Platform to promote the protection of journalism and safety of journalists. Online at: <https://www.coe.int/en/web/media-freedom>.

Ukrainian Association of Journalists, hamper reporting. It is particularly problematic that in the meantime laws against »misinformation« have been passed in numerous autocracies and are being used to prevent criticism of the regime. In Belarus, for example, a media law reform from 2018 allows people to be prosecuted if they disseminate false information online. The Malaysian government also made sharing misinformation a punishable offence in 2018. Thus, in several autocracies, criminal proceedings against persons for alleged disinformation have been and are being instigated and carried out.<sup>34</sup> They often supplement bans on »hate speech«, which now exist worldwide.

34 Cf. »A guide to anti-misinformation actions around the world«. Online at: [www.poynter.org/ifcn/anti-misinformation-actions/](http://www.poynter.org/ifcn/anti-misinformation-actions/).

# THE MEDIA IN THE ELECTION CAMPAIGN

Distortions of competition, restrictions on political communication rights, as well as defamation, hate speech and disinformation sometimes continue or are reflected in the media sector. This is all the more problematic as the media play an important role in elections and electoral competition. On the one hand, the media report on candidacies, parties and contentious issues in elections. On the other hand, they enable candidates and parties to advertise themselves and their programmes. Without reliable information and without a diversity of information and opinions, a free choice is not possible. A pluralistic media landscape is therefore an important prerequisite for the population being able to obtain information about elections and electoral competition from different and reliable sources.

In a number of countries, however, there are no or hardly any rules for the media in election campaigns. Some do not consider them necessary, while others rely on self-regulation by the media and their associations. Where legal provisions exist, the density of regulation can vary considerably. Here, differences in political culture play a major role. In the USA, where the media are literally seen as a »marketplace« of ideas, the state traditionally holds back on regulation far more than it does in Europe, for example, where government regulations tend to ensure balanced reporting and a fair media presence of political opponents. A particular problem now arises from the growing importance of digital media, where traditional regulations are either not effective or only partially effective. This makes a public discussion about rules and responsibilities of social media in general and during elections all the more important.

## Election advertising in the media

It is in line with international standards that persons and/or parties running for election may also advertise in the media. For example, it is part of the largely indirect public campaign financing that parties may receive free advertising time or place advertisements in public media. Here too, the principle of equality must be respected. In a strict sense, this means that all candidate parties must be granted an equal share of advertising opportunities. However, in many places the »proportional« principle is also applied here, according to which parties with different levels of popular support, measured in terms of the proportion of seats or votes

they hold, are also treated differently. (It is highly unusual and questionable, however, when survey results are used as a basis for the proportional allocation of advertising time). Sometimes only parties receive free advertising, but not independent candidates running for election. This has been criticised by the ODIHR in the case of Bulgaria, for example. It is also important to pay attention to when, where and how long candidates and parties can advertise in public media. There are many opportunities here for candidates to be advantaged or disadvantaged. Several states prohibit paid electoral advertising in addition to their allotted advertising time in the public media.

In order to safeguard freedom of expression, the Council of Europe's *Code of Good Practice in Electoral Matters* also calls for legislation to ensure that private media provide minimum access to the various participants in elections for the purposes of campaigning and advertising. While in some countries (including outside Europe, e.g. Paraguay and Peru) this is the case, such a requirement goes too far in the view of representatives of a market-liberal understanding of electoral advertising. From this perspective, even limits on purchased advertising time or advertising space in private media are to be rejected. However, where election advertising is placed in the private media, all candidates or parties should be at least required to pay the same price for the same advertising services in order to ensure equal opportunities. Above all, however, paid advertising should also be clearly identified as such in order to separate it from the editorial content of the reporting.

Since a large proportion of election advertising and information about the elections and election candidates is now distributed in virtual environments, it is also urgently necessary to adapt the rules of election campaigns to the digital world. This applies all the more so because both overt and covert election advertising is being carried out in a largely unregulated form in many countries. This requires responsible action on the part of political opponents (to comply with ethical standards), Internet platform operators (to clearly identify political advertising) and public institutions (to adapt election campaign rules to online developments).<sup>1</sup> Personalised election advertising, which with the Internet has gained significantly in importance, must also be regulated. Thanks to sophisticated methods of data collection, personality profiles of eligible voters are now often created, which are then used without their consent for individually tailored voting information and election advertising, and influence or even manipulate their voting decisions.

1 See: Koffi Anan Foundation 2020.

## Media following official government line?

In addition to the actual election advertising, general reporting on the candidates and parties often plays an immensely important role, especially when the media do not feel committed to the principle of independent and neutral reporting. Media power ultimately means power of opinion. However, in many countries there is a lack of genuine media diversity and a high degree of media concentration. »Reporters Without Borders« has thus developed its own »Media Ownership Monitor« to establish transparency of ownership of national mass media. In Brazil and Mexico, for instance, the media are largely dominated by a few super-rich entrepreneurs, and media oligopolies exist. In the case of Turkey, even before the attempted coup in July 2016 and the subsequent wave of repression, media concentration there had already restricted the scope for independent journalism. The political and economic ties of many important media owners with the government have nipped critical reporting in the bud.

It is particularly problematic when the most important media are under state control and the government takes full advantage of this to gain an electoral advantage, for example by reporting on incumbents *in extenso*, while the opposition receives little (positive) media attention, even during election periods. This is particularly prevalent in some »hard« electoral autocracies such as Tajikistan or Turkmenistan, where the government controls almost all media and the opposition is hardly present in the election campaign. The situation is only slightly better in Belarus, where state-owned media serve as a propaganda tool for the government. Media coverage is also not balanced in Russia. Much of the media there, including the most popular television stations, are state-owned or (semi-) state-financed and openly represent the government line. There are also negative developments in some democracies. In Poland, for instance, the national-conservative government in office has controlled the public media since 2015 and brought reporting in line with its position.<sup>2</sup> It took advantage of this in the 2019 parliamentary elections and in the 2020 presidential elections.<sup>3</sup>

Due to the importance of mass media for the electoral process, serious election observation missions include their own media analysts who conduct pre-election media monitoring.<sup>4</sup> In doing so, they examine, *inter alia*, the extent and nature of reporting on competing individuals and parties. Traditionally, they focus largely on television, radio and print media. Although the focus is increasingly switching to websites and social media, monitoring of the diverse online content during

2 [www.reporter-ohne-grenzen.de/Polen/](http://www.reporter-ohne-grenzen.de/Polen/).

3 Cf. the ODIHR reports on the elections.

4 See, for example, the relevant OSCE/ODIHR 2012 manual.

elections is still underdeveloped. As such, there is an urgent need for media monitoring by election observation missions, national election authorities and media associations to increasingly »go online« as well. However, there is still a lack of appropriate standards, guidelines, good practice examples and resources for monitoring and dealing with social media and online content during elections.<sup>5</sup> However, an indispensable part of the assessment is already now the extent to which the media can act freely in elections and the Internet is freely accessible.

### **Obstruction of media critical of the government**

In a number of countries things do not look too good when it comes to freedom of the media and often also of the Internet. This is shown, for instance, by the reports of »Reporters Without Borders«, »Freedom House« or other organisations that generally examine freedom of expression, press freedom and Internet freedom, and complement the more election-focused media analyses of election observation missions. Especially in autocracies, criticism of government expressed offline or online is more or less severely sanctioned. Professional journalism and the »citizen journalism« practised by bloggers, for example, are often associated with great dangers there when the government is criticised or the interests of powerful people in politics, society and the economy are affected.

In extreme cases, media representatives are threatened with death and even murdered by state or non-state actors. This is often accompanied by criminal charges and imprisonment, whether for alleged disturbance of public order, incitement to violence or support of terrorist organisations, or even »only« for insult, defamation or any other pretext (tax evasion, drug possession, etc.). »Reporters without Borders« and other organisations keep their own lists of media workers who have been murdered and imprisoned. The Council of Europe also maintains a web-based *Platform to promote protection of journalism and the safety of journalists*.<sup>6</sup> In addition, the countless bureaucratic hurdles, claims for damages and dismissals of critical media workers, which create a climate of intimidation and self-censorship, have had a major impact – albeit with less international attention.

The countries with – at least formally – multi-party elections in which freedom of expression is most restricted include Belarus in Eastern Europe, Azerbaijan in the Caucasus, Turkmenistan and Tajikistan in Central Asia, and Turkey, Iraq and Iran in the Middle East. An example from the Far East is again Cambodia,

5 Cf. Wagner 2020.

6 <https://www.coe.int/en/web/media-freedom>.

where Prime Minister Hun Sen took significant action against media critical of the government in the run-up to the parliamentary elections of 2018. Among the African states, Equatorial Guinea, Egypt, Burundi and Rwanda, and in Latin America Venezuela (Cuba does not hold multi-party elections) are doing particularly badly. The picture is only slightly different when it comes to Internet freedom. Among the countries with multi-party elections, the governments of Egypt, Russia and Venezuela, for example, are taking extensive measures to block unwanted content, block (or hack) sites critical of the government, and prosecute bloggers and Internet users, if necessary.<sup>7</sup>

While a limited, manipulated or conformist public opinion is almost a characteristic of autocracies, it is essential for democracies to allow and secure a diverse, critical public. Unfortunately, this is not always the case, especially not in democracies that have serious functional problems and are not yet consolidated. According to »Reporters Without Borders«, Mexico, which the Bertelsmann Transformation Index identifies as a »defective« democracy,<sup>8</sup> is one of the most dangerous countries for media workers worldwide.<sup>9</sup> Even in established democracies, things are sometimes in a bad way. Prominent cases include the murders of investigative journalist Ján Kuciak in Slovakia in 2018 and, a few months earlier, of investigative journalist Daphne Caruana Galizia in Malta, where media workers who work on corruption cases have been repeatedly threatened, harassed and charged with defamation.

In addition, even top politicians and their supporters sometimes insult disagreeable members of the press and use their verbal attacks to fuel the hostile climate for critical media coverage. The list of countries where this happens is long. It is particularly dramatic that democracies are now included. Former President Donald Trump in the USA is a notable example. In Brazil, a team of advisors – a »hate cabinet« – around President Bolsonaro conducts large-scale insult and threat campaigns against disagreeable journalists. In India, millions of »yoddhas« (warriors) of Indian Prime Minister Modi stir up hatred in social networks against critics of his Hindu-nationalist government. But also right-wing populists in Europe are not afraid to denigrate critical media (representatives), either when they are in power or when they are acting from the opposition. The experiences not only in Hungary and Poland, but also during the intermezzo of the turquoise blue government coalition in Austria show this, as do the media hounding (»Lügenpresse«, »lying press«) which right-wing groups in Germany

7 Cf. Freedom House: Freedom on the Internet 2019. Online at: <https://freedomhouse.org/report/freedom-net>.

8 <https://www.bti-project.org/de/berichte/country-dashboard-MEX.html>.

9 [www.reporter-ohne-grenzen.de/Mexiko/](http://www.reporter-ohne-grenzen.de/Mexiko/).

and elsewhere pursue. Just how quickly verbal attacks can turn into violence is even shown in Germany by the increasing number of threats and attacks on people who work in journalism or are involved in (local) politics.

Although the extent to which restrictions on freedom of expression, freedom of the press and the Internet, as well as attacks on media workers, influence the reporting on elections must be examined on a case-by-case basis, the press that is critical of the government is sometimes the target of criticism, denigration and threats during politically significant election campaign periods. In India, for example, before the 2019 elections, the number of attacks on journalists by supporters of Prime Minister Narendra Modi increased significantly. At the same time, verbal attacks against politicians are taking place, especially in the media and through the media. Media (representatives) are not only victims of possible restrictions on press freedom and »media bashing«, but also the creators of platforms for defamation and disinformation. In some countries, this already applies to »traditional« TV, radio and the print media. Apart from the fact that private and even public media do not all report independently, fairly and impartially on candidates and parties, they sometimes take part in »smear campaigns« against political opponents. The problem has been greatly exacerbated by the Internet and social media, where unfiltered hounding is possible, whether by real users or »trolls«. While the Internet and social media can be used to inform and exchange information during election campaigns, as already mentioned they unfortunately also provide the opportunity to significantly influence, if not manipulate, public opinion and elections.

# PARTY AND ELECTION CAMPAIGN FINANCING

It is widely accepted that election campaigns cost money. Candidates and parties cannot promote their views and programmes if they do not have the financial means to do so. Thus, adequate campaign financing is an important element of elections in modern democracies. However, the influence of money can lead to corruption and unfair competition. It is therefore important that election laws or laws on party (financing) include clear rules on campaign and party financing. However, in some countries such a legal framework is lacking. In some others, the rules are so complex that parties sometimes find it difficult to meet the bureaucratic requirements.

Admittedly, the regulation of election campaign and party financing is a difficult task. Accordingly, legal regulations vary widely around the world. Some relate to the financing of political parties, including all their activities, while others relate only to election campaign financing. In some countries, parties receive public subsidies for their election campaigns, while in others they rely – exclusively or primarily – on private funds. Often a mixed system exists. In some countries, income and/or expenditure is »capped«, while in others it is not. Certain income and expenditure may also be prohibited. Finally, the legislation varies considerably as to whether and to what extent party and election campaign finances need to be broken down. The great diversity makes it difficult to establish common standards in this area.

## Public funding of parties and campaigns

However, in the interest of equal opportunities, it would seem appropriate for the state to provide (moderate) public campaign grants so that all candidates and parties, regardless of their (possibly small) financial resources, can promote their political views and programmes. This has also been called for by the Venice Commission of the Council of Europe, while accepting that a minimum percentage of votes may be a condition for direct public funding to parties.<sup>1</sup> In doing so, the Commission recognises that in a number of countries the granting of state sup-

<sup>1</sup> CDL-INF (2001) 8, para. 8.

port to parties and/or election campaigns is not only linked to party registration or participation in elections, but also to winning seats or a defined percentage of votes.

The database of International IDEA identifies 63 states with regularly provided public funding of political parties, another 45 states that also provide direct public election campaign grants, and a further 16 states in which public funding is limited to the election campaign.<sup>2</sup> The latter include Canada, the USA, Australia and New Zealand. 49 states are listed in the database that do not provide any public party or election campaign financing. They include established democracies such as Italy and India, young (sometimes »defective«) democracies such as Ghana and Sierra Leone, and electoral autocracies such as Egypt, Iran, Pakistan and Belarus. In the 2016 parliamentary elections in Belarus, candidates had to forego public campaign support for the first time and campaign at their own expense or with private donations, limited in amount.

Where public subsidies are granted, the principle of equal opportunities must be respected. It can be applied in a strict sense so that all candidates or parties receive the same subsidies. This is practised both in states where competitive elections are held (such as the USA, Paraguay, Tunisia and Mongolia) and in states where the degree of competitiveness of the elections is (severely) limited (e.g. Angola, Gabon, Cambodia and Tajikistan). Far more frequently, however, public funding is distributed in proportion to the strength of the parties at the level of votes or mandates. In simple terms, the more votes or mandates the party has (or has had), the higher the public subsidies or reimbursement of campaign costs. The Council of Europe's *Code of Good Practice in Electoral Matters* allows the principle of equality to be applied both in its strict and in this »proportional« sense. The same applies to indirect public subsidies, such as free advertising time in public media.

In Germany, political parties are financed by contributions from members and elected officials, donations from natural and legal persons, income from assets, events, marketing and other income-generating activities, and from government grants. The parties receive partial public funding for their activities, which are incumbent on them under the Basic Law and are specified in the Political Parties Act. This also includes, in particular, participation in elections. The criterion for the distribution of state funds is the parties' roots in society. This is measured, on the one hand, by success in European, *Bundestag* and *Landtag* elections and, on the other hand, by the amount of contributions from members and elected of-

2 Political Finance Database. Online at: <https://www.idea.int/data-tools/data/political-finance-database> (as of 29th May 2021).

ficials as well as the party donations collected from natural persons. The amount of partial state financing may not exceed the sum of the parties' revenues (relative upper limit). The total volume of party financing is also »capped« (absolute upper limit). The German scheme is interesting in that it seeks to strike a balance between self-funding and state support, electoral success and grant-related state contributions, and relative and absolute upper limits.

In principle, those parties are entitled to partial public funding if the final election results show that in the last European or federal elections they achieved at least 0.5%, or in the most recent *Landtag* elections 1% of the valid votes cast for their lists. A further precondition for entitlement is the submission of the reports due in each case, by means of which the parties give an annual account of their income, expenditure and assets. Since a reform of the Basic Law in 2017, parties which are unconstitutional (but not necessarily prohibited) and »by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany« (Article 21(2)) have also been excluded from public funding.« If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease« (Article 21(3)). The Federal Constitutional Court makes the decision on this. In July 2019, the *Bundestag*, *Bundesrat* and Federal Government submitted a joint motion to exclude the NPD from public funding.

## The regulation of private donations

So how can private financial support be regulated, which in many countries, where permitted, is far more important than public financial support? In the USA, for example, election campaigns are primarily financed by private donations. International IDEA's database on political financing shows that in most countries donations from abroad are prohibited. The Venice Commission of the Council of Europe also calls for a ban on party and election campaign financing through foreign states or companies. However, the ban should not apply to nationals resident abroad.<sup>3</sup> Moreover, in many countries, anonymous donations are prohibited in general or above a certain amount, which is certainly conducive to the transparency of party and/or election campaign financing. However, this is not always to the benefit of donors. Apart from the fact that in some cases »dirty money« flows into election campaigns – as drug money was demonstrably fed into the election campaigns of former presidents Jaime Paz Zamora in Bolivia,

3 CDL-INF (2001)8, paragraphs 6 and 10.

Ernesto Samper in Colombia and Ernesto Pérez Balladares in Panama<sup>4</sup> – even serious donors sometimes support the government and the opposition alike, so that they are always on the »winning side«. The other side should not necessarily know this though.

Donations from trade unions are allowed in the majority of cases. The same applies to donations from companies, although in some places with the restriction that they may not have business connections with the government. Donations to so-called third parties<sup>5</sup>, which do not run for election themselves, but which promote the election of certain persons and parties, have also become more important. This is now particularly prevalent in the USA. There, *Political Action Committees (PACs)*, *Super-PACs* and other committees are allowed to collect an unlimited amount of donations and spend money to promote their preferred candidates, as long as they do not transfer the money directly to the candidates or coordinate with their campaign teams. This was made possible by decisions of the US Supreme Court in 2010 and 2014, according to which the state may not restrict political contributions as long as they do not flow directly from an individual or institution to a candidate. This is based on the understanding that such financial contributions are part of freedom of expression. The International IDEA database shows that in the majority of states there are no restrictions on general or even election-related party donations and candidates. Furthermore, for the majority of candidates there are no rules on how much private wealth they put into their election campaign. There are also no limits on taking out loans for election campaign purposes in most cases.

### **High election campaign expenditure**

It is undeniable that money now plays a paramount role in election campaigns, even if, according to International IDEA, party spending is »capped« in 63 countries and candidate spending in 87.<sup>6</sup> In the many countries where there are no restrictions on campaign spending, the doors are already legally open to the influence of money. Added to this, where applicable, is the expenditure of the aforementioned »third parties« which carry out election advertising. In many places they are not banned, and their expenditure is usually not subject to any restrictions.

4 Cf. Zovatto 2019: 806.

5 These are not political parties. The concept of »third party« is rather borrowed from (civil) law, where »third parties« are, as it were, »uninvolved parties«.

6 <https://www.idea.int/data-tools/data/political-finance-database> (as of 5th December 2020)

As a result, election campaign expenses are correspondingly high in many places. The front-runners are probably the USA. As the Centre for Responsive Politics has calculated on the basis of the financial statements submitted to the Federal Election Commission, campaign expenditure for the US congressional elections in 2018 amounted to about \$5.7 billion. This is even higher than in 2016, when \$4.3 billion was spent on the Congressional campaign. In 2016, however, almost \$2.5 billion was added for the presidential elections.<sup>7</sup> This includes the expenditures of the respective candidates for the Senate and the House of Representatives as well as the campaigns of parties and the aforementioned Political Action Committees.

According to International IDEA, in 108 states the parties and in 123 states the candidates have to submit – more or less detailed – financial reports on their election campaigns and in many cases make them publicly available. In most cases, the electoral authorities are responsible for the audit, but sometimes also special audit agencies or ministries, parliamentary committees and/or courts. Transparency of party and/or campaign funding is indeed of great importance for the democratic process, as voters need to know from whom candidates and parties have received financial support and whether they are accounting for and spending it legally. With this in mind, it is in principle to be welcomed that, for example, in Honduras in 2016 a law with the promising name »*Ley de Política Limpia*« (Law on Clean Politics) has been adopted, which is intended to improve the transparency of pre-election revenue and expenditure and to cap campaign expenditure. It also aims to combat corruption and illegal campaign financing, particularly by drug gangs and organised crime. However, it remains to be seen to what extent such laws are actually effective in Honduras or other countries. The International IDEA database does not provide any information on this. Scepticism is warranted, not only in Honduras.

7 Calculations by the Center for Responsive Politics: [www.opensecrets.org](http://www.opensecrets.org).

## THE PUBLICATION OF ELECTORAL POLLS

Election polls can influence voting behaviour in many ways. Not only can they affect voter turnout, depending on whether they predict a »close« or an effectively already decided election, but they may also influence voting decisions. For example, election prognoses may suggest political satisfaction or a mood for change that leads to a greater number of people voting for governing or opposition parties. Election forecasts can also indicate an upward or downward trend of a party, which can influence voting behaviour. The choice of small parties also depends on whether survey-based election forecasts predict that they are likely to win or lose seats in parliament (because they might fail to win due to a threshold clause, for example). Tactical voting behaviour, for example in respect of the formation of a possible coalition government, is also influenced by polls.

On the one hand, it can be argued that election prognoses can promote rational voting behaviour. On the other hand, an overly strong influence of polls on voting decisions is seen as problematic. This is all the more true if they are misleading and politically abused, as OAS election observation missions, for example, criticise.<sup>1</sup> With the growing importance of polls commissioned by political parties or the media, many states have therefore introduced rules to ensure that the influence of polls is limited and manipulation is avoided. Such rules may include requirements that the surveys provide information on, for example, the client and implementing organisation, the number and type of respondents and the methodology. In order to avoid artificial poll data by »sham institutes« and to ensure a minimum quality of the surveys, polling institutes conducting electoral surveys are even required to register with the electoral authorities in some Latin American countries.

Particularly significant are guidelines for the publication of the survey results. It is usually forbidden to publish election polls within a more or less long period of time before election day. In Europe, this period is usually between 24 and 48 hours. In Spain the ban extends to five days before the elections. An even longer ban was introduced in Slovakia through an electoral reform. There, no election-related opinion polls could be published less than two weeks before the 2016 parliamentary elections, and even 50 days before those in 2020 – which was not without good reason already seen as an interference with the freedom of infor-

1 Cf. for example the OAS reports on the 2018 elections in Paraguay and the 2019 elections in Panama.

mation of those entitled to vote. In Latin America, the periods are on average longer than in Europe, ranging from two days (Uruguay) to 30 days (Honduras) or even 36 days (Guatemala) before election day.<sup>2</sup> However, neither traditional nor social media always stick to the guidelines.

In Germany, there is neither a ban on polling voters before or on election day, nor a ban on publishing such poll results before the elections. However, polling institutes and political parties traditionally exercise great restraint shortly before election day, so that no corresponding need for regulation is seen.<sup>3</sup> However, such a need may well arise if practices change. It should also be borne in mind that people who use postal voting usually vote at a time when the results of election-related opinion polls are being published.

Of particular importance is the ban on the publication of polls on election day before polling stations close. A similar provision was also included in the 1979 Federal Election Act of the Federal Republic of Germany. It does not prohibit »exit polls«, i.e. surveys of voters after they have left the polling station, which are used by polling institutes as a basis for their election forecasts. However, the publication of such poll results and forecasts before polling stations close is not permitted in order to prevent them from influencing voting behaviour. The ban on publication also extends to social networks. However, it is problematic that the ban only applies to actual election polls. It is unsatisfactory that – at least in terms of the wording – neither the Federal Election Act (section 49 (1) No. 2) nor the Criminal Code (section 108 (1)) expressly prohibit the dissemination of invented predictions or fake election results on social media on election day.<sup>4</sup>

2 Lazarte Rojas 2019: 916.

3 Cf. Schreiber 2017: 574.

4 Cf. Schreiber 2017: 573.

## THE BALLOT AND ITS PITFALLS

Universal, equal, direct, secret and free suffrage must be guaranteed in the organisation of elections. It is therefore the responsibility of the electoral authorities to ensure that all registered voters can vote without undue influence and that a secret ballot is guaranteed.

### When do elections take place?

It is a key democratic principle that elections are held at regular intervals. From a democratic point of view, it is problematic if the term of office of elected officials is extended for the current term or if elections are postponed (let alone indefinitely) for spurious reasons. It may be appropriate to postpone the date of elections because of serious organisational or security problems or health risks, as was the case during the COVID-19 pandemic in 2020.<sup>1</sup> However, apart from such reasons, election postponements are often motivated by political calculation or the unwillingness of those in power. Take the Palestinian Territories, for instance, where no elections have been held since 2005. In Lebanon, political instability and a lack of political consensus on electoral law reform led to the parliamentary elections scheduled for 2013 being postponed several times. After 2009, elections were not held again until 2018. For this reason too, Lebanon has since been classified as a »moderate autocracy« rather than a »highly defective democracy«.<sup>2</sup>

An extraordinary spectacle took place in the »Democratic Republic of Congo«, which is not at all democratic. In 2015, street protests and international pressure forced the then incumbent Joseph Kabila to abandon his plan to lift the ban on re-election after two terms of office by means of constitutional reform. As a result, he postponed indefinitely (with reference to the problematic voter registration) the elections due in November 2016, in which he was no longer allowed to run. Only after national and international pressure did the elections take place in December 2018, formally without him, but he remained the strong man behind a government alliance that supports his movement, even if it does not put up the

1 See the supplement on elections during the corona pandemic at the end of the book.

2 Cf. Völkel 2018: 5. The Bertelsmann Transformation Index uses the following categories to typologically determine the level of development of political transformations: democracies in consolidation, defective democracies, highly defective democracies, moderate autocracies, hard-line autocracies; cf. [www.bti-project.org](http://www.bti-project.org).

president. The Africa researcher Pierre Englebert spoke of an »electoral sideshow« and noted with disappointment that »Kabila’s retention of power despite the election represents an unusual tour de force for an authoritarian ruler and a catastrophic failure for democracy«.<sup>3</sup>

However, in most countries, not only in democracies but also in electoral autocracies, elections take place at regular intervals, unless new elections are called early, which is not at all uncommon in unstable government situations. Elections are usually called at least 90 days before election day, although sometimes earlier. If elections are called at too short notice, opposition parties in particular may be disadvantaged if they are not given enough time to prepare for the election competition.

It is rather unusual for elections (where only one ballot is held) to be held on several days, like in Egypt, for example, or even in different weeks, as in India, where a »marathon election« takes place, as it were: For organisational reasons, elections in India are held at different times in different parts of the country over a period of six weeks. Elsewhere, elections are usually held within a day, often on a fixed day of the week. In Germany this is always a Sunday. In large territorial states, voting can also take place across several time zones. In Russia, polling stations in the Kamchatka region have long since closed again when Kaliningrad’s voters are still voting. In addition, Russian citizens living or residing in 35 remote regions north of the Arctic Circle and in the Far East have the possibility of »early voting«. To ensure that their votes are counted in time, they are allowed to vote before election day. In the 2018 elections, this affected around 120,000 people, including reindeer herders, oil and gas field workers and sailors.<sup>4</sup>

In a number of other countries, too, certain categories of voters (e.g. electoral staff, police forces) or all voters (under certain conditions) may vote before the actual election date. Iceland, Finland, Norway and Sweden, for example, have a long tradition of early voting, though this always requires a considerable amount of additional administrative effort.<sup>5</sup> In the most recent elections (2017, 2018 or 2019), in Iceland almost 19% of the votes were cast in advance, in Norway 36%, in Sweden 47%, and in Finland 51%. Curiously, in Iceland, the possibility of early voting began one month before the end of candidate registration.<sup>6</sup> There are also differences between early voting and regular voting procedures in Iceland, which is odd by international electoral standards.

3 Englebert 2019: 124.

4 Cf. Katzenberger 2018.

5 See the electoral laws of the respective countries.

6 Cf. the ODIHR report on the 2017 elections.

Politically more significant, however, is the question of whether elections to the various elected institutions at national (president, lower chamber of parliament, possibly senate) or even sub-national level (regional, local elections) are held separately or at the same time. There are undoubtedly organisational and financial reasons for merging elections. This can also have a positive effect on voter turnout. Politically, the interaction between the elections is also strengthened: if, for example, presidential and parliamentary elections are held at the same time, there is a greater chance that the outcome of the presidential elections – which are usually considered more important – will also influence the outcome of the parliamentary elections. If, on the other hand, presidential and parliamentary elections are held separately, possibly in different years, it is more likely that the election results will diverge more. However, whether this makes it easier or more difficult to govern depends also on many other factors. Latin America, a region where presidential systems are used throughout, offers a fertile field for investigation in this respect. In some countries, presidential and parliamentary elections are held separately, in many others together, in some cases even on the same ballot (*boléta única*) and with only one vote.<sup>7</sup>

### **Identification of voters and measures to prevent multiple voting**

The identification of voters before they cast their vote is essential to ensure the integrity of the ballot and to avoid multiple voting, where voters cast more than the vote(s) to which they are entitled or vote in more than one polling station. This is necessary: Particularly in countries with little democratic electoral tradition and in electoral autocracies, it happens time and again that voters are transported from one polling station to another in a so-called »carousel voting« in order to illegally vote more than once, usually for the ruling party, but sometimes also for the opposition. Accurate electoral registers and careful voter identification can help to avoid this. Usually, voters have to identify themselves by means of ID cards, pre-issued voting cards or ballot papers – which are then cross-checked against electoral lists and confirmed by the voter's signature (or fingerprint).

With technical progress, the identification of voters by means of biometric data (fingerprints, face recognition, etc.) is also gaining in importance. The International IDEA database lists 48 countries worldwide that use biometric data at the polling station – the vast majority of them in the countries of the »Global

7 Cf. Nohlen 2019: 408.

South«. <sup>8</sup> Brazil, for example, has long since switched to storing biometric data when registering voters, which then allows the registered persons to be identified, among other things, by their stored fingerprints at the polling station. Almost 60 per cent of registered voters used this technology for the 2018 presidential elections. In Africa, too, identification by means of biometric data is propagated by technophile advocates<sup>9</sup> and, according to International IDEA, is used in 20 countries. In Ghana, for example, such technologies were used for the first time in the presidential and parliamentary elections in 2012, but by no means without difficulties. In Nigeria, the »Independent National Election Commission« began issuing *Permanent Voter's Cards* for the 2014 elections and nationwide for the 2019 elections, which contain individual biometric data on a chip.<sup>10</sup> In Namibia a *Voter Verification Device* in the polling station reads the polling cards.<sup>11</sup> In the Council of Europe countries, for example, identity documents containing biometric data are used in Albania, Armenia, Georgia and Montenegro.<sup>12</sup>

A simple measure to prevent multiple voting is to mark a finger with indelible ink. Although this method is not used in established democracies in Western Europe and North America, it is used in countries in other regions of the world – from Belize, Afghanistan, Egypt and Lesotho to Indonesia and Timor-Leste. It is widely recommended, especially for emerging or young democracies, provided, of course, that the ink is actually indelible for a sufficiently long period of time and is applied appropriately (which is not always the case due to the lack of quality of the ink and the lack of appropriate training for election personnel). In fact, in the case of the 2014 Afghan presidential elections, indelible ink was the main mechanism for preventing multiple voting, as voters were allowed to vote at any polling station throughout the country. However, since the Taliban had called for an election boycott, it would have made sense to use »invisible« ink, which can only be read with special readers at the polling stations so as not to endanger voters. However, this in turn is technically more demanding and more prone to interference. In Cambodia, opposition activists initiated a »clean finger« boycott campaign, albeit at too short notice and with little success, to counter the government's attempts to increase the legitimacy of the only slightly competitive parliamentary elections of 2018 by means of a high voter turnout. Sad, because it is necessary, is the fact that special electoral regulations in the former civil war countries El Sal-

8 [www.idea.int/data-tools/data/icts-elections](http://www.idea.int/data-tools/data/icts-elections) (as of 5th December 2020)

9 See, for example, the contributions in Nwokefor 2017.

10 Cf. Obe 2019: 111 et seq.

11 See the African Union report on the 2019 elections in Namibia.

12 [www.idea.int/data-tools/data/icts-elections](http://www.idea.int/data-tools/data/icts-elections) (as of 5th December 2020).

vador and Nicaragua specifically prescribe that voters who have lost both hands or arms should be marked in a different, visible place on their bodies.

### **Buying votes – a widespread problem**

Apart from multiple voting, buying votes is a common problem in electoral autocracies which, however, is not completely absent in democracies, either. The section on election campaigns already referred to the practice of many governments of influencing voters with the help of public resources and election gifts. Besides this, there are regularly examples of votes being bought specifically, whether in the run-up to the elections or on election day. In many countries – the International IDEA database alone lists 165 – the buying of votes is expressly prohibited and sometimes subject to heavy penalties. Malawi's new Political Parties Act of 2018, for instance, prohibits handouts (cash, gifts, etc.) to influence voters.<sup>13</sup> However, such practices are commonplace in countries with a weak democratic electoral culture. In Cambodia, to name just one example, buying votes is traditionally widespread. In other countries and regions of the world, too, buying votes is criticised to a greater or lesser extent, even in Europe: The practices of vote buying and »organised« voting persist in Albania, Bulgaria, Moldova and Ukraine, for example. It should be noted that not only politicians or parties that want to achieve a better election result and win as many seats as possible are responsible for vote buying. There are also people who are entitled to vote and who want to sell their votes. In Nigeria, for instance, it is reported that many voters expect something in return for their participation in the elections, and openly ask candidates what they are willing to pay for their vote.<sup>14</sup>

Incidentally, there is a correlation between vote buying and the electoral system: the smaller the constituency, the lower the financial outlay and the chances of success of vote buying. In parliamentary elections that award seats in single or small multi-person constituencies, it is therefore generally easier to buy votes than in countries that use (closed) party lists in large constituencies or even at the national level.<sup>15</sup> For the same reason, buying votes in local and regional elections is sometimes more prevalent than in national elections.

13 Under the Political Parties Act there, »handouts« means: »transactions whereby political parties, bodies, candidates or any other person distribute private goods, cash, gifts and other items to a person as an enticement to vote for the political party or the candidate that shall not include matters or transactions specified in the Schedule« (Political Parties Act 2018, Section 2).

14 Obe 2019: 13.

15 See the chapter on electoral systems.

## Voting at the polling station – still the gold standard

Voting with a printed ballot paper at the polling station is still the most common and perhaps the safest way to vote, as it is the best way to ensure free and secret voting and to check the correctness of the results afterwards. However, it is important to ensure that voters actually cast their votes free of pressure and external influence – and to avoid electoral fraud, especially if they cannot be confident that their vote will be truly secret.

Against this background, it is first of all important that polling stations are, as far as possible, located in neutral places, such as schools, and that election advertising is no longer on display there. The design of the polling stations must allow for a proper electoral process and proper secret ballot free of pressure. This ranges from the availability of the necessary voting materials to the rules of conduct at the polling station and the setting up of the voting tables, booths and ballot boxes. This often reveals whether the people in charge at the polling station have been given clear and sensible instructions and are well trained. An orderly ballot is important for free and secret voting. Although elections draw in a lot of people and observation is both desired and important, overcrowded polling stations can sometimes put pressure on voters or even jeopardise the secrecy of the voting process – for example, when queues are led directly past the polling booths or when people congregate near polling stations. This is all the more true when – as in the Philippines, for example (for economic reasons) – no polling booths are used, but only cardboard privacy screens to enable secret voting.

In general, the carrying of weapons in polling stations or, as in the Philippines or in some Latin American countries, anywhere in public on election day is expressly prohibited. Furthermore, armed and security forces should not be in the immediate vicinity and certainly not in the polling station, as they can also be perceived as a threat, especially in former or existing authoritarian contexts. Only when security problems arise should those responsible at the polling station call them in if necessary. In countries such as Afghanistan, where the Taliban threaten the election process, the visible presence of security forces has so far proved indispensable. In the 2019 presidential elections, the government there deployed some 100,000 members of the military and security forces to ensure the security of the ballot. Nevertheless, in many parts of the country a secure ballot was and is not possible. This also applies to a varying degree to some African countries with internal violent conflicts, such as Cameroon or Nigeria. Even in Mexico, although the election day was generally peaceful, a total of 936 polling stations had to temporarily suspend voting and 32 polling stations had to comple-

tely suspend voting in the 2018 elections due to the theft or destruction of voting material or the threat of violence.<sup>16</sup>

However, even in countries without openly violent conflicts, security problems can arise, and considerable pressure can be exerted on the electorate to go to the polls and vote for certain persons or parties. This is particularly true in electoral autocracies. However, pressure is usually built up in the run-up to elections: In Belarus or Russia, for example, even before the elections, workers and employees in state-owned enterprises, teachers and students, parents of school children and members of the public administration are repeatedly pressured to take part in the elections and vote in favour of the regime. This is often done through compulsory participation in election campaign events, such as in Kazakhstan in the 2019 elections, or by addressing individuals directly. Sometimes, however, influence is also exerted on polling day, for instance in the context of the organised transport of voters to the polling station. The latter occasionally also happens in democracies.

In any case, even in democracies, the presence of large groups of identifiable party members in front of and inside the polling station can make voters feel intimidated or harassed, which OAS observers complained about, for example, in the 2015 elections in Belize and the 2016 elections in the Dominican Republic. Despite election campaign bans on polling day, many voters in Latin America and the Caribbean in particular go to the polls dressed in the colours of their party, leaving no doubt as to who they are voting for. The same applies to many elections in Africa. For this reason, in the Seychelles, for example, it is expressly forbidden to wear or display clothing, banners, badges, flags or the like, which indicate a person's voting preference, within a radius of 100 metres from the polling station.

### **The secret ballot**

Oral and thus open voting was still common in the 19th century, for example in Great Britain before the Ballot Act (1872), in many US states (until 1896) or also in Denmark (1848–1900) and Iceland (until 1906). Also in Prussia the second chamber was publicly elected from 1849 to 1918. A variant of the non-secret ballot was that the voters had to line up in different queues depending on their preferred candidate.<sup>17</sup> In the course of the 20th century, however, the secret ballot became generally accepted – with the exception of some elections under authoritarian conditions. In 1943, in keeping with the spirit of the then dictator Anastasio Somoza García, Nicaraguan constitutional lawyer Manuel Escobar, for example,

<sup>16</sup> Cf. the OAS Election Report on the 2018 elections.

<sup>17</sup> See Elklit 2000a: 192.

described the secret ballot law – which was already common in Latin America at that time – as follows: »The written vote achieves nothing but frightening and intimidating the voters; the secret ballot attempts to conceal the responsibility of the cowards, egoists and undecided. The oral vote, which must be public, is superior to the secret vote, since it teaches manliness and patriotism, and the right to vote is not exercised out of fear, but to fulfil a sacred duty«. <sup>18</sup> Accordingly, in the 1947 elections in Nicaragua, there were separate queues for the government and opposition candidates, with those for the opposition sometimes being forcibly dispersed by the National Guard. Even after the reintroduction of the secret ballot in 1962, the secrecy of the vote was not guaranteed during all seven national elections during the Somoza dictatorship (1936–1979). <sup>19</sup>

Nowadays, the right to vote by secret ballot is fundamental to democratic elections. It enables voters and, especially in traditional societies, women voters to keep their choice to themselves and protects them from any negative consequences and sanctions. At the same time, it enables them to vote independently of external influence. The possibility of voting outside the voting booth, either legally provided for or actually used, is therefore untenable. In the case of Hungary, Russia and Ukraine, the ODIHR has occasionally criticised such practices. Elections not conducted in secret are contrary to international standards, as it is not only a right but also an obligation to vote by secret ballot in order not to influence the voting decisions of other people. At the same time, secret voting serves to avoid practices of harassment of voters and vote buying. Indeed, harassed and »bought« voters could be encouraged to disclose their voting decisions. For this reason, the taking of photographs of one's own completed ballot in the voting booth, which is now particularly easy and difficult to detect with a mobile phone, should also be prevented. <sup>20</sup> In the case of a bought vote, the photograph could serve as proof of the voting decision taken. For the 2019 elections in Nigeria, the National Election Commission even explicitly banned mobile phones in the voting booth, but without actually being able to enforce the ban. <sup>21</sup>

Equally unacceptable is the practice of spouses and families voting together (family voting) in the voting booth, as was once common in the former Soviet Union and Eastern Europe and is still sometimes practised and tolerated there. It was still widespread in the recent elections in Kosovo, for example. However, it is not always easy for voters to understand that the secrecy of the ballot – even

18 Escobar 1943: 27 (translation from Spanish by the author)

19 See Krennerich 1996a, 1997.

20 Such a ban also exists in Germany.

21 Obe 2019: 113.

between family members – is a democratic electoral principle. *Haus lain voting*<sup>22</sup> is even more extreme, as is the case in Papua New Guinea (and similarly in Central Asian states). This entails the leader of a family or group marking the ballot papers of all those eligible to vote in that family or group. Strictly speaking, this is not so much a violation of the right to a secret vote as a multiple vote by one person and the *de facto* withdrawal of voting rights from the others.<sup>23</sup>

Restrictions on secret ballots sometimes only arise as a result of overcrowded polling stations, incorrectly laid out voting documents, the location of voting personnel or the inattentiveness of voters who fold their completed ballot papers outside the voting booth. Such incidents are particularly common in countries where the population has little or no experience of democratic elections and where, at the same time, the people responsible in the polling stations are not sufficiently trained. In Germany, incidentally, polling officers must reject a voter if the ballot paper is marked or folded outside the voting booth or if it is folded or marked in such a way as to jeopardise the secrecy of the ballot. The same applies if the ballot paper is photographed or filmed inside the voting booth.<sup>24</sup>

However, there are also restrictions on secret ballots, which are (or must be) accepted. This already applies to the fact that it is possible to identify who took part in the elections – by means of the public nature of the ballot, signed voter lists in polling stations, stamped passports or voting cards, or even marked fingers. However, voter participation is sometimes a political issue: in order to ensure the supposed democratic legitimacy of the elections, not just a few autocrats try to compensate for the more or less severe restrictions on electoral competition by means of a high voter turnout. Knowing who was absent from the elections can have negative professional or personal consequences for the individuals concerned, especially if there have been calls for boycotts by the opposition.

There are restrictions on the secrecy of the ballot itself in the case of all those persons who need assistance to vote. It is true that technical procedures have been developed and implemented worldwide that enable illiterate people or people with disabilities, for example, to cast their votes without assistance – from symbols for political parties to Braille ballot papers and disability-friendly electronic voting. Nevertheless, there are still people who need the help of others to cast their votes. Whether they are relatives or friends, who are (allowed to be) chosen by the people concerned themselves, or people responsible at the polling station, the secrecy of voting is inevitably limited. This also applies to proxy vo-

22 Haus lain – Pidgin for a group from one house/household.

23 Cf. Elklit/Maley 2019: 70, footnote 12.

24 Cf. section 56 (6) of the Federal Electoral Regulation (*Bundeswahlordnung, BWO*).

ting which is used extensively in Belgium, France and the Netherlands, for example, but is expressly prohibited in Finland.

It also cannot be guaranteed that in the case of postal voting the ballot paper is always filled in secretly or that it is only completed in person, even if, as in Germany, a signed declaration to this effect is also submitted. The transport and counting of postal votes also involve risks. Similarly, Internet voting is not free of risk. After all, it must be ensured that only the person entitled to vote casts their vote, and in such a way that the vote cast can no longer be attributed to the person who cast it.

## Variations of the ballot paper

At the polling station, votes are usually cast on one or more ballot papers, although these may vary considerably. If several elections are held on the same day (president, parliament, etc.), there are often different ballot papers for the organs to be elected. Sometimes, however, the different institutions are elected using the same ballot paper, in extreme cases with one and the same vote. This strengthens or (if only one vote is cast) even guarantees the coherence of the vote for different organs.

Moreover, a single integral ballot paper listing all candidates and/or parties and on which voters mark their preference(s) is not used everywhere. This type of ballot was first used in 1856 in the Australian colony of Victoria, and is still known in the Anglo-American world as the »Australian Ballot«.<sup>25</sup> Although it is widely used, a few countries – in Europe, for example, France, Sweden and Spain, in Latin America, for example, Argentina and Panama – still apply a system that provides for a separate ballot paper for each candidate or party to be selected in the constituency. If a »ballot and envelope model«<sup>26</sup> is used, the voters cast their vote by first placing the ballot paper of their preferred candidate or party in a neutral envelope and then in the ballot box. In some cases, the printing of such ballot papers is even the responsibility of the parties themselves (e.g. in Argentina and Panama), although this is subject to government guidelines as to how they should look.

However, such a model has disadvantages, at least when the ballot papers of all candidates and/or parties standing for election are laid out on a table in the polling station. Instead of having the ballot paper handed out by the persons responsible at the polling station, as is otherwise customary, voters choose one

25 See Mackie 2000: 19 et seq.

26 Elklit/Maley 2019: 62.

or more ballot papers themselves and take them with them to the voting booth, where they first put their preferred ballot paper in a neutral envelope and, after leaving the booth, in the ballot box. The secrecy of voting is compromised in this procedure if it is publicly visible which ballot papers are taken into the booth: if voters only take one ballot paper with them, their choice is easy to determine; if they only take a few, certain voting preferences can at least be ruled out. In strict terms, secret voting is only fully guaranteed if the ballot papers are laid out in the voting booth, as is the case in Spain,<sup>27</sup> or if voters take all the ballot papers laid out into the voting booth. Alternatively, they may bring a ballot paper already distributed by political parties or public institutions before the elections. Since the ballot and envelop model makes it more difficult to guarantee the secrecy of the vote and encourages vote buying, it is not recommended for countries without a democratic electoral culture. In Bulgaria, the 2005 electoral reform put an end to this practice. Even in the authoritarian Republic of Congo (Brazzaville), single integral ballot papers were introduced in 2016 by means of an electoral reform, as requested by the opposition in order to make election manipulation more difficult.

As a rule, therefore, elections are now held using single integral official ballot papers, the design of which is then regulated to a greater or lesser extent in laws and regulations. As a rule, only a defined number of ballot papers are printed, in order to avoid too many ballot papers being freely circulated. If an »Australian ballot« is used, the order of the parties on the ballot is also significant for political competition. This is usually determined by the relative strength of the parties in previous elections or alphabetical or, as in Finland, by drawing lots. In Germany, for example, the order of party lists and constituency nominations on the ballot papers is initially determined by the number of second votes obtained by the party lists in the last *Bundestag* election in the country. The other party lists and constituency candidates follow in alphabetical order of the keywords or names of the parties.<sup>28</sup>

In countries with a high illiteracy rate, it is common and good practice to put symbols for candidates or parties on the ballot papers. In many countries around the world the ballot papers are correspondingly colourful. This makes it easier for all those voters who are unable to read to cast their votes without the help of another person. However, the choice of symbol can be a political issue, as it makes a difference whether a party – polemically speaking – is identified by the symbol of a turtle or an eagle on the ballot paper. Occasionally, the symbols are

<sup>27</sup> Article 86(2) of the electoral law.

<sup>28</sup> Cf. section 30 (3) BWahlG.

officially specified and determined between the parties by drawing lots. For reasons of equal opportunities, it is problematic if a party uses the national colours or national symbols, which is sometimes expressly forbidden.

If integral ballot papers are used, the actual voting is usually done by marking the ballot papers, either with a pencil or, as in Indonesia, by using a nail to punch a hole in the ballot paper. In the Philippines, until the introduction of voting machines (see below), voters received blank ballot papers on which they had to write the names of their preferred candidates. Finland also uses »write-in-ballots«. There, large posters with numbered candidates from all parties are on display and voters write the number of their preferred candidates on the ballot paper. The Gambia has a unique (and nice) way of voting, which will of course now be changed: Up to now, voters there have placed glass voting marbles into differently coloured ballot boxes corresponding to their preferred candidate.<sup>29</sup> The method was already introduced in the 1960s in view of the high number of illiterate voters. Counting was quite simple, as the glass marbles were placed in special trays with 200 or 500 balls. The difficulty, however, was to determine whether one or more balls had been thrown in, given the multiple clicks of the marbles when they were placed in the metal ballot boxes. The ballot box was therefore filled with sand to prevent the marble from bouncing around. Moreover, the ballot boxes were not supervised, since they had to be placed directly behind the voting booth and thus outside the field of vision of the polling officers, in order to allow secret ballots to be cast. The electoral commission recently announced that the marbles would be replaced by ballot papers.<sup>30</sup>

## Electronic voting – risk or guarantee for clean elections?

The use of electronic aids is now widespread. The closest to classical voting is the use of hybrid systems, in which voters fill out a paper ballot, but the paper ballot is counted automatically, either by using machine-readable pens or by means of electronic image capture. Of course, *e-voting* in the narrower sense of the term is only considered to be electronic voting when it is also carried out electronically, as an alternative to ballot papers. Electronic voting machines are now used in

29 For a visual impression of this, see: <http://www.electionpassport.com/electoral-systems/the-gambia/>.

30 See Rahman Alfa Shaban, Abdur: »Gambia to switch from glass marble voting to use of ballot papers«, *Africanews*, article from 20th March 2018. Online at: <https://www.africanews.com/2018/03/20/gambia-to-switch-from-glass-marble-voting-to-use-of-ballot-papers/>.

a number of countries, from Brazil and Venezuela to Namibia, the Democratic Republic of Congo, Kyrgyzstan and the Philippines.<sup>31</sup> *E-voting* can, however, also take place online, so it also encompasses Internet voting (*i-voting*).

*E-voting* can be introduced for a variety of reasons: to open up new ways of voting, to make voting easier and increase voter participation, to enable voters to vote from home or abroad, to save costs and speed up the counting of votes, to avoid vote rigging in the counting and documentation of votes, or even just to »move with the times« and adapt the electoral organisation and voting process to technical progress. Health concerns may be added as a result of recent pandemic experiences. However, despite all the advantages, it should not be forgotten that behind this are tangible economic interests of companies that actively promote their technology. Many technology-friendly election authorities and election consulting organisations are susceptible to this.

In some countries, electronic voting machines have been introduced explicitly for security reasons – in India, for example, to make ballot-box stuffing more difficult, i.e. filling ballot boxes with several ballots at the same time. The electronic voting machines there are supposedly programmed to accept only a maximum of five votes per minute. Although *e-voting* in the strict sense has not been introduced in the Philippines, to prevent ballot box stuffing, vote padding or »*dadag-bawas*« automatic voting machines have been in use there for about ten years. Voters insert their ballot papers, similar to a fax or scanner (*e-counting*). The procedure is well accepted there, although it seems that there were problems with the re-use of the machines in the 2013 elections, as they sometimes did not accept all the ballot papers or stopped working after a while.

Technical problems are an important argument against electronic voting and counting, even in established democracies. Mechanical and electronic voting machines have long been used in the USA, for example. However, the aging technologies used vary considerably between and within states, are sometimes prone to errors and sometimes do not allow for verification of election results by means of printable election records.<sup>32</sup> According to Constanze Kurz in the *Frankfurter Allgemeine Zeitung*, the many uncertainties when it comes to electronic voting, combined with media cyber panic in the face of potential attacks on IT infrastructure, have seriously damaged confidence in the correctness of the election process, even before the 2020 elections.<sup>33</sup>

31 A list of all countries that use e-voting can be found at: [www.idea.int/data-tools/data/icts-elections](http://www.idea.int/data-tools/data/icts-elections).

32 See the ODIHR reports on the US elections.

33 »Wer traut noch einem Wahlcomputer? Die Midterm-Wahlen in den Vereinigten Staaten offenbaren eine Vielzahl technischer Probleme« (Who still trusts a voting

Due to security risks and verifiability problems, electronic voting at the polling station has not (yet) become established in Western European democracies, with the exception of Belgium, where touch-screen voting machines have been used in some cases since the 1990s. In the Netherlands, *e-voting* was abolished in some municipalities after the 2006 elections due to security risks. In Germany, in 2009 the Federal Constitutional Court declared the use of voting computers to be compatible with the Basic Law only if the essential steps of the voting process and the determination of results can be reliably verified by citizens without the need for particular expertise. These requirements were not met by the voting computers used in some places in the 2005 *Bundestag* elections, which were used by around two million voters in several federal states at the time.<sup>34</sup> France has for some time used voting machines in some municipalities in national elections, but they have not become established nationwide. Bulgaria has conducted pilot projects in several elections since 2014. Since the voting machines were not available nationwide, as ordered by the court, they were not used at all in the 2017 parliamentary elections.

Internet voting (*i-voting*) offers – in the sense of remote *e-voting* – an alternative to voting at the polling station. In Estonia, Internet voting has been available since 2005. In the 2019 parliamentary elections, almost 44% of valid votes were cast online, which is probably a world record. A specific characteristic is that within a 7-day period, voters can vote as often as they like. Only the last vote counts, and this can be invalidated by a printed ballot paper that is handed in in time.<sup>35</sup> All this is to ensure that voters vote without influence or pressure from others. While the security of internet voting is not being questioned in Estonia, Belgium and Latvia, in France internet voting (possible for nationals abroad since 2012) was suspended for the 2017 general elections due to cyberthreats. In Switzerland, where *i-voting* had already been tested in several cantons and for voting abroad, it has now been suspended, as none of the available systems met the legal requirements. At the same time, resistance to the introduction of electronic voting as the »third voting channel« for the parliamentary elections formed there as part of a peoples' initiative.

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machine? The midterm elections in the United States reveal a number of technical problems) in: *Frankfurter Allgemeine Zeitung*, article from 12th November 2018, p. 12. Online at: <https://www.faz.net/aktuell/feuilleton/aus-dem-maschinenraum/wer-traut-noch-wahlcomputern-probleme-bei-midterm-wahlen-15885404.html>.

34 BVerfG, judgment from 3rd March 2009–2 BvC 3/07 and 2 BvC 4/07. See also Will 2009, Reiners 2017.

35 For details and the Estonian conditions that facilitate e-voting there in contrast to Germany, see Reiners 2017.

In 2004, the Council of Europe adopted a recommendation on standards for the use of *e-voting* and updated it in 2017.<sup>36</sup> While it was clear that the Council of Europe is quite open to *e-voting*, it also emphasised that public confidence in the technology and in the electoral authorities is an essential prerequisite for the use of *e-voting*. The security, reliability and transparency of the *e-voting* systems envisaged or used must be guaranteed. The Council of Europe confirmed that all voting, including *e-voting*, must respect democratic electoral principles.

From the perspective of universal suffrage, for example, it must be ensured that the voter interface can be used easily and independently by voters, including people with disabilities, and that all votes are actually counted. With regard to voting equality, it is necessary that all voters are equally informed about the technology used and that their identification and voting are reliable in order to prevent unauthorised and multiple voting. Freedom of choice implies that voters' preferences are reliably recorded by the voting machine and are not affected or falsified. It is therefore important that they are able to confirm and verify their vote. At the same time, precautions must be taken to ensure that voters do not make any supporting documents for their vote public or even use them as proof when buying votes. In the case of online voting, they should therefore not be able to make screenshots, printouts or copies of their vote. The secrecy of the ballot, on the other hand, requires, as already mentioned, that the voting decision cannot be attributed to the respective voters, even retrospectively.

If voters do not have confidence that the election decisions will remain unaltered and anonymous and that everything will be »in order« when the votes are counted, the use of *e-voting* is problematic. This is all the more true if no adequate security measures have been taken against external influences (keyword: hacking). Particular challenges concern electronic voting outside the polling station (*remote e-voting*). Secure encryption technologies are indispensable, especially in the case of online voting. Extensive testing before the system goes live is just as important as ongoing checks, technical updates and serious risk management. The verifiability of the voting results must also be ensured.

Nevertheless: A trend towards *e-voting* is discernible worldwide, especially in the countries of the »Global South«. In Brazil, since 2000, the entire electorate has been voting by means of »electronic ballot boxes« – according to the OAS without any technical problems in the 2018 elections. In some other Latin American countries, such as Peru in 2020, electronic voting is possible in a (small) number of polling stations. In Africa, for example, Namibia has introduced elec-

36 CM/Rec(2017)5 See also the corresponding *Explanatory Memorandum* to the Recommendation, CM(2017)50-add1final, and the corresponding Implementation Guidelines, CM(2017)50-add2 final.

tronic voting machines. However, experience there shows that voting machines can occasionally be susceptible to malfunctions and operating problems.<sup>37</sup> The COVID-19 pandemic may also provide an impetus for the introduction of *i-voting*, which has not yet become established and requires comprehensive security precautions that have so far overwhelmed many countries.

## Accessibility of voting?

Not only since the UN Convention on the Rights of Persons with Disabilities came into force has particular importance been attached to barrier-free access to elections. On polling day, this requires barrier-free access to polling stations and voting. People with disabilities should, if possible, be able to cast their votes independently and secretly without outside help. To this end, technical procedures (assistive tools) have been developed and implemented worldwide to enable people with disabilities to cast their votes without assistance – from voting information in easy language to voting templates for people with visual impairments to electronic voting for the disabled.

Where elderly and disabled people still require technical assistance or personal assistance, many electoral laws now contain provisions for assisted voting. The most common practice is assistance by a person who is usually chosen by the eligible voter himself or herself. Alternatively, an election assistant may be available at the polling station. Many states grant people with disabilities preferential treatment in the polling stations, for example in the queues.

If it is not possible for a person to go to the polling station, more or less safe alternative ways of voting are possible; they range from voting with mobile ballot boxes in hospitals, nursing homes or in their own home to postal or online voting. However, such alternative forms of voting should not relieve the electoral authorities of their responsibility to create the best possible conditions for people with disabilities to vote at the polling station and thus participate in political life like all other voters.

There is still much to be done throughout the world with regard to the accessibility of voting. Despite all the progress that has been made, including in the countries of the Global South, polling stations are often not designed and equipped to be barrier-free and there is a lack of appropriate instruction and training for voting personnel. For example, international election observation missions – as well as the UN Committee on Rights of Persons with Disabilities and many

37 See, for example, the African Union Preliminary Election Observation Report on the 2019 elections.

disability associations – are calling for further measures to be taken during elections in Europe to enable people with disabilities to vote freely.

## Voting outside the polling station

For the many voters who cannot or do not want to come to the polling station on election day, there are usually alternative ways of voting. They make it easier to make use of universal suffrage but should be accompanied by additional voting and security arrangements. In a number of countries, early personal voting at a polling station is possible. Sometimes special polling stations are available on election day for voters who are not resident in their country. In some places, *proxy voting* is also possible on request. For example, in Belgium, where voting is compulsory, voters who are unable to vote at the polling station for reasons of health, profession, studies, military service, imprisonment, residence abroad or religion may appoint a proxy to vote on their behalf. The same applies to France. In the Netherlands, it is not even necessary to give reasons for having a proxy to vote, which runs counter to the principle of voting in person in elections. While proxy arrangements enjoy a high level of confidence in the countries mentioned, they are problematic for countries without a democratic electoral culture.

Voting by means of mobile ballot boxes (*mobile voting*), which is possible in various countries of Eastern (Central) Europe and the Caucasus, especially for sick and infirm persons, is also exposed to greater security risks. According to the Venice Commission of the Council of Europe, the use of mobile ballot boxes is not desirable because of the high risk of fraud. Often the secrecy of the vote is endangered. Scepticism is also warranted, for example, if a mobile ballot box has only left the polling station for a short time, but the persons accompanying it provide a comprehensive list of signatures of voters they claim to have visited throughout the city. Where mobile ballot boxes are used, their use must be subject to strict security measures. In particular, several members of the polling station's electoral commission representing different political groups should be present during the mobile voting process.<sup>38</sup>

An alternative – In addition to the Internet voting already discussed – is the traditional postal vote, which is now possible in many European countries as well as in North America. After the Federal Constitutional Court had ruled in earlier decisions that *postal voting* is not unlimited and unconditional, but only permitted in justified cases, voters who are entered on a voters' register have been able to vote by postal vote since the 2013 *Bundestag* elections, even without any special

38 Cf. CDL-AD(2002)023rev2-cor.

reason. Admittedly, the number of votes cast by postal vote had already risen from 13.4% (1994) to 16.0% (1998), 18.0% (2002), 18.7% (2005), 21.4% (2009) and 24.3% (2013) and stood at 28.6% in the 2017 elections to the *Bundestag*.

*Postal voting* is probably used most in Switzerland: Around 85% of voters there now cast their votes by postal vote. However, postal voting requires a secure postal service, appropriate postal voting documents and appropriate controls during the counting process. This limits its usability in many countries around the world. Even in the countries of the »Global North« there are sometimes problems: In Austria, for instance, the incorrect handling of the postal vote was a reason for the nullification of the presidential election in 2016. Generally, however, postal voting is secure there. Despite minor technical problems, this is also true for postal voting in the United States. Electoral authorities and courts – as well as international electoral observers – rejected unsubstantiated and false allegations of widespread electoral fraud, particularly with regard to postal votes, raised by President Trump and his team before and after the 2020 elections.

## Voting outside the country

Provided that nationals living or staying abroad are allowed to participate in the elections, they can do so by postal vote in some countries, just as German voters abroad can do. However, if postal voting (or Internet voting or proxy voting) is not permitted, they must attend specially set up polling stations abroad (embassies, consulates etc.) to cast their votes. Although this is an organisational and financial effort, even poorer and smaller states are prepared to make the effort. Timor-Leste, for example, set up between one and four polling stations for the 2018 elections in Australia, Portugal, South Korea and the United Kingdom. Political problems with the host country are not usually associated with this. Exceptions include the political conflict over the setting up of polling stations for Russians living in Ukraine in the 2018 Russian presidential elections, against the background of the annexation of Crimea by Russia and the war in eastern Ukraine involving Russia.

In Germany, the holding of elections of foreign states in their diplomatic or consular representations or at other places on German territory – with the exception of postal votes – is subject to approval. The authorisation, which is not binding under either international or European law, is granted upon application by a written *note verbale* from the Federal Foreign Office on behalf of the Federal Government. The number of authorised elections of foreign States in Germany varies according to election cycles: in 2014 there were 55 elections, in 2015 there

were 28, and in 2016 there were 44. The German government banned, however, the intended holding of the Syrian presidential elections in 2014 with voting in the federal territory.<sup>39</sup>

If there is no possibility of voting by postal vote, *e-voting*, by proxy or in person at embassies or consulates, voters abroad must travel to their home country *no-lens volens* to cast their vote – provided they are registered there.

**Fig. 4: Member States of the Council of Europe: Voting from abroad**

Albania	No	
Andorra	Yes	Postal voting
Armenia	Limited	Only for diplomats and military personnel deployed abroad and their family members
Austria	Yes	Postal voting
Azerbaijan	No	
Belgium	Yes	Voting in embassies or consulates, postal voting and by proxy
Bosnia & Herzegovina	Yes	Voting in embassies or consulates and postal voting
Bulgaria	Yes	Voting in embassies or consulates
Croatia	Yes	Voting in embassies or consulates
Cyprus	Yes	Voting in embassies or consulates
Czech Republic	Yes	Voting in embassies or consulates
Denmark	Yes	Voting at embassies or consulates and early voting
Estonia	Yes	Voting via e-voting, in embassies or consulates and early voting
Finland	Yes	Voting in embassies or consulates and postal voting
France	Yes	Voting in embassies or consulates and by proxy
Georgia	Yes	Voting in embassies or consulates
Germany	Yes	Postal voting
Greece	No	

39 The data originates from an internal work aid in the Federal Foreign Office. The Federal Government does not keep corresponding lists, so that further data is not publicly available; cf. *Bundestag printed paper 18/12067*.

Hungary	Yes	Voting in embassies or consulates and postal voting
Ireland	Limited	Only for civil servants and military personnel deployed abroad and members of their families
Iceland	Yes	Voting at embassies or consulates and by early voting
Italy	Yes	Postal voting
Latvia	Yes	Voting in polling stations set up abroad and postal voting
Liechtenstein	Yes	Postal voting
Lithuania	Yes	Voting in embassies or consulates
Luxembourg	Yes	Postal voting
Malta	Yes	Early voting
Monaco	Yes	Voting by proxy
Montenegro	No	
Netherlands	Yes	Voting by proxy and postal vote
Northern Macedonia	Yes	Voting in embassies or consulates
Norway	Yes	Voting at embassies and consulates, postal voting and early voting
Poland	Yes	Voting in embassies or consulates and postal voting
Portugal	Yes	Voting in polling stations set up abroad and postal voting
Rep. of Moldova	Yes	Voting in embassies, consulates and in polling stations set up in other countries
Romania		Voting in embassies or consulates and postal voting
Russia	Yes	Voting in embassies or consulates
San Marino	No	
Serbia		Voting in embassies or consulates
Slovakia	Yes	Postal voting
Slovenia	Yes	Voting in embassies or consulates and postal voting
Sweden	Yes	Voting in embassies or consulates and postal voting

Spain	Yes	Voting in embassies or consulates and postal voting
Switzerland	Yes	e-voting and postal voting
Turkey	Yes	Voting in embassies or consulates
Ukraine	Yes	Voting in embassies or consulates
United Kingdom	Yes	Postal vote and voting by proxy

Source: own compilation based on: <https://www.coe.int/en/web/electoral-assistance/elecdata>

## How many and which votes?

The respective electoral system is decisive for the voting procedure and thus on the question of how many votes are to be cast and by what means.<sup>40</sup> In presidential elections – with the exception of Sri Lanka, for example, where the *alternative vote* is used – voters usually have only one vote, with which they elect the president, possibly together with the vice-president on one ballot paper. In a few states, the two offices are elected separately, which can lead to the fact that the president and vice-president come from different parties.

However, the differences are much greater for parliamentary elections. The simplest procedures are those in which the eligible voter allocates a single vote to a candidate or to a party list. Vote splitting is possible, for instance, in mixed member systems using two votes. Greater opportunities for participation are offered by alternative voting systems (as in the Republic of Ireland) or preferential voting systems, which in Europe are possible at the national level, for example, in Belgium, Estonia, Finland, Iceland, the Netherlands, Norway, Sweden, Slovenia and the Czech Republic. In Liechtenstein and Switzerland, it is even possible to give preferential votes to different lists (*panachage*), in national parliamentary elections.

Most unusual from the point of view of Western democracies is the possibility to cast a »negative vote« (»against all«). Such a regulation existed in Russia, for example, until 2006, and was introduced in Bulgaria in 2016: It allows voters to express their displeasure with all candidates and/or parties. In Latin America, the counterpart to this is »white ballot papers« (*votos en blanco*), which, although not taken into account in the allocation of seats, are counted and documented separately from the invalid votes. In Spain too, *votos en blanco*<sup>41</sup> are counted and

<sup>40</sup> See the chapter on electoral systems.

<sup>41</sup> With the »ballot and envelope model« used there, envelopes containing no ballot paper are counted as *votos en blanco*. See article 96 (5) of the Spanish electoral law.

not deemed to be invalid votes. However, in the early general elections in Spain in 2019, these accounted for only 0.76% of the valid votes cast. In order not to encourage political and party frustration, the ODIHR and the Venice Commission of the Council of Europe, for example, are pushing for the abolition of negative votes.

# DETERMINATION, NOTIFICATION AND ACCEPTANCE OF ELECTION RESULTS

## The counting of votes

According to international standards, the counting of votes should take place immediately after the polling stations close. This not only has the advantage of ensuring that votes are counted quickly. It also avoids that sealed ballot boxes containing votes are »lost« during transport to a superordinate election commission before they have been counted. Such »ballot box losses« occur from time to time in some countries, such as in the 1996 elections in Nicaragua, where the author was an election observer. In exceptional cases, however, it may be appropriate not to count the votes on the spot and not to post the election results at the polling station as is customary – for example, when a small municipality is threatened with consequences, perhaps by a powerful big landowner, if they make the »wrong« decision. Even in Iceland, votes from the polling stations are first mixed and then counted at the district level. In view of the many small polling stations with fewer than 100 eligible voters, this is intended to better safeguard the secrecy of the ballot. Usually, however, votes are counted by the people responsible at the polling station. To ensure that the count is conducted correctly, the presence of accredited election observers and party representatives is generally welcomed. With regard to the presence of other persons during the counting of votes, a balance must be struck between transparency and the susceptibility of the counting process to disruption.

The steps to be carried out visibly and documented during manual counting for the respective body to be elected (president, parliament, etc.) are typically the counting of the ballot papers and cross-checking with the number of voters in accordance with the signatures on the voting lists, the counting of valid, invalid and, if separately identified, blank ballot papers, the counting of votes for the candidates or parties – combined in each case with new control counts. Any discrepancies (e.g. between the number of ballot papers and the number of voters), disputes (e.g. as to whether a ballot paper is valid or invalid) and unusual incidents (malfunctions in the vote count, power cuts, etc.) must also be recorded.

It is also necessary to ensure that the voting material, in particular the electoral lists, ballot papers and the records of the results, are adequately secured. Usually the material in the ballot boxes – which should be sealed – is kept in a lockable room. It is most unusual for ballot papers to be destroyed after the elections, as is provided for by Spanish electoral law with the exception of invalid and contested ballots.<sup>1</sup> In the interests of transparency and the integrity of the elections, copies of the protocols should be given to the representatives of election observation groups and of the candidates and parties.

While in many countries counting is regulated in detail and carried out appropriately, irregularities occur repeatedly elsewhere. In part, this is due to organisational shortcomings in the election process and not to attempts at electoral fraud. However, there is also some electoral fraud, which can either be carried out autonomously by the persons responsible on site or be centrally controlled. This may involve, for example, ballot box stuffing or the manipulation of election protocols. In the case of the 2020 parliamentary elections in Azerbaijan, for example, the Parliamentary Assembly of the Council of Europe (PACE) election observation mission concluded that »... despite some appearance of progress in the preparation for the elections, the widespread violations of counting procedures raised serious concerns about the results of the voting in general«.<sup>2</sup>

## Publication of the election results

Allegedly it took five days for George Washington to receive the news that he had been elected the first President of the United States. Given the long process of counting and re-counting, Joe Biden also had to be patient and wait until he was declared winner in U.S. presidential elections in 2020. However, with the exception of lengthy counting and calculation processes – such as the Single Transferable Vote System in the Republic of Ireland or in proportional representation systems with preferential voting –, however, election results are nowadays usually available much faster and are communicated more quickly. Forecasts and projections start to show trends soon after polling stations close, and the electoral authorities strive to publish partial and overall results as soon as possible.

In order to increase the transparency of the election results, in many countries, particularly in Latin America and Africa, the count results from polling stations are not only passed on to the next higher electoral level by telephone or electro-

1 See Article 97(3) of the Spanish electoral law. However, it is recalled that no »Australian Ballots« are used in Spain.

2 PACE, DOC 1590, para. 7.

nically, but are also publicly displayed on election night. This is also recommended by the Council of Europe in its *Code of Good Practice in Electoral Matters* for its member states. In this way, the election results can be directly traced back to the respective polling station. Election observation teams and political parties, which in many countries even receive copies of the election protocols, often use the partial results at local level to determine an overall result in parallel with the election commissions. Such parallel voting tabulations can confirm the official results or uncover electoral fraud. It is undisputed that the results can be better controlled retrospectively if the disaggregated data are publicly available. In this way, subsequent »corrections« to the election records by higher-level electoral authorities can also be uncovered.

There are then different strategies for publishing the preliminary election results at the national level. Partial results may be published as they come in from the respective parts of the country. This kind of piecemeal reporting has the advantage that the first partial results are available quickly. On the other hand, the overall result can differ greatly from the partial results – and thus fuel accusations of election fraud. Alternatively, the first partial results are only published when all or a representative part of the results are available. Then the partial and final results usually do not differ greatly from each other. However, publication at too late a date can also cause problems and lead to allegations of fraud. The electoral authorities therefore endeavour to provide reliable results quickly. Technical innovations in the documentation and transmission of election results have also made it possible to do so in large territorial states or in countries with poorly developed infrastructures.

It is particularly problematic if the publication of partial results is suddenly suspended. Dieter Nohlen reported on how in 1990 in Nicaragua the ruling Sandinistas temporarily stopped the addition of incoming election results on election night, obviously to discuss whether they should accept their looming defeat in the election. Former US President Jimmy Carter, who was on the ground as an election observer with his *Carter Center*, offered good offices of electoral diplomacy. Alluding to his bad experiences in Panama<sup>3</sup>, he said that Daniel Ortega (the then president and recent presidential candidate of the Sandinistas) could now show whether he was a statesman or a scoundrel.<sup>4</sup> The Sandinistas finally accepted the election results.

A more recent example: during the 2019 presidential elections in Bolivia, the publication of partial results was also interrupted. On election night, it became

3 In Panama, the 1989 presidential and parliamentary elections were annulled before the end of the count, when an opposition victory was looking likely; cf. Rodríguez 1989.

4 Nohlen 1990: 3.

apparent that President Morales would have to go into the unfavoured run-off. When Morales' victory in the first round was announced, there were accusations of electoral fraud and the subsequent protests ultimately cost Morales his presidential office. Election observers and election monitors of the OAS spoke of obvious manipulation.<sup>5</sup>

Another of many current examples of suspected electoral fraud is the 2016 presidential elections in Gabon, in which the incumbent Ali Ben-Bongo officially emerged as the winner by a wafer-thin majority. After his opponent, Jean Ping, was ahead in the count in almost all provinces of the country, the announcement of the results from the president's home province was delayed. With officially around 95% of the votes and a turnout of almost 100% in that province (with a national turnout of only around 45%), the incumbent finally overtook his rival by a few thousand votes, according to official figures. Allegations of electoral fraud and violent protests were not long in coming, especially as the disaggregated election results were not published, let alone recounted.

## **Allegations of election fraud, protests and violence**

This leads on to the issue of recognition of the elections. On the one hand, this concerns the incumbents. Autocrats in particular find it extremely difficult to recognise any election defeats. In most cases, this is not necessary, because they can influence and manipulate the election process in their favour, but as shown at the beginning of the book, there are occasional »opening elections«, in which authoritarian rulers have to decide whether to accept an electoral defeat. In Gambia, for instance, it took considerable international pressure in 2016 for the authoritarian ruler to resign and go into exile. In 2010, a real drama unfolded in Côte d'Ivoire, which had been in the grip of civil war from 2002 to 2007. President Laurent Gbagbo, who had ruled the country since 2000, contested the 2010 elections with the slogan »We win, or we win« – and did not recognise the victory of opposition candidate Alassane Ouattara in the run-off vote. As a result, the civil war flared up again for a short time before French forces arrested Gbagbo and handed him over to the International Criminal Court.

In democracies, on the other hand, recognition of an electoral defeat should not be a problem, but part of the democratic »rules of the game«. It is completely unacceptable if individual candidates in democratic elections complain in advan-

5 Cf. for example »Evo Morales: Overwhelming evidence of election fraud in Bolivia, monitors say«, *BBC*, article from 6th December 2019. Online at: <https://www.bbc.com/news/world-latin-america-50685335>.

ce that they will only recognise the results if they win the election. This is precisely what Donald Trump did, making unfounded accusations of electoral fraud in the run-up to the 2016 and 2020 elections.<sup>6</sup> And what is more: he did not concede that he lost re-election in 2020, insisting on his completely unsubstantiated allegations of widespread electoral fraud. To be clear: the non-recognition of elections can only be democratically justified if the elections are not sufficiently free and fair or if the election results have been falsified, as, for example, in Belarus. This was definitely not the case in the 2020 elections in the United States.

Furthermore, a sense of proportion is required when evaluating elections: The many irregularities, which are particularly prevalent in young, not yet consolidated democracies, are not always reflected in the election results. Particularly in politically polarised societies, where there is great mistrust between political opponents, the respective election losers are sometimes (all too) quickly at hand with accusations of fraud. Just two examples: In Nicaragua, Daniel Ortega, after being voted out of office in 1990, regularly complained of fraud in the subsequent, largely valid elections, until he was finally re-elected in 2006 and confirmed in office in controversial elections in 2011 and 2016. After his narrow election defeat in 2006, the current President of Mexico, Andrés López Manuel Obrador – accompanied by large street demonstrations – had made strong accusations of electoral fraud, before he was finally elected president in 2018 after another election defeat in 2012.

Unsurprisingly, studies show that a lack of confidence in the electoral process can contribute towards peaceful protests or even the outbreak of violence after elections.<sup>7</sup> This may be compounded by individual negative experiences of voting and with election officials, confirmed or unconfirmed information from parties and the media about electoral irregularities and fraud, or even a lack of knowledge and experience of elections.<sup>8</sup> International and national election observations in particular can play an important role in the recognition of election results, in terms of the acceptance of election defeats by both government and opposition. However, they can also document election manipulation and fraud. This can lead to justifiable protests and possibly violent clashes after the elections.<sup>9</sup>

There are numerous examples throughout the world of how manifestly manipulated or »stolen« elections are not recognised and, if necessary, challenged

6 For 2016 see, for example, Cottrell/Herron/Westwood 2018.

7 See Beaulieu 2014, Brancati 2016.

8 Cf. for example Karp/Nai/Norris 2018.

9 Cf. Hyde/Marinov 2014, Daxecker 2012.

by the losers – or even lead to (mass) protests.<sup>10</sup> In addition, there are many protests in which the election losers, out of political disappointment, complain about election fraud. However, the relevant data is unsatisfactory, starting with the question of what level of protests are registered. Katya Kalandadze and Mitchell Orenstein, for example, counted a total of 17 »major electoral fraud mobilizations« that took place in Africa, Eurasia and Latin America between 1991 and 2005.<sup>11</sup> In her book *Electoral Protest and Democracy in the Developing World*, Emily Beaulieu lists 135 »post-election mass demonstrations« between 1977 and 1995.<sup>12</sup> Many of these concern protests fuelled by allegations of electoral fraud.

Often, the violence emanates from the state. President Lukashenko of Belarus, who has been mentioned several times, is just one of the many potentates who have been responsible for violently suppressing peaceful election protests.<sup>13</sup> In Nigeria, over a thousand people are said to have lost their lives in the protests following the 2011 elections.<sup>14</sup> Indonesia<sup>15</sup>, which is marked by political and religious conflicts, on the other hand, is an example of violent protests started by supporters of the loser of the elections. There, former General Prabowo Subianto refused to acknowledge his defeat in the 2014 and 2019 elections, complained – contrary to the assessment of international election observation missions – about extensive election fraud and the resulting protests escalated violently.

## Election complaints and challenges to elections

Besides mass protests against the election results, the losers of the elections usually still have institutional ways of contesting the elections or even filing complaints about individual irregularities.<sup>16</sup> The possibility of lodging complaints is an important, albeit hardly noticed by the public, part of the election process. Complaints should be open not only to candidates and parties (and their proxies), as in Armenia and Lithuania, but to all eligible voters. Whether they are used depends not only on the validity of the elections, but also on public awareness and trust in the complaints procedures. If voters and electoral contestants

10 A number of studies deal with the connection between election rigging and mass protests, e.g. Kalandadze/Oerenstein 2009, Beaulieu 2014, Little/Tucker/LaGatta 2015, Brancati 2016, Harvey/Mukherjee 2018, Ong 2018, Geelmuyden Rød 2019.

11 Cf. Kalandadze/Orenstein 2009.

12 Cf. Beaulieu 2014: 159–180. Irritatingly, these include protests in countries in Eastern and Central Europe that are not generally considered part of the »developing world«.

13 Cf. Hafner-Burton/Hyde/Jablonski 2016.

14 Cf. Angerbrandt 2018.

15 Cf. Aspinall/Mietzner 2019.

16 Cf. also Chrenykh 2013.

assume that complaints will be rejected anyway without proper investigation, this reduces the willingness to report irregularities.

But who deals with election complaints? In many Western European states, election complaints are handled by »ordinary« administrative and judicial bodies operating in accordance with special procedures. In most Central and Eastern European states – and in many other parts of the world – the responsibility for deciding on election complaints and appeals is shared between (formally) independent electoral commissions and ordinary courts. In the United Kingdom, *ad hoc* election courts are set up to hear complaints. In Latin America, there are sometimes even permanent election courts. In some cases, election complaints are also dealt with by parliaments, but – with the exception of Belgium, Denmark and the Netherlands – their decisions have to stand up to judicial review. This is also the case in Germany, where the *Bundestag*'s »Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure« as well as the Federal Constitutional Court hear objections to the conduct of elections. Although there is no single »best« method suitable for all countries, the procedure before electoral authorities (and parliamentary committees) is usually more accessible for voters and faster than before courts. However, the electoral process should not be left under the complete and final authority of the electoral administrative body or the parliament. Particularly decisions on constitutionally guaranteed rights and the validity of elections (see below) should be subject to judicial, if not constitutional review.

Whatever form the rules take, it is important that they are clear and unambiguous, so that complainants know who to turn to and there are no institutional conflicts over responsibilities and competences. The possibility of addressing an election complaint *either* to the electoral commission *or* to the courts has been criticised in the past, for example in the cases of Georgia, Ukraine, Kyrgyzstan and Russia.<sup>17</sup> Clear procedural rules are necessary, for example, so that the electoral authorities can first examine the complaint and then, if necessary, challenge their decisions in court. Furthermore, the competent authorities must also investigate election complaints quickly and effectively, which is not the case in many countries. For example, the ODIHR criticised the fact that in Germany, legislation does not provide for a deadline by which complaints received after election day must be decided. In practice, this could take a very long time, which contradicts international standards.

It should be noted that the possibility to complain should cover the entire electoral process: the right to vote and to be elected, the registration of voters,

17 CDL-AD(2009)001, CDL-AD(2010)047, CDL-AD(2011)025, CDL-AD(2012)002.

the validity of candidacies, the observance of campaign rules, the misuse of state resources, and the polling day itself, which may again give rise to a variety of problems – from the incorrect identification of voters at the polling station, to irregularities in voting, counting and the aggregation of votes, to the documentation and publication of the election results. Of particular importance is the possibility of contesting elections in whole or in part. However, the requirements for this are generally high and (constitutional) courts are often involved in the decision, as is the case in the majority of the Council of Europe states (with the exception of Belgium, Luxembourg, the Netherlands and Romania, for example).<sup>18</sup>

In Germany, if an election is contested, there will only be a repeat of elections to the *Bundestag* if the electoral error has an impact on the distribution of seats. German lawyers refer to the likelihood of such an impact as *Mandatserheblichkeit* and invoke the so-called *Erheblichkeitsgrundsatz* (principle of relevance). Moreover, in order to minimise interference, an election rerun only takes place where the error had an effect, for example in the respective constituency.<sup>19</sup> In many other countries, too, the central criterion for the partial or complete nullification of elections is whether the electoral violations affect the election result, in particular the distribution of seats. In some countries, such as Azerbaijan and Ukraine, electoral laws provide for a margin of tolerance for electoral irregularities, based on the percentage of irregular votes. However, this is not in line with international standards.

While, due to complaints, results in individual polling stations are annulled from time to time (e.g. Serbia 2017, Russia 2018), the nullification of complete national elections is rare. In Austria, however, the second round of the 2016 presidential elections had to be repeated in its entirety. The Constitutional Court there had accepted a corresponding election challenge due to the incorrect handling of postal votes and the early publication of partial results on election day.<sup>20</sup> Another curious example is the nullification of the presidential election 2019 in Malawi by the Constitutional Court there. The election commission had admitted to having overwritten the results of the so-called »Tipp-Ex-election« with the help of white correction fluid and thus manipulating no fewer than 1.4 million of the total 5.1 million votes. In Kenya, at the request of the main opposition candidate, in 2017, the Supreme Court there annulled the presidential elections because of legal illegalities and irregularities; however, the re-run was boycotted by the opposition due to the lack of sufficient reforms by the election authorities.

18 See CDL-AD(2009)054.

19 Cf. Schreiber 2017: 745 et seq.

20 Constitutional Court, W I 6/2016–125, 1st July 2016.

Demands to re-run elections are usually made by the opposition. In Turkey, however, it was recently the other way around: After the opposition had won the local elections there on 31 March 2019 in eleven major cities, including Istanbul, which has been ruled by the Justice and Development Party (AKP) for 25 years, President Erdoğan spoke of »theft at the ballot box«. The elections in Istanbul were annulled on his insistence by the election commission (due to allegedly insufficient staff levels in the polling stations) and rerun. In Istanbul with about ten and a half million voters, the autocrat believed that the narrow lead of the opposition candidate Ekrem İmamoğlu of 13,000 votes could be made up. He trusted in the state resources available to the AKP, its significant media power and an election campaign in which he strongly polemicised against the opposition, accusing it of supporting terrorism. However, the propaganda did not have the desired effect in respect of the rather conservative İmamoğlu of the »Republican People's Party« (CHP). The opposition won the repeated elections, and Erdoğan had to accept the result, partly because it was too clear this time. After he and the press under his control had previously declared the Istanbul election to be the extremely important for the whole of Turkey, attempts were later made to play down the significance of the elections. Whether the opposition's election victory in Istanbul »has what it takes« to change Turkey as a whole, as German commentators somewhat short-sightedly believed, is questionable. Erdoğan will learn his lessons from the election defeat for the next presidential and parliamentary elections, which in any case are not due until 2023.

Finally, it is important that violations of electoral law are properly investigated and sanctioned. Criminal law must also include corresponding provisions. They can lead to fines or even prison sentences and the withdrawal of the right to vote or stand for election. In many countries, however, there is a lack of legal provisions or political will to investigate, yet alone sanction, violations of electoral law, so that in some places a culture of impunity for electoral violations has developed. In the case *Garamanli and Others v. Azerbaijan*, for example, which was decided on 5th December 2019, the European Court of Human Rights criticised that neither the election commissions nor the courts in Azerbaijan had adequately dealt with allegations of election fraud from opposition candidates. This decision follows on from other ECtHR judgments concerning Azerbaijan for violations of the right to free elections (enshrined in the First Protocol to the ECHR).

# ELECTORAL SYSTEMS AND THE TRANSLATION OF VOTES TO SEATS

Having already considered specific technical elements of electoral systems when dealing with the question of constituency boundaries and voting, this chapter takes a closer look at the questions of how votes are converted to seats. At first glance, this would appear to be a rather dry subject, with many technical details and plenty of mathematics. However, it will quickly become clear that electoral system questions are not purely technical, but highly political, because they are about nothing less than political power. Electoral systems have a decisive influence on how the electorate's votes are translated into political mandates and how political power is distributed.

## Presidential elections – how much of a majority should it be?

In those states that use a presidential or semi-presidential system of government, presidents are elected in addition to the parliament, for example, in the USA, in individual European countries, in all Latin American countries, in a majority of African countries and in more than a few Asian countries.

Among these, the USA is an exception, where the president (together with the vice-president) is still elected indirectly through an electoral college. The electoral college is composed of 538 »electors« elected in each state (and in the federal capital Washington D.C.). Each of the 50 states (and the capital city) has at least three »electors« and an additional number of »electors« according to the size of its population. With two exceptions, namely Maine and Nebraska, and the capital, the party with the most votes, i.e. the party with the simple majority (plurality), receives all of the »electors« in the respective state, regardless of whether it won by a small or a large margin (winner takes all principle).

Indirect election, especially through a non-proportionally appointed electoral college, can mean that the person who has received the most votes nationwide does not necessarily have the majority of »electors« behind them. For example, in 2016, the democratic presidential candidate Hillary Clinton won a total of 48.01 per cent of the votes (but only 42.2 per cent of the »electors«), while the election winner Donald Trump won only 45.95 per cent of the votes (but had 56.5 per cent

of the »electors« behind him). Even in 2000, the defeated democratic presidential candidate Al Gore had – albeit only just – obtained more votes than the winner George W. Bush. The way presidents are elected in the USA can therefore lead to »undemocratic« results and seems somewhat behind the times. Having said that, it is not that easy to change historically grown traditions that are important for power politics. After all, the presidents of the USA have been elected by an electoral college since 1788,<sup>1</sup> and the electoral system in the USA is likely to survive for some time to come. On the contrary, in Argentina, by far the last country in Latin America to use a system of indirect presidential elections through an electoral college, direct presidential elections were introduced in 1994 by way of a constitutional reform.

In direct presidential elections, plurality rule, whereby the candidate who received the most votes is elected, is the simplest but not the most common form of election in the world. It is still used in Latin America in Honduras, Mexico, Panama and Paraguay, in Africa in the Democratic Republic of Congo, Cameroon, Malawi, Rwanda and Togo, and in South-East Asia, for example, in the Philippines, Taiwan and Singapore. In the Philippines, there is the peculiarity that the president and vice-president are elected separately. Presidential candidates may name their preferred »running mate«, but voters are free to choose which person they wish to elect as vice-president. In the Council of Europe countries, plurality rule in presidential elections is now only used in Azerbaijan, Bosnia-Herzegovina and Iceland. Its advantage is that only one ballot is required. The big disadvantage, however, is that the winner only needs a simple majority of the votes (i.e. more than any other). Depending on the distribution of votes between candidates, such a plurality can be well below half of the votes – which can affect the legitimacy of the elected officeholders.<sup>2</sup>

For this reason, qualified majorities are often required. In Costa Rica, for example, the winner of the election needs at 40% of the votes. This is also the case in Bolivia and Ecuador, where the first-placed candidate must also win with at least 10% more of the votes than the runner-up (or need to get an absolute majority of votes). In Nicaragua, 40% of the votes are also required, but if the lead on the runner-up is 5%, only 35% is required, which benefits the ruling Sandinistas, who had also changed the electoral system for this reason. 50% of the votes are required in Ecuador and 45% in Argentina or, if the lead on the runner-up is 10%, only 40% in both countries.

1 On the history and for a discussion of the Electoral Colleges see, for example: Fortier/Berns 2004, Sabato/Ernst 2006, Edwards 2019.

2 For a discussion of the advantages and disadvantages of the various presidential election systems, especially in Latin America, see Nohlen 2019 or McClintock 2018.

However, most states with direct presidential elections require a qualified majority of more than 50% of the valid (or cast) votes, i.e. they apply absolute majority systems without restrictions, with a run-off vote if necessary. This is not only true most states in Latin America and Africa with presidential or semi-presidential systems of government. Among the 47 states of the Council of Europe, the (semi-)presidential systems in Azerbaijan, Austria, Croatia, the Czech Republic, Finland, France, Georgia, Northern Macedonia, Poland, Portugal, Moldova, Romania, the Russian Federation, Serbia, Slovakia and Turkey are also covered. In Bulgaria and Northern Macedonia, however, 50% of the *registered* electorate is required, rather than the usual and more appropriate number of valid votes cast.

In some countries the qualifying majorities are even higher. In Sierra Leone, for example, 55% of the votes are needed in the first round of elections. Additional requirements may also exist, as in Indonesia, where the winner of the elections must obtain not only an absolute majority of the votes, but also 20% of the votes in more than half of the provinces. The situation is similar in Kenya. There, the election winner must not only receive an absolute majority of the votes, but also 25% of the votes in 24 of the 47 counties. In Northern Macedonia, a turnout of at least 40% (here again of registered voters) is required in the run-off ballot in the second round of voting. This increases the risk that the elections will have to be repeated. This was the case in Serbia, for example, before the 2004 electoral reform, where the presidential elections of 2002 and 2003 failed to meet a corresponding turnout threshold of 50%.

If the absolute majority (or any other required qualified majority) is not achieved, a second round of voting usually leads to a run-off between the two candidates with the highest number of votes in the first round. This makes the majority two round system administratively more burdensome than the plurality system. On the other hand, it offers the possibility of selecting the person preferred by the majority of the population in the second round. At the same time, the run-off election provides an institutional incentive for parties or electoral alliances to reach election agreements in order to join forces. In a number of African countries, this has helped the opposition to defeat incumbents in elections.<sup>3</sup>

Alternatives are that instead of a run-off vote, Parliament chooses between the two strongest candidates, as was the practice in Chile until 1973, or it selects one of the three strongest candidates, as was the case in Bolivia until the 1993 electoral reform. Alternatively, eligible voters can indicate their first preference as well as other preferences, which are taken into account if no candidate receives more than half of the votes in the first round. Such an alternative vote system

3 See Bleck/van de Walle 2019: 74.

exists in Sri Lanka, but it has not been used there since the introduction of direct presidential elections in the 1980s, because the winners have always obtained the required majority of votes at the first attempt.

## **Parliamentary elections – a diversity of electoral systems**

In contrast to presidential elections, parliamentary elections are characterised by the sheer diversity of electoral systems. This is mainly due to the fact that the various technical elements of the electoral system – the constituencies, the form of candidacy and voting, and the vote allocation procedure – can be combined in a variety of ways and at different levels. Going beyond the basic distinction between majority representation and proportional representation, we must also differentiate between electoral systems. There are different plurality/majority systems and very different proportional representation systems. There are also a number of electoral systems that combine elements of majority and proportional representation systems, and it is sometimes difficult to classify them as belonging to one or other of the two principles of representation. Especially since the 1990s, the »Electoral systems of the world« (*Wahlsysteme der Welt*)<sup>4</sup> have become very differentiated.

The basic distinction between majority representation and proportional representation is based more on different principles of representation that have evolved historically. Accordingly, majority representation (plurality/majority systems) is primarily aimed at translating votes into mandates in such a way that the formation of parliamentary majorities is facilitated. Proportional representation, on the other hand, aims at a fair, i.e. proportional representation of political parties in parliament according to their share of votes.<sup>5</sup> Looked at in this respect, the assignment of specific types of electoral system to these principles of representation is primarily oriented towards the expected distorting effect of the electoral system: Do the proportion of votes received by the respective parties correspond approximately to the number of seats these parties are allocated, as is typical for proportional representation systems, or are large parties favoured for the purpose of forming parliamentary majorities, as is the case with plurality/majority systems?

In the following, several important types of electoral system are introduced briefly and some variants are mentioned, which enrich the diverse world of elec-

4 This is the title of the early standard work by Dieter Nohlen (1978).

5 Cf. Nohlen 2014.

toral systems. The individual electoral systems, their technical elements and their functional strengths and weaknesses are described in more detail elsewhere.<sup>6</sup>

The **plurality system in single-member constituencies** (first past the post system) is used in the United Kingdom, Canada, the USA and many African, Asian and anglophone Caribbean states, especially those that were formerly British colonies or under Anglo-Saxon influence. In this electoral system, the country is usually divided into single-member constituencies, in each of which one candidate is elected to parliament. Each voter has one vote and a simple majority (plurality) of the votes in the constituency is decisive.

Variants of this type relate to the use of plurality systems partially or entirely in multi-member constituencies, as was previously the case in the UK, whereby several candidates with the highest vote are elected in the respective constituency. While under »block vote« electors have as many votes as there are candidates to be elected, under »party block vote« voters cast a single vote for a party of choice, and the party with the most votes wins every seat in the respective multi-member constituency. A particular variant is the so-called best loser system in Mauritius,<sup>7</sup> which is the subject of a debate on reform within the country.

<p><b>Plurality system in single-member constituencies</b> (First past the post system)</p>
<p>Typical electoral system elements: Single-member constituencies – individual candidacies – single vote – plurality</p>
<p>Frequency: high</p> <p>United Kingdom, Canada, USA as well as several states in Africa (e.g. Ethiopia, Botswana, Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone), Asia (e.g. Bangladesh, India, Malaysia, Myanmar) and Oceania (e.g. Papua New Guinea) as well as almost the entire Anglophone Caribbean (e.g. Barbados, Jamaica, Trinidad &amp; Tobago). Also in: Azerbaijan, Belarus</p>
<p><b>Variants</b></p> <p>Block vote: Mongolia Best loser system: Mauritius</p>

Source: own compilation

The **absolute majority system** in single-member constituencies, particularly the majority two-round system, is the French variant of majority representation. Here too, candidates compete in single-member constituencies and those eligible

6 The works of Dieter Nohlen are systematically most convincing, above all his textbook »Wahlrecht und Parteiensystem« (*Election Law and Party System*), which was published in its seventh edition in 2014. Following this systematically, see also the textbook by Behnke/Grotz/Hartmann 2017. Also recommended: Gallagher/Mitchell 2005, Reynolds/Reilly/Ellis 2006. Newly published: Herron/Pekkanen/Shugart 2018.

7 See Fessha/Ho Tu Nam 2015 and the Electoral Commission website: <http://electoral.govmu.org>.

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to vote have one vote each. However, unlike the first past the post system, the absolute majority (i.e. more than 50% of the valid votes cast) in the constituency is decisive. If this majority is not achieved, a second round of voting takes place, in which either a run-off vote is held between the two candidates with the highest number of votes or a simple majority (plurality) decides between several candidates. In France, for example, all candidates who have received at least 12.5% of the votes of registered voters (not of the valid votes) in the constituency in question are allowed to take part in the second round. While the majority two round system is common in presidential elections, it is rather rare in parliamentary elections, at least in today's democracies.

Variants of this electoral system include the use of absolute majority voting in multi-member constituencies, and in particular the alternative vote system used in Australia, Nauru and Fiji. There is no second round of voting, but the voters rank the candidates in order of preference, which is then taken into account, if necessary, when the votes are counted.

<b>Absolute majority system in single-member constituencies (Majority two-round system)</b>
Electoral system elements: Single-member constituencies – individual candidacies – single vote- absolute majority second round of voting if necessary (run-off or plurality)
Frequency: rare (among democracies) France, Monaco, otherwise in (inter alia) Gabon, Republic of Congo (Brazzaville), Central African Republic
<b>Variants</b> Alternative vote: Australia, Nauru, Fiji

Source: own compilation

In contrast to these two »classical« plurality/majority electoral systems, on the other side of the spectrum there are two »classical« types of proportional representation (PR). The first is **proportional representation at the national level**. The voters cast their votes for a party list, and the seats are then allocated proportionally at the national level. This electoral system is currently used in the Netherlands, Namibia and Guinea-Bissau. In Israel, it is linked to a threshold clause requiring a minimum percentage of valid votes for the acquisition of mandates by parties, which has been gradually increased over time to 3.25%. The electoral system with legal thresholds is also used in Timor-Leste and in several Eastern (Central) European countries, and it was recently introduced in Kyrgyzstan. If there is no (or only a very low) legal threshold, one can speak of »pure

proportional representation«. High threshold clauses, however, deviate from the principle of pure proportional representation, as they exclude small parties (or party alliances) from the allocation of mandates. While PR at the national level is usually accompanied by closed party lists and single votes, in Slovakia it is used with open party lists and up to four preferential votes.

One variant of PR at the national level is PR in multi-member constituencies with compensatory seats. This is a two-stage electoral system, in which the first stage involves the allocation of mandates in multi-member constituencies, but the total share of seats for the parties is calculated proportionally at the national level. A corresponding proportion of seats is calculated by means of regional or national lists. Different forms of this type of electoral system are used in Denmark, Norway and the Republic of South Africa.

<b>Proportional representation at the national level</b> (National PR list system)
Electoral system elements: National constituency –closed or open party lists – single vote or preferential vote – PR formula
Frequency: moderate Israel (3.25%) Netherlands, Namibia, Guinea-Bissau, Timor-Leste (3%) and now also: Montenegro (3%), Serbia (5%), Slovakia (5%, 7%, 10%)*, Kyrgyzstan (7%)**
<b>Variant</b> PR in multi-member constituencies with compensatory seats: Denmark, Norway, Republic of South Africa

Source: own compilation. The percentages in brackets refer to the legal thresholds of representation. In the remaining countries, natural thresholds arise on the basis of the number of parliamentary seats. \*Open lists. \*\*And at least 0.7% in each of the seven regions and in Bishkek and Osh cities.

Far more common than PR at the national level is **proportional representation in multi-member constituencies** (which in English is also falls under the PR list system or List PR). Here the country is divided into a more or less large number of constituencies of different sizes, which often correspond to the administrative divisions of the country. In each of these constituencies (often called electoral districts) a certain number of representatives are elected by proportional representation. PR list systems in multi-member constituencies are often used in Europe and Latin America, but sometimes also in other regions of the world. As for national elections, it often appears in conjunction with closed party lists and single votes, as in Albania, Northern Macedonia, Portugal, Romania, Spain and Turkey. In a number of European countries, however, voters can also cast

preferential votes for their preferred candidates on open lists. In Liechtenstein and Switzerland, there are even free lists, so voters can express their preferences across party lines (*panachage*).<sup>8</sup>

A now common variant of PR in multi-member constituencies is to combine it with additional national lists of candidates, which proportionally allocate some or all parties additional seats. This can strengthen proportional representation or, if the additional seats are only given to large parties, as until recently in Greece, it can facilitate the formation of a majority.

<b>Proportional representation in constituencies (PR list systems)</b>
Electoral system elements: Multi-member constituencies – closed or open party lists – single or preferential voting – PR formula in each constituency
Frequency. very high Mainly in Europe (including Albania, Belgium*, Bulgaria*, Croatia*, Czech Republic*, Cyprus*, Estonia*, Finland*, Latvia*, Luxembourg, Poland*, Portugal, Northern Macedonia, Romania, Slovenia*, Spain, Turkey), Latin America (including Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador*, Honduras, Paraguay) and now Africa (e.g. Algeria, , Benin, Capo Verde, Equatorial Guinea, Guinea-Bissau, Mozambique, Niger, São Tome y Principe, Togo), in some cases also in Asia (e.g. Cambodia, Indonesia*)
<b>Variants</b> PR in multi-member constituencies with additional national lists: e.g. Iceland*, Guatemala, Nicaragua, Angola, Burundi, Sri Lanka, Taiwan, Greece** as well as in Ukraine as of the next elections*

Source: own compilation. In some states there are some additional reserved seats or single-seat constituencies (e.g. for voting from abroad). \*In connection with open lists and preferential voting. \*\*Until 2019: Additional mandates allocated to large parties (»enhanced proportional representation«).

Besides these »classical« electoral systems, there are also electoral systems that combine elements of plurality/majority and proportional systems. Here, some of the seats are determined by plurality or majority rule in single-member constituencies, while others are allocated to party lists by means of proportional representation. The decisive factor here is whether there is a connection between the two distribution methods, as in the case of Personalised proportional representation (mixed member proportional systems), or not, as in the case of parallel or segmented electoral systems (mixed member systems).

8 While closed lists only allow votes to be cast for an unchangeable party list, preferences can be given to individual persons on open lists; this may change the order of the selected list candidates. Free lists make it possible to cross party lines when voting and, to a certain extent, to compile one’s own list of people from different parties.

Both allocations are completely separate in the **parallel or segmented system**. According to this system, a proportion of the seats are allocated by plurality or majority in single-seat constituencies (throughout the country), the other proportion separately to party lists by means of proportional representation. The overall result is calculated by adding together the two separately determined partial results. If the number of seats allocated to single-member constituencies significantly exceeds the number of seats allocated by proportional representation, then this is a variant of a plurality/majority system with additional proportional list seats.

Another variant of segmented electoral systems, for technical reasons, is where the constituency, often depending on the administrative units and population size, is divided partly into single-member constituencies and partly into multi-member constituencies, and different methods of allocation are used depending on the size of the constituency: in single-member constituencies the plurality or majority rule, in multi-member constituencies a PR formula. One could also speak of »false parallel systems« here, since the two types of allocation only cover some of the constituencies within the country.

<b>Segmented system, Parallel system (Mixed member system)</b>	
Separate allocation of seats: Single-member constituencies – single candidacy – one vote – plurality or majority	Separate allocation of seats: National constituency – party list – one vote – proportional representation formula
Frequency: moderate e.g. Lithuania (71/70), Moldova (51/50), Russia (225/225) and up to and including the 2019 elections in Ukraine (225/225) With major differences between the number of seats: Georgia (30/120), Guinea (38/76), Japan (289/176 in 11 multi-member constituencies), Mexico (300/200 in five multi-member constituencies), Senegal (90/60)*, Tajikistan (41/22), Thailand (350/150)**	
<b>Variants</b>	
Plurality/majority election in in single-member constituencies with additional proportional additional list seats: e.g. Philippines, South Korea »Fake parallel systems«: Election areas divided into single and multi-person constituencies, which use plurality/majority or PR depending on the size of the constituency: e.g. Mali, Madagascar***	

Source: own compilation. The figures in brackets indicate the ratio: direct mandates/list mandates. \*90 plurality (block vote) mandates in single-member and multiple-member constituencies. \*\*Thailand: according to the 2017 Constitution. \*\*\*One- and two-member constituencies.

On the other hand, a characteristic of mixed member proportional systems, inspired by the German **personalised proportional representation system**, is that the two allocation procedures are interrelated. With the exception of any overhang mandates (if these are not completely compensated for, as was the case in the 2013 and 2017 elections in Germany), the allocation of direct mandates in single-member constituencies does not affect the parties' vote-mandate ratio. Instead, each party's share of the seats is based on the proportional share of votes at the national (or regional) level, from which the number of direct mandates already won is deducted.

<b>Personalised proportional representation Mixed member proportional system</b>	
Combined allocation of seats	
Single-member constituencies – single candidacy – one vote – plurality	National constituency – party list – one vote – PR formula
Frequency: rare Germany*, New Zealand*, Lesotho (80/40)**, Thailand (350/150), Bolivia(63:60)* ***	

Source: own compilation. New Zealand and Bolivia have additional constituencies for minorities. \*With legal threshold and/or basic mandate clause. \*\*Since 2011 only one vote. \*\*\*Calculation of proportional representation at the level of multi-member constituencies.

It should be noted that this is only a short, very condensed selection of important types of electoral system. Other types include, for example, the *single transferable vote system*, which is often discussed but very rarely used, notably in Ireland or Malta. Also interesting is the *binominal electoral system* used in Chile between 1989 and 2013, which applies proportional representation in two-member constituencies (and thus tends to favour the second strongest party). Furthermore, it is not possible here to explain in detail the respective characteristics and modifications of the various types of electoral systems, although such details significantly determine their impact.

## Effects of parliamentary electoral systems

The effects of electoral systems are a traditional subject of comparative political science. Easily measurable (mechanical) effects of the electoral system concern first of all the relationship between votes and mandates. A comparison of the percentage of votes and mandates of the respective parties reveals distortions (proportionality/disproportionality) for which the electoral system is largely responsible. It becomes clear which parties are favoured or discriminated against

by the electoral system when it comes to the allocation of mandates, measured by their share of the votes. This can be illustrated by a fictitious example:

	Share of votes in %	Share of mandates in %	difference in %
Party A	40	60	+20
Party B	30	25	-5
Party C	20	10	-10
Party D	10	5	-5

The sum of the vote-mandate distortions of all parties considered gives us the vote-mandate distortion for the respective election being examined. Proportionality indices are used for this purpose, which help to compare the degree of disproportionality between different elections.<sup>9</sup>

Closely related to proportionality or disproportionality are the effects of the electoral system on the party system. A comparison of the number and strength of parties at the level of votes and mandates shows the extent to which the electoral system has a concentrating effect on the party system. Does it reflect the fragmentation of the party system at the vote level, or does it lead to a considerable concentration of the party system in parliament through the exclusion or disadvantaging of small parties in the allocation of mandates? This can be measured by comparing the »effective number« of parties at the vote and mandate level. This is a measurement of the number of parties weighted according to their share of votes or seats.<sup>10</sup> In our example, the effective number of parties at the vote level would be 1:  $(0.4^2 + 0.3^2 + 0.2^2 + 0.1^2) = 3.3$ ; at the mandate level, however, the value would be 1:  $(0.6^2 + 0.25^2 + 0.1^2 + 0.05^2) = 2.3$ . It is clear how the electoral system has a concentrating effect on the party system, in this case in favour of the strongest party.

- 9 Proportionality index according to Rae: sum of the differences between the parties' shares of votes and seats divided by the number of parties. Only parties with more than 0.5% of the vote are taken into account (problem: overemphasis on proportionality of the elections in which many small parties participate). Proportionality index according to Loosemore-Hanby: sum of the differences between the parties' shares of votes and seats, divided by 2 (problem: overemphasis of the disproportionality of the elections in which many parties participate). Proportionality index according to Gallagher (Least Square Index): The differences between the share of votes and seats of each party are squared and then summed. The result is divided by 2. The square root is taken from the value (advantage: stronger weighting of large deviations between votes and mandates compared to smaller deviations; problem: more complex calculation). See also Gallagher/Mitchell 2005, Appendix B.
- 10 Calculation: 1 divided by the sum of the parties' squared shares of votes (or seats).

At the same time, the electoral system can also have an impact on the formation of majorities in parliament, not only by favouring large parties, but also by producing manufactured majorities. In other words, parties receive an absolute majority of parliamentary mandates due to the electoral system, even though they have not obtained an absolute majority of votes. (In the example case, party A receives the majority of parliamentary mandates with 40% of the votes). In plurality/majority systems, such a majority is not unusual and can certainly be desirable. Two recent examples: In 2019, Prime Minister Modi's *Bharatiya Janata Party* (BJP) won 37.8% of the vote in India, giving it 55.8% of the seats, while the second strongest party – the *Indian National Congress*, which had ruled the country for decades until 2014 – won 9.6% of the seats with 19.7% of the vote. In the UK, the Conservative Party won 43.6% of the vote in December 2019, giving it a whopping majority of 56.2% of the seats in the House of Commons, while the *Labour Party* took 31.2% of the seats with 32.2% of the vote.

Far more difficult to prove than such mechanical effects of the electoral system are its psychological effects on the behaviour of voters, candidates and parties. The electoral system is an important part of the institutional framework within which the actors operate. Although the parameters and logic of the electoral system do not determine the behaviour of actors, they do provide institutional incentives for behaviour patterns. For example, electoral systems can promote vote splitting or electoral tactical behaviour in favour of promising candidates or parties. A simple example: a legal threshold clause can deter many voters from voting for small parties because they do not want to give away their vote. At the same time, the electoral system influences the electoral strategies of the people and parties competing in the elections, such as their candidacy decisions or their electoral agreements and alliances. Here is another example: in the past, the small Liberal Democratic Party (FDP) has repeatedly »solicited« second votes from Christian Democrat voters in Germany. In France, parties made various electoral agreements to prevent the victory of the extreme right *Front National* (now: *Rassemblement National*) in the second round of the run-off vote.

Further-reaching, highly contextualised effects of the electoral system concern the legitimacy of the elections and the elected office-holders, the institutionalisation of the parties, the structure of party competition, the stability of the party systems, the occurrence of changes of government, or even political stability in general. However, the electoral system is only one – and often only a secondary one – of many factors affecting the phenomena to be explained. Above all, the social and political cleavages which decisively determine the party system and the political stability of a country must be taken into account. The outdated thesis of Ferdinand A. Hermens, for example, that pure proportional representation led

to the collapse of the Weimar Republic in Germany, has long been considered obsolete. Indeed, many other factors were decisive for the failure of the Weimar Republic and the rise of National Socialism.<sup>11</sup>

This does not mean that the electoral system cannot also be important for the outbreak or resolution of political conflicts. In Lesotho, for example, the main opposition party received around 23% and 25% of the vote respectively in 1993 and 1998. However, due to the plurality system in single-member constituencies, it received no (or only one) seat in parliament, despite the fact that it expected to win the elections in 1998. This fuelled (largely unsubstantiated) allegations of electoral fraud, which led to violent protests that were only ended by an intervention by troops from South Africa and Botswana at the request of the government. Subsequently, a mixed member proportional system, based on the German example, was introduced in Lesotho.<sup>12</sup>

Particularly in states with great ethnic diversity and social conflicts, electoral system experts often recommend proportional representation systems because they aim for a fair representation of social minorities, while plurality/majority systems focus on the formation of stable parliamentary majorities.<sup>13</sup> On the other hand, plurality or majority rule has traditionally been used in sub-Saharan Africa, and the constituency ties of members of parliament play a major role in the political culture of these countries. The latter can be promoted through single-seat constituencies – which explains the »compromise« in Lesotho, where plurality rule in single-seat constituencies were combined with proportional representation. However, in this case, the introduction of a mixed member proportional system has been accompanied by a proliferation of small parties in parliament and multi-party government coalitions that have proved unstable. This already leads to the evaluation of individual electoral systems, all of which have their strengths and weaknesses.

11 See Nohlen 2014: 366 et seq.

12 The electoral system reform at the time, in which the author was involved as an advisor to the Foreign Office, was about combining fair representation with constituency representation. While the government of the time tended to combine the existing plurality system in single-member constituencies (first past the post system) with proportional representation, the author tended to favour PR in multi-member constituencies, possibly with a national additional list. However, the »German model« ultimately prevailed; cf. Elklit 2005

13 Cf. for example Reynolds 2011.

## Evaluation of parliamentary electoral systems

How can the different types of electoral system be assessed? What are the criteria against which electoral systems should be measured? Thanks to the work of electoral reform commissions and electoral system debates, a number of realistic criteria have become established in electoral system research against which the functional strengths and weaknesses of electoral systems can be measured. Already in the 1990s, Dieter Nohlen – inspired by the outstanding electoral reform debate in New Zealand, which had introduced a mixed member proportional system at the time<sup>14</sup> – applied the following five criteria to electoral systems: representation, concentration, participation, simplicity and legitimacy.<sup>15</sup> Other authors later took up this idea as well.<sup>16</sup> In a slight modification of this catalogue of criteria, the following functions should be highlighted:

Functional requirements for electoral systems		
Functions	Promote	Counteract
Representation	Fair representation of the parties according to their share of votes in parliament; minority representation	High distortion of votes' share and seats' share of the parties; exclusion of minorities
Concentration	Concentration of the party system; stable parliamentary majorities	Fragmentation of the party system; unstable coalitions
Participation	Option to vote also for individual (party or independent) candidates	Choice only between parties
Constituency representation	Close ties between elected representatives and constituencies	»Anonymous« party lists at regional or national level
Strengthening the parties	Strengthening party organisation and the institutionalisation of the parties	Internal party fragmentation and local personalism
Simplicity	Easy to understand and use	Difficult comprehensibility and incorrect application

14 Report of the Royal Commission on the Electoral System 1986. See also: Report of the Electoral Law Committee 1988.

15 Nohlen 2014: 187 et seq.

16 Also Behnke/Grotz/Hartmann 2017.

Administrative effort*	No (or easy) drawing of electoral boundaries; no constituency-based registration and voting; only one ballot; easy and quick counting and allocation of votes; simple voter education possible	Complex drawing of electoral boundaries; complex allocation of voters to constituencies; several ballots; difficult and time-consuming counting and allocation of votes; demanding voter education necessary
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Source: own compilation. \*Although this criterion is not »on equal footing« with the other criteria in normative and functional terms, it is not insignificant for electoral organisational reasons.

It is obvious that an electoral system cannot fully satisfy all these functional requirements, especially because there are conflicting objectives. Increasing performance in one respect usually results in a loss of performance in another. If, for example, the electoral system's ability to fairly represent the parties in parliament is to be increased, this will inevitably be at the expense of the concentration function, and *vice versa*. Or, if the voters are allowed to express their preferences for individual candidates on open party lists, the influence of the party organs on the composition of the parliamentary factions will be weakened. If, on the other hand, several functional requirements are to be combined, for instance by introducing constituency representation in the context of proportional representation, then, for better or worse, a complex electoral system is needed. In short, no electoral system fulfils all functions completely, each has its advantages and disadvantages, and each sets different priorities.

Due to the anticipated distortion between the proportion of votes and seats held by the parties, the **plurality system in single-member constituencies** tends to promote a concentration of the party system and, where appropriate, the formation of parliamentary majorities by individual parties. Single-member constituencies also facilitate a close relationship between constituents and »their« members of parliament. In many countries, it is precisely the constituency connection of the members of parliament that is an important part of the political culture and a central argument in favour of this electoral system. The plurality system is also easy to understand and apply. In return, however, representativeness exists only in a local context, through MPs representing their constituencies (sometimes at the expense of national interests and the political minority in the constituency). The electoral system tends to exclude small parties (without regional strongholds) from parliamentary representation. Votes for the losing parties in the constituency are lost (wasted votes). Contrary to the model ideas of alternating governments, the electoral system can also strengthen the »structural majority« of dominant or hegemonic parties to such an extent that no effective opposition remains in parliament, as the aforementioned example of Lesotho showed. If plurality rule is applied in multi-member constituencies (*block vote* or

even *party block vote*) this effect tends to be reinforced. Especially in states with insufficiently institutionalised parties, the constituency orientation of MPs also carries the risk that a certain provincialism will shape parliamentary work or even encourage local clientelism. In many traditional societies, moreover, women, minorities and professionals find it more difficult to stand and be elected (at least for the first-time) in their constituencies than popular local figures. For countries with extensive internal migration, it is also a disadvantage that constituency allocation and voter registration involve a considerable administrative burden, especially if malapportionment and gerrymandering are to be avoided.

The effects of the **absolute majority system in single-member constituencies** are not fundamentally different from those of the plurality system. However, it is only in the second round of voting that eligible voters are encouraged to vote for large parties or party alliances and the parties are stimulated to make electoral agreements. Advocates of this electoral system see it as an advantage that voters and parties can make a rational, tactical decision in the second round of voting on the basis of the results of the first round (in the sense of a vote test, so to speak). However, the rare occurrence of this electoral system in democratic parliamentary elections shows that this is often viewed differently, especially when there are intransparent electoral agreements between the parties. Moreover, two rounds of voting entail a considerable extra material and administrative effort and voters must be motivated to vote once again.

**Pure proportional representation**, on the other hand, allows, as far as mathematically possible, for fair parliamentary representation, proportional to the share of the vote. The electoral system provides institutional incentives for small parties to participate in elections and for electors to vote for them. This is particularly beneficial for the inclusion of small parties whose constituencies are scattered across the country. However, since the electoral system (largely) reflects the fragmentation of the party system at the level of votes, even at the level of mandates in parliament, the formation of parliamentary majorities can become more difficult. Therefore, legal threshold clauses are sometimes used to counteract the proliferation of excessively small parties in parliament. A further disadvantage is that proportional representation at the national level does not provide for constituency ties and is usually used in conjunction with closed party lists, which can appear quite »anonymous«. On the other hand, such lists strengthen party headquarters, which can be an advantage in countries with less institutionalised parties. It is also easier for parties to specifically place lesser known persons, women, or experts on promising list positions. Furthermore, the electoral system does not require the drawing of constituency boundaries or the allocation of eligible voters to constituencies. It is also quite simple to apply.

As a rule, **proportional representation in multi-member constituencies** is less representative in the sense of fair vote-mandate allocation than pure proportional representation. This is already mathematically evident from the fact that fewer mandates are usually allocated in multi-person constituencies than in PR systems at the national level. Small parties in constituencies, depending on the number of mandates to be allocated there, therefore sometimes have to win a considerable share of the vote, which can disadvantage parties without regional strongholds. The smaller the constituencies, the greater this effect. Depending on how they are designed, additional national lists can be used to mitigate (or, as in the case of Greece up to and including 2019, to increase) this distortion.

The advantage of this electoral system, however, is that although voting takes place in constituencies, it is proportional (if the constituencies are not very small). Applied in medium or large constituencies, it tends to produce much »fairer« results than plurality or majority systems. When applied with closed party lists, it does not offer voters the possibility of voting for preferred candidates on party list, but it strengthens the influence of national or regional party organs and is quite easy to understand and apply. If the constituency allocation follows the prevailing administrative units, then the only things that are a little more demanding are the allocation of the number of MPs per constituency and the registration of voters. If, on the other hand, this electoral system is applied with open or even free party lists, which allow eligible voters to choose their preferred candidates on or from the party lists, it favours participation and candidate-oriented voting. However, this makes the electoral system more complicated.

The **parallel or segmented system** is an electoral system that, in a milder form, shares the strengths and weaknesses of the plurality or majority system in single-member constituencies. The distorting effect that single-member constituencies tend to create can only be mitigated, but not compensated for, by the allocation of proportional list mandates in the overall result. Candidate-oriented voting and regional ties are retained by the single-member constituencies, but are weakened by the fact that there are generally fewer constituencies in the parallel system and direct representatives must therefore represent more eligible voters than in plurality/majority systems in single-member constituencies. On the other hand, proportional list mandates allow candidates who have little chance of being elected in single constituencies to enter parliament.

**Personalised proportional representation**, as used in Germany and New Zealand, allows at least those parties that have cleared the 5% threshold (or received the necessary number of direct mandates) to be fairly represented in parliament, in terms of the percentage of votes obtained. At the same time, the legal threshold of representation prevents very small parties from entering parliament. In Germany,

this has contributed towards the concentration of the party system, but without significantly promoting the parliamentary majority formation of the strongest party or preventing the emergence of new parties. Of great importance, however, is the fact that the electoral system combines the allocation of direct mandates in single-seat constituencies with the principle of proportional representation. This is often appreciated in international debates on electoral reform because it makes it possible to ensure that members of parliament are elected in their constituencies while at the same time achieving fair and proportional results. A major drawback, however, is that the procedure is not easy to understand. In Germany, personalised proportional representation, significantly reinforced by the introduction of compensatory mandates, has also led to considerable bloat in the parliament.

### **Electoral system reforms – no solutions on the drawing board**

The explanations schematically outline the general advantages and disadvantages of the respective electoral systems – without bringing in significant, though actually necessary gradations. These are thus only tendencies. Even if electoral systems are the same or similar – I.e. if they belong to the same type of electoral system – they need not have the same effects everywhere. The effects of electoral systems depend to a large extent on the political and social context, such as the geographical distribution of the electorate, the strength and degree of institutionalisation of the parties, the social and political cleavages that characterise political competition, the political culture and much more. In other words, we must be aware that when we talk about the advantages and disadvantages of electoral systems, we can only make statements about the effects of trends. Their concrete effects in a country can only be determined in connection with the socio-political conditions existing there.

In specific debates on electoral reform, it is therefore useful to start from the points of criticism of the existing electoral system and to clarify first, whether the criticism is justified (is the problem being criticised due to the electoral system or to entirely different factors?); second, what are the objectives associated with the criticism; third, what reform objectives are realistic and should be prioritised; and fourth, which electoral system reforms are to be recommended in order to work towards the implementation of the desired political objectives. The political scope for reform must always be explored. It is not unusual for small, incremental reforms to be easier to implement than large, far-reaching reform recommendations. Experience shows that there is the greatest scope for far-rea-

ching reforms after major political upheavals and crises. Since elections are often seen as a »litmus test« in such post-conflict situations or transition phases, it should be well considered which system can and should be implemented under the prevailing conditions, respectively.

Major and minor reform debates are taking place in many countries all over the world. The electoral system used for the elections to the German *Bundestag* has also been the subject of electoral reform debates from the very beginning, and these continue to this day.<sup>17</sup> They have concerned individual technical elements – such as the two-vote system, the allocation formula, the basic mandate clause or the threshold clause – or they concerned undesirable effects of the electoral system – such as a negative weighting of votes, the growing number of overhang (and now equalising) mandates and thus the »bloating« of the parliament. In the 19th legislative period (2017–2021), for example, Germany had the largest parliament among the democracies with 709 members. So far, advocates of the plurality system or even just a fundamental change in the type of electoral system have hardly been able to assert themselves. The difficulties in pushing through an electoral system reform, which would prevent the *Bundestag* from »bursting at the seams«, illustrates once again that electoral reforms are political power issues.

## Undemocratic parliamentary election systems?

With regard to the question of whether the elections are free and fair, it can be established that the vast majority of electoral systems for elections to single-chamber parliaments or the lower houses of bicameral parliaments meet democratic standards, even if they are based on different concepts of representation. However, there are exceptions. These include elections in which not all members of parliament are directly elected. In Myanmar, for instance, only 168 of the 224 members of the lower chamber of the parliament are directly elected. The military appoints the remaining 56 seats (25%). In Kazakhstan, only 98 MPs in the lower house of parliament (*Majilis*) are elected directly, while another nine are elected indirectly by the People's Assembly, an advisory body appointed by the President. In Gambia, »only« five of the 58 members of the *House of Representatives* were appointed by the president in 2017, but this also does not conform to international standards – even if the 2017 elections were largely free and fair and led to a change of government. In Rwanda, 27 elected representatives of interest

17 Cf. for example Jesse 1985, 2003, 2016, Nohlen 2009, 2014, Strohmeier 2009; Behnke 2011, 2019a, 2019b, 2019c; Grotz 2012, 2014, 2016; Dehmel/Jesse 2013, Hellmann 2016, Behnke et al. 2017, Grotz/ Pukelsheim 2020, Grotz/Vehrkamp 2017, Jacob 2019.

groups are appointed in addition to the 53 directly elected representatives: Of these, 24 are reserved for women, two are appointed by a youth organisation and another by the National Union of Disability Organisations. Even where appointed members ensure the representation of disadvantaged minorities, it is problematic that they are not directly elected. It would make more sense to encourage political parties to allow minorities to run for office.

With regard to electoral systems for directly elected members of parliament, »bonus« electoral systems, which provide for a fixed allocation of seats or allocate additional mandates to the strongest party, are problematic from a democratic point of view. Significantly, these often serve as instruments of autocratic governance practices. The elections during the Somoza dictatorship (1936–1979) in Nicaragua have already been mentioned. Irrespective of the actual election result, parliamentary mandates there were distributed between the majority and minority party/parties in a ratio of 2:1 (from 1950) and 3:2 (from 1971). The so-called »minority representation« (*representación de minorías*) served to co-opt the official opposition.

The electoral system in authoritarian Djibouti currently also has elements of a bonus voting system. There, every eligible voter has one vote to elect a party list in one of the multi-member constituencies. As of 2013, the party with the highest number of votes in the constituency will automatically hold 80% of the seats in that constituency, while the remaining seats will be distributed proportionally between the other parties if they have obtained more than 10% of the votes. However, if the 10% threshold is not cleared by any of the other parties, the party with the most votes will receive all the mandates. In contrast to the previous electoral system, the opposition received ten (2013) and eight (2018) of the 65 mandates, but the electoral system cannot be considered democratic.

However, the electoral system used in Djibouti before 2013, namely an absolute majority system in five multi-member constituencies, was even more exclusive under the prevailing political conditions. Then as well, voters had only one vote each with which they voted for the candidature list of a party or an alliance of parties in their constituency. However, the list with the most votes always received all the mandates (party bloc vote). In a hegemonic party system such an electoral system leaves the small opposition parties little chance of parliamentary representation (unless they have a genuine stronghold in one of the constituencies). Accordingly, even after the abolition of single-party elections in 1992, the regime alliance won all the mandates in the multi-party elections of 1992, 1997 and 2003. Ultimately, the opposition boycotted the 2008 elections.

Another electoral problem in Europe are the majority bonus systems, which were last used in Greece in 2019 and have been used in Italy from 2005 onwards.

In Greece, up to and including the 2019 elections, the party with the most votes received an additional bonus of 50 seats. The remaining seats were distributed among the parties in proportion to their share of the vote. Although the bonus was intended to create stable majorities, as it does not represent the distribution of votes in the strict sense, there were democratic reservations about such a system. With the electoral reform adopted in 2016, which did not take effect until after the 2019 elections, the Tsipras government abolished the bonus system. In Italy, the proportional elements of the electoral system were amended in 2005 such that the list with the highest number of votes would obtain the absolute majority of parliamentary seats. The country thus continued its undemocratic experiences with bonus systems from the fascist era.<sup>18</sup> However, following several electoral reforms, Italy now applies a segmented electoral system. In San Marino, however, the majority bonus is still in place. There, the strongest party list receives at least 35 of the 60 seats in parliament

Even electoral systems that are not undemocratic *per se* can produce problematic results. It is only in terms of results that criticism of the Hungarian electoral system can be understood. There, the majority-building effect of the electoral system has been widely criticised. It is true that, given Orbán's autocratic style of rule, it is politically highly problematic if the hegemonic *Fidesz* party obtains a two-thirds majority in parliament with less than half of the votes (as in 2010 and 2018), which would enable it to amend the constitution. In electoral terms, however, the majority-building effect of the combined electoral system is lower than that of plurality or majority systems.<sup>19</sup> This is even true for the reformed electoral system that was applied in 2014 and 2018: Of the now only 199 seats in the single-chamber parliament («House of the Nation») in Hungary, 106 seats are allocated by relative (previously absolute) majority representation in single constituencies and 93 by proportional representation at the national level. For the purpose of calculating the number of seats allocated by proportional representation, not only the national votes of the parties which have passed the 5% threshold (10% or 15% depending on the number of parties in the case of electoral alliances) are counted. In addition also those votes are considered a) which the winners in the single-member constituencies did not need to win the elections in order to obtain a majority (surplus seats) and b) (as before the electoral reform) the votes of the losing parties (above the threshold) which, in the absence of an election victory in the single-member constituencies, went by the board. With the introduction of surplus seats, the compensatory effect of the proportional

18 Cf. Nohlen 2014: 252.

19 Cf. already Grotz 1998.

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allocation of mandates was weakened. However, the actual majority-building effect of the electoral system is mainly due to the allocation of mandates in single-member constituencies, from which *Fidesz* in particular benefits in this case, especially since only a plurality of votes in the constituency is now required.

# REPRESENTATION OF WOMEN IN ELECTIONS

Universal suffrage is a necessary but insufficient condition for women to participate equally in political life. Despite long struggles for emancipation, politics in democracies, as in autocracies, is still dominated by men. The »Group Portrait with Lady« still characterises the appearance of international meetings of heads of state and government, and parliaments are still predominantly male, even though the proportion of women has risen considerably worldwide in recent decades: from 9.1% in 1990 to 24.9% at the beginning of 2020.<sup>1</sup>

Based on the October 2020 data (worldwide: 25.2% proportion of women), the figures are above average in the Americas (31.8%) and Europe (30.3%) in an inter-regional comparison, while they are below average in sub-Saharan Africa (24.8%), Asia (20.6%), Middle East/North Africa (17.5%) and the Pacific (16.8%).<sup>2</sup> More and more countries are exhibiting a balanced representation, which in the relevant literature is set at 40% of the mandates. While at the beginning of 2000 only one country, namely Sweden, exceeded the 40% mark, in January 2010 there were seven states and in January 2020 already two dozen. In a further 31 countries, the proportion of women was between 30% and just under 40% of the mandates in 2020.

Top of the table in Africa and worldwide in October 2020 was Rwanda, with a female proportion of around 61%. The autocratically governed country not only provides for a legislated gender quota for candidacies, but also allocates additional reserved parliamentary seats for women that do not result from general elections. South Africa (46.4%) and Namibia (43.3%) also do well in Africa – in both cases because the parties dominating there have introduced voluntary gender quotas for candidacies. In America, with the exception of Cuba, which does not provide for multi-party elections, the proportion of women is highest in Bolivia (53.1%), followed by Mexico (48.2%), Nicaragua (47.3%) and Costa Rica (45.6%). In Europe, the Nordic countries of Sweden (47%), Finland (46%) and Norway (41.4%) traditionally lead the way, although Spain now also has an almost balanced gender representation (44%) and, since the 2019 elections, Andorra (46.4%). In the other regions of the world, only New Zealand has exceeded the 40% mark,

1 Data based on: Inter-Parliamentary Union, [www.ipu.org](http://www.ipu.org).

2 <https://data.ipu.org/women-averages>

with the exception of the United Arab Emirates, whose parliament has only advisory functions and is not elected by direct universal suffrage. Women's representation is particularly poor in the Pacific countries, which tend to have very few women MPs or, as in Micronesia, Papua New Guinea and Vanuatu, »manage« without women altogether. The proportion of women is also shamefully low in several other countries around the world, from Nigeria (3.6%) to Lebanon (4.7%), Sri Lanka (5.4%) and Tuvalu (6.3%). Among the consolidated democracies, Japan is particularly negative, with 9.9% women after the 2017 elections, while in Europe Malta (13.4%), Hungary (12.1%) and Liechtenstein (12.0%) are at the bottom of the list.<sup>3</sup> In Germany, the proportion of women in parliament fell from 36.3% (2013) to 30.9% (2017). This was due to the lower proportion of female members of parliament in the CDU/CSU (around 20 %) and the low proportion of women among the members of the FDP (just under 23 %), which re-entered parliament, and in the AfD (around 11%), represented for the first time in the *Bundestag*.

While a proportion of women between 40% and 50% shows an (approximate) balanced representation, a value of 30% to 35% is occasionally regarded in politics and academic fields as a »benchmark« for a »critical mass« of female members of parliament, which is necessary for women to have a lasting influence on parliamentary politics. Of course, this does not exclude the possibility that even a few women can make a difference. Conversely, a numerically adequate representation is not yet a guarantee for gender-specific and female-friendly policy in parliament. It must therefore be examined in each case to what extent »numerical representation« actually leads to »substantial representation«, which is reflected in policymaking. If, however, there are only a few women in parliament, the chances of women playing an equal role in shaping politics are low(er). Despite remarkable progress over the past three decades, it is therefore necessary to overcome the prevalent numerical under-representation of women, which still largely exists. Very different economic, social, cultural, religious and political factors make it either more difficult or easier for women to overcome the three hurdles that must be surpassed in order to enter parliament: 1) Women must find themselves in a position that they are able and willing to stand for election. 2) Women must be nominated as candidates in elections where they have a chance of success and be supported by their parties. 3) Finally, women must also be elected by the electorate.

The most critical point here is the second: the nomination of candidates, which in modern democracies is largely in the hands of the political parties. »*Selecting*

3 See here the »Ranking« of the Inter-Parliamentary Union, available at: <https://data.ipu.org/women-ranking> (as of October 2020). There you will find information on the proportion of women in parliament for 191 countries.

*Women, Electing Women*« is the apt title of a study that shows the importance of female candidate selection for the election of women in Latin America.<sup>4</sup> The »party gatekeepers« not only determine who will stand for election, but also have a decisive influence on the electoral success of candidates by assigning them more or less »safe« constituencies or list places and providing them with appropriate support during the election campaign. In addition to social norms and political-strategic considerations, the electoral system and, above all, gender quotas for candidacies play a role here.

## Electoral systems and representation of women

The debate on electoral systems and the representation of women in parliament is mostly conducted in general terms, at the level of the basic types or »families« of electoral systems. It is empirically proven to a large extent that proportional representation systems are more conducive to the representation of women than plurality/majority systems. The findings are usually based on aggregated data that relate basic electoral system types to the proportion of women. It is also revealing to look at individual countries that either have different electoral systems or have undergone a fundamental electoral system change for parliamentary elections. As in many previous elections, in the United Kingdom the proportion of women MPs in the first-past-the-post election to the House of Commons in 2017 (32%) and 2019 (34%) was lower than in the PR election to the European Parliament in 2018 (47%), despite considerable increases. In New Zealand, although the proportion of women in the parliament rose gradually from 13% (1984) to 21% (1993) with the British plurality system, it jumped to 29% (1996) with the introduction of a mixed member proportional system, reaching almost 41% in the 2017 elections. Also of interest are those states that combine different allocation procedures in one electoral system. In the personalised proportional system in Germany, the proportion of female candidates and seats in elections in single-member constituencies is usually lower than for those on party lists. In 2017, 218 women (30.7% of all MPs) were elected to the *Bundestag*. In single-seat constituencies 64 women (21.4% of all constituencies) were successful, 154 (37.6% of all list places) on the *Länder* lists. Women also tend to do better on party lists in the parallel electoral systems.<sup>5</sup> We must, however, be careful to differentiate here. As has already been mentioned, electoral systems belonging to the same »family« can have very different effects. One reason for this is that the effects of electoral systems depend

4 Hinojosa 2012.

5 See already Kostadinowa 2007: 427.

to a large extent on the socio-political context. Secondly, the technical and typological diversity of electoral systems must be taken into account. Let us therefore take a brief look at individual electoral system elements:

**Single-member or multi-member constituencies?** In relevant literature, single-member constituencies have long been considered to be rather a hindrance to women standing as candidates and being elected.<sup>6</sup> Since in single-member constituencies, each party nominates only one person and only the person with the most votes wins the constituency, women have to prevail against men from their party (in the nomination process) and against men from other parties (in the election). It is argued that male claims to power and the supposedly poor prospects of being elected contribute to the reluctance of some parties to nominate women in single-seat constituencies. This is all the more true if it prevents male candidates from standing for re-election. The extent to which such considerations actually guide the selection of candidates by parties in single-seat constituencies must be examined on a case-by-case basis. It must also be examined whether female candidates are actually less popular with the electorate if they run against male candidates in the constituency. This is probably most likely to be the case in societies with a traditional understanding of gender roles. If, however, they are nominated by parties with a high chance of winning, women often have a good chance of being elected. And if they are elected, the chances of being re-elected as an elected representative are even higher.

Nevertheless, the theoretical advantage of multi-member constituencies for women is that parties in the respective constituencies can nominate more than one candidate, thus enabling them to establish a gender balance on party lists, which can also be important in terms of electoral strategy. In electoral system research, it is therefore often assumed that larger constituencies in particular, where several mandates are allocated, favour the nomination and election of women. Further research suggests that it is not only the district magnitude but also the party magnitude that matters. In terms of the electoral system, party magnitude is the number of MPs a party wins in a constituency. Only if a party assumes that it will win several seats in a constituency, then – so the argument goes – do strategies to balance the list actually have an effect. Of course, constituency magnitude and party magnitude (in the electoral sense) are closely related. In small constituencies with three to five seats, even parties with a strong vote will receive little more than one or two seats. In large or even national constituencies, on the other hand, the parties' chances of winning more seats per constituency increase mathematically, so that gender-balancing strategies are more effective.

6 Instead of many: Matland 2005.

**Legal thresholds of representation** that make the acquisition of parliamentary mandates dependent on the attainment of a certain percentage of votes appear to be a hindrance to the parliamentary representation of women for the time being. For example, small parties that specifically represent women's interests or are even purely women's parties can be excluded from entering parliament by means of threshold clauses. If, however, we consider party magnitude (in the electoral sense) to be an important factor that promotes the gender balance of party lists, then legal thresholds have just the opposite effect: they exclude splinter parties that would only receive a few seats. At the same time, thanks to the threshold, it is mainly those parties that receive enough mandates to ensure that any balancing of the list can have an effect.

**Closed, open or free lists?** Although it is also possible to elect party lists in plurality or majority systems, by way of party block votes, they are a characteristic feature of proportional representation systems. Accordingly, the term »PR list systems« is often used in the Anglo-American world. Where closed lists and single votes are used, the question of whether women are on higher list positions is significant for having a chance to be elected. That depends, of course, on the party committees that decide on candidates and list positions. In the case of open or free lists, in contrast, the election of women is more in the hands of the voters, as they can change the list order or even compile new lists.

However, the allocation of preferential votes or the possibility of cumulation and *panachage* also harbours the danger that – at least in traditional societies – men are more likely to be elected. Under such conditions, open and free lists can lead to discrimination against women. In less traditional societies, however, especially if women are well organised and campaign actively for female candidates, preferential votes can also lead to a larger proportion of women in parliament. In Denmark, for example, both preferential voting and party nomination practices favoured women's representation. Sweden, Switzerland, Norway, Belgium, Austria and Iceland, which have a relatively high proportion of women in parliament, also use open lists. Therefore, it is hardly possible to make general recommendations regarding list form and voting – with one exception: if legislated gender quotas are also applied, with placement rules that ensure that women can stand for promising candidatures, then with closed lists they are on the safe side.

## **Gender quotas – »fast track« to parliament**

While the complexity of electoral systems and their implications mean that it is not easy to design reforms in such a way that women's representation is actually

facilitated, gender candidate quotas are often considered a »fast track« for women's access to parliament.<sup>7</sup> Women (or gender) quotas define a minimum required percentage of female candidates (or of candidates of either sex) in elections, usually on party lists.<sup>8</sup> In addition, they may also contain provisions concerning the placing of female candidates (or candidates of the underrepresented sex) on the lists. Women or gender quotas can be introduced by law for all parties competing in elections (legislated candidate quotas) or voluntarily by the individual political parties (voluntary party quotas).

Let us first consider legislated candidate quotas, which are mandatory for all parties competing in the elections. Here Latin America is the forerunner and leader. Argentina was the first democracy to introduce such a quota for women in 1991, followed by a number of other Latin American states from the 1990s onwards. In Europe, on the other hand, the introduction of legislated gender quotas sometimes met with considerable political or even constitutional reservations. Nevertheless, several member states of the Council of Europe have now introduced legislated quotas for elections to national parliaments. However, these vary considerably with regard to the minimum percentage of female candidates (or candidates of the underrepresented sex). In Europe, only Belgium provides for an equal share of women and men on party lists and, in relation to the total number of party candidacies in constituencies, so does France. In most of the countries that apply legislated quotas, the minimum proportion is between 30% and 40%, sometimes even lower. In Ireland, the quota for 2023 has just been increased from 30% to 40%. Real *parité*, as the talk of parity laws suggests, are therefore rare. They are still most likely to be found in Latin American parliamentary elections, whether for party election primaries or the final lists of candidates.<sup>9</sup>

Only a few countries, such as Bolivia, Costa Rica, Ecuador and Nicaragua, provide for a continuous »zipper system« in the case of legislated gender quotas, with candidates taking turns. With PR list systems in multi member constituencies, it is also important that the first party list positions are altering between sexes in order to avoid that the first elected candidate in the respective constituency is always a man.<sup>10</sup> In Lesotho, where a mixed member proportional system

7 It should be mentioned that gender quotas can also apply to presidential elections. In Ecuador, for instance, the candidates for the presidency and vice-presidency, who are elected with one vote on the same ticket, must be of different sexes.

8 Instead of »women quota« »gender quotas« are increasingly used, while maintaining the binary distinction between men and women. However, the intended purpose is the same: to overcome the underrepresentation of women and achieve political equality between both sexes.

9 See Bareiro/Soto 2019b: 740 ff.

10 See Benavides 2019, Ortíz Ortíz 2020.

is used, a legislated quota with a zipper system is only (or at least) prescribed for list candidacies. In Europe, on the other hand, no country applies a legislated quota combined with a zipper system, not even in Belgium, where it is only required that the first two list positions be filled with candidates of different sexes. Only some legislated quotas in Europe even regulate the placement of women on the lists. In Northern Macedonia, for example, every third place on the list must be reserved for the less represented sex, in Serbia it is every fourth place, in Spain every fifth. The lack of strict placement requirements is a major weakness of the legislated gender quotas as they apply in Europe. It allows parties to place women at the bottom of the lists. Moreover, there is often a lack of effective sanctions when parties do not respect the quotas.

As an alternative to or in addition to legislated quotas, one or more parties have voluntarily introduced gender quotas for candidacies in a number of states, including in Europe. These quotas also differ in terms of the minimum percentage of female candidates and any placement rules. The quotas are usually between 30% and 40% of the respective candidacies. Equal representation of candidates on party lists is rather rare but is practised by some Green and Left parties in Germany, Iceland, the Netherlands, Austria and Sweden, for example. Sometimes, the »zipper system« is even applied.

So how effective are such quotas? Gender quotas can indeed constitute a fast track for the parliamentary representation of women, at least if they are sufficiently high, include placement rules and are not undermined by the parties. In a number of countries, the introduction of legislated quotas led to a considerable increase in the representation of women in parliament or helped to consolidate an already existing relatively high proportion of women, which had been achieved previously, partly due to voluntary party quotas. In other countries, the effects remained minimal due to low quotas, a lack of placement rules and a reluctance to place women on promising list positions and to support them in the election campaign. In Kosovo, for example, the legislated quota of 30% is hardly effective because there are no placement rules and because female candidates are at a strong disadvantage compared to their male colleagues in *terms of* finances, media presence and campaigning, as the EU Election Observation Mission criticised in 2017.

The importance of voluntary party quotas for the overall representation of women in parliament, in turn, depends largely on which parties use such quotas and the importance of these parties in parliament. When the Labour Party of Norway, at the time the largest party in the country, introduced a voluntary quota for women in 1985, the proportion of women in parliament increased in one fell swoop. The same is true of the Croatian Social Democratic Party when it

introduced a 40% quota in 1996, or the British Labour Party a year later with its »all women shortlists«. This effect is particularly evident when large, dominant parties use gender quotas – such as the African National Congress (ANC) in the Republic of South Africa or SWAPO in Namibia. However, if only small parties voluntarily introduce quotas, the effect on the overall representation of women in parliament is small.

Which parties use voluntary party quotas depends not least on their programmatic and substantive orientation. In Europe, the pioneers of voluntary quotas were mainly left-wing and green parties. Conservative and liberal parties, on the other hand, tend to hold back on voluntary commitments, even if they use quotas in individual cases or at least take gender aspects into account when nominating candidates. However, there are sometimes »contagion effects«: as soon as individual parties begin to nominate more women, other parties follow suit more easily, driven by inter-party competition. Significantly, in a number of European countries not only one but several parties have introduced voluntary party quotas for women, one after the other. In Germany, for example, the success of the Greens, which already used a gender quota based on parity in the 1980s, has put some pressure on other parties, especially the Social Democrats.

Let us be clear: the proportion of women in Parliament is influenced by very different social determinants, many of which cannot be changed overnight. This is the reason why it is attractive to accelerate change through political and institutional reforms. Accordingly, the introduction of voluntary, but above all legislated quotas for women's candidacies is being prominently discussed. If they are designed effectively, they are suitable to increase the proportion of women in parliament in a targeted manner. However, legislated candidates quotas may meet with political resistance and constitutional concerns. With regard to the German Basic Law, the majority of the constitutional literature still holds the view that legislated candidate quotas represent a disproportionate encroachment on democratic electoral principles. This can and should be disputed. But even if legislated candidate quotas are not deemed to be unconstitutional and are politically desirable, they are not constitutionally required.

As meaningful and effective as a legislated quota may be, voluntary party quotas are easier to enforce, which can also sustainably increase the representation of women in parliament. The states with the highest representation of women in Europe only have voluntary quotas. In this respect, it is sensible and purposeful not only to focus on legislated gender quotas, but also to encourage and urge the parties to voluntarily use the high quotas for women and to place women on promising list positions and also in promising constituencies. On the one hand, effectively organised women's networks within the parties can push for this. On

the other hand, such demands can also be brought to parties »from outside« – from civil society and the media – and be appreciated by voters when they come to cast their vote.

A final remark concerning reserved seats for women in parliament, which are not considered an appropriate means of strengthening women’s representation in parliament, either in Europe or in America. In some states in the Middle East (e.g. Afghanistan, Iraq, Jordan), South Asia (e.g. Bangladesh, Nepal, Pakistan), Africa (e.g. Burundi, Kenya, Niger, Swaziland, Tanzania, Uganda, Zimbabwe) different forms of such outcome quotas and reserved seats are applied. What they all have in common is that they predetermine the outcome in terms of how many women should be represented in parliament. They are sometimes combined with candidacy quotas; results not achieved by such candidacy quotas are then »produced« subsequently, for example by appointment or indirect election. Alternatively, a certain number of women are appointed immediately or indirectly elected. In Kenya and Uganda, on the other hand, there are separate constituencies in which only women are allowed to stand for election. It is striking that, with the exception of Rwanda (where 24 women are indirectly elected in addition to a 30% quota of candidates for direct universal suffrage), none of the countries has a balanced representation of women in parliament. The corresponding figures are usually between 15% and 35%.

**Fig. 5: Representation of women in parliament in the Council of Europe countries (2020)**

Country (election)	Women in % 2020 (1995)	Legislated quota in %	Position rules	Party quota**	Electoral system
Sweden (2018)	47.0 (40.4)	---	---	Yes	PR*
Andorra 2019)	46.4 (3.6)	---	---	---	Parallel
Finland (2019)	46.0 (33.5)	---	---	---	PR*
Spain (2019)	44.0 (16.0)	40	2 of 5	Yes	PR
Switzerland (2019)	41.5 (21.0)	---	---	Yes	PR*
Norway (2017)	41.4 (39.4)	---	---	Yes	PR*
Belgium (2019)	40.7 (12.0)	50	1 of the first 2 places	---	PR*
Portugal (2019)	40.0 (13.0)	33,3	Every 3rd place on the list		PR
Denmark (2019)	39.7 (33.5)	---	---	---	PR*

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France (2017)	39.5 (6.4)	50 (48)	---	Yes	MTW
Austria (2019)	39.3 (26.8)	---	---	Yes	PR*
Serbia (2020)	38.8	30	Every 3rd place on the list	---	PR
Northern Macedonia (2017)	38.3 (3.3)	40	Every 3rd place on the list	---	PR
Iceland (2020)	38.1 (25.4)	---	---	Yes	PR*
Italy (2018)	35.7 (15.1)	40 Const. 50 List	Alternating (list)	Yes	PR (bonus)
United Kingdom (2019)	33.9 (9.2)	---	---	Yes	Plurality
Monaco (2018)	33.3 (5.6)	---	---	---	Parallel (BV)
Netherlands (2017)	33.3 (32.7)	---	---	Yes	PR
San Marino (2019)	33.3 (11.7)	33.3	---	---	PR (bonus)
Germany (2017)	31.2 (26.3)	---	---	Yes	MMP
Croatia (2020)	31.3 (7.9)	40	---	Yes	PR
Latvia (2018)	30.0 (15.0)	---	---	---	PR*
Luxembourg (2018)	30.0 (20.0)	---	---	Yes	PR*
Albania (2017)	29.5 (5.7)	30	1 of the first 3 places	---	PR
Estonia (2019)	28.7 (12.9)	---	---	---	PR*
Poland (2019)	28.7 (13.0)	35	---	---	PR*
Bulgaria (2017)	26.7 (13.3)	---	---	---	PR*
Moldova (2019)	24.8 (4.8)	40	---	---	PR
Lithuania (2016)	24.1 (7.1)	---	---	Yes	Parallel*
Armenia (2018)	23.5 (6.3)	20	Every 5th place, from 2nd place on	---	Parallel*
Slovenia (2020)	22.7 (14.4)	35	---	Yes	PR*
Czech Rep. (2017)	22.5 (10.0)	---	---	Yes	PR*
Ireland (2020)	22.5 (12.0)	30	---	---	STV

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Montenegro (2020)	22.2 (23.5)	30	Every 4th place on the list	---	PR
Romania (2016)	21.9 (4.1)	---	---	Yes	PR
B & H (2018)	21.4 (4.5)	40	1 of 2, 2 of 5, 3 of 8	---	PR (*)
Ukraine (2019)	20.8 (3.8)	---***	---	---	Parallel****
Greece (2019)	20.7 (6.0)	33	---	Yes	PR
Slovakia (2016)	20.7 (14.7)	---	---	?	PR*
Cyprus (2016)	19.6 (5.4)	---	---	Yes	PR*
Turkey (2018)	17.3 (2.4)	---	---	Yes	PR
Azerbaijan. (2015)	16.8 (12.1)	---	---	---	Plurality
Russia (2016)	15.8 (13.4)	---	---	---	Parallel
Georgia (2016)	14.1 (6.9)	---*****	---	---	Parallel
Malta (2017)	13.4 (1.5)	---	---	Yes	STV
Hungary (2018)	12.1 (11.4)	---	---	Yes	Parallel
Liechtenstein (2017)	12.0 (8.0)	---	---	---	PR*

Source: own compilation based on IPU 2020 and Quota Project: [www.quotaproject.org](http://www.quotaproject.org)

MMP = Mixed member proportional system, MTW = Majority two round system, PR = Proportional representation, STV = Single Transferable Vote system.

\*Open or free list. \*\* At least one party voluntarily applies gender-related candidacy quotas. \*\*\*From next election: 40%. \*\*\*\*From next election: PR. \*\*\*\*\* In 2020 elections, at least 1 of 4 of different sex.

## THE REPRESENTATION OF NATIONAL MINORITIES

According to international human rights and electoral standards, national minorities must not be discriminated against in elections. This applies to the right to vote and to stand for office, as well as to many other aspects of elections, from voter registration and campaigning to the actual ballot. Like all other voters, persons belonging to national minorities must be able to exercise their electoral rights free from restrictions and pressure. In order to ensure the representation of national minorities in elections, exceptional regulations are even explicitly allowed.

With regard to the electoral system, this starts with the drawing of constituency boundaries. Constituencies can be drawn in such a way that regionally concentrated national minorities have a real chance of winning seats there. As explained above, Canada's electoral law even allows relatively large variations in the size of constituencies to protect indigenous groups. A quota system for candidatures exists in Kyrgyzstan. There the parties must not only include at least 30% women on the rigid lists of candidates. In addition, 15% of candidates must be members of national minorities (and 15% must be under 35 years old).

In some countries, there are also reserved seats in the parliament for the election of minority representatives. This sometimes even breaks with the »one person, one vote« principle. For example, the Council of Europe's *Code of Good Practice in Electoral Matters* »allows« persons belonging to national minorities to have the right to vote both for the general lists and for lists of national minorities – as is the case in Slovenia, for example. There, unlike other nationals, members of the Italian and Hungarian minorities have an additional vote in parliamentary elections for the allocation of the seats reserved for both of these minorities in the 90-seat parliament. In Croatia, on the other hand, members of minorities have only one vote and have to decide whether to vote in a minority constituency or a regular constituency. It is important, however, that voters are not forced to declare that they belong to a national minority.

Another possibility is to allow exceptions to the normal rules for the allocation of parliamentary mandates. In Germany, for example, there are some special rules for officially recognised »national minorities« covered by the »Council

of Europe Framework Convention for the Protection of National Minorities«.<sup>1</sup> These include the Danish minority, the Sorbian people, the Frisians and the German Sinti and Roma. If parties belonging to these national minorities were to take part in federal elections, they would enjoy a number of privileges: these concern the signature requirement for constituency nominations and national lists. Above all, however, the 5% threshold clause and the clause on the minimum number of constituency seats required for party representation in parliament do not apply to lists submitted by parties of national minorities. Nor do they require a minimum number of votes to receive public funding. At present, however, there is only one party of a recognised national minority in Germany, namely the *Süd-schleswigscher Wählerverband* (SSW) of the Danish minority. The SSW took part in the first four elections to the *Bundestag* and even had a member of parliament in the first *Bundestag*. Since then, however, the SSW has no longer participated in *Bundestag* elections, but only in *Länder* elections. However, the SSW had been represented almost without exception in the Schleswig-Holstein *Landtag* since 1947 and was also exempted from the threshold clause there. An analogous exemption from the threshold clause is provided for in Brandenburg's electoral law for Sorbs if they submit lists as parties or political associations, which is not the case, however.

1 Each State Party to the Treaty can decide for itself which minorities it considers to be »national minorities« within the meaning of the Treaty.

## AFTER THE ELECTION IS BEFORE THE RECALL

As stated above, the *demos* grants a temporary mandate to govern in democratic elections and at the same time appoints the parliamentary opposition. If those entitled to vote are not satisfied with the elected representatives, they have the option of not re-electing them at the end of the electoral term. During the legislative period, this possibility does not usually exist unless new elections are called early. However, in some countries, particularly in Latin America, the electorate may vote to remove the elected presidents or members of parliament before the end of the term of office. Known examples are Venezuela, where the former President Chávez survived such a recall in 2004 and his successor Maduro was able to fend off such an initiative by manipulation in 2016. In Bolivia, the then president, Evo Morales, also survived such a recall attempt in 2009. In Ecuador and Taiwan, a recall election is possible for all elected officeholders. In Panama, Ethiopia, Liberia and Nigeria, as well as in Kyrgyzstan, Kiribati and Palau, at least for members of parliament. There are few countries in Europe that allow recalls by the electorate. These include Romania, where it has already been tried twice without success, the Republic of Moldova for elected presidents and Liechtenstein and Lithuania for the elected parliament. In the United Kingdom, ten per cent of electorate in a constituency can force a vote on the elected candidate.<sup>1</sup>

In some *Länder* of the Federal Republic of Germany there is also – in addition to the right of self-dissolution – such a possibility for the *Länder* parliaments there. In Bavaria, for example, the *Landtag* can be recalled by referendum at the request of one million eligible voters. In Bremen and Berlin, such a referendum may be held if one fifth of the electorate so request in a referendum. A successful referendum there would require the approval or participation of 50% of those entitled to vote. However, referendums have neither been held in Bavaria, Bremen and Berlin nor in Brandenburg and Rhineland-Palatinate, where such referendums are also possible. In Berlin, in contrast, a total of ten attempts were made to initiate a referendum by means of a petition for one. In eight cases, not enough signatures were collected, and twice the *Landtag* (Senate) dissolved itself.<sup>2</sup> In Baden-Württemberg, a referendum in 1971 failed due to the 50% appro-

1 Cf. CDL-AD(2019)011 rev. para. 26.

2 <https://bb.mehr-demokratie.de/berlin/berlin-volksbegehren/berlin-land-uebersicht/abwahlbegehren/>.

val quorum, and a petition for a referendum in 1973 failed to collect the required number of signatures.

## SUPPLEMENT: ELECTIONS DURING THE COVID-19 PANDEMIC

The COVID-19 pandemic that broke out in 2020 caught many governments unprepared. In addition to numerous primaries, local and by-elections, several national elections have been postponed worldwide since March 2020 due to the pandemic. In Europe, these included the parliamentary elections in Serbia and Northern Macedonia, which were originally scheduled for April, but which were then postponed until June and July, respectively, and the presidential elections in Poland, which were postponed from May to July after fierce political controversy. In Sri Lanka, the parliamentary elections, originally scheduled for April, were held in August, while in the Dominican Republic and Bolivia the May elections were held in July and October, respectively. In Chad, the December parliamentary elections were postponed indefinitely early on. The central government of Nobel Peace Prize Laureate Abiy Ahmed Ali in Ethiopia did the same, aggravating the current political conflicts there.

In a number of other countries, however, national elections were held as planned. These included countries where there were few confirmed cases of infection at the time of the elections, such as Israel, Guinea, Mali (March/April) and Mongolia (June), as well as countries that were affected early or severely by the COVID-19 crisis, such as South Korea (April), Burundi, Surinam (both May) and Croatia, where elections were held in July, even before the end of the full legislative term. In the second half of the year, the vast majority of countries returned to holding regular national elections. With increasing experience in dealing with the pandemic, in contrast to the option of postponing elections, the option of at least holding national elections with appropriate safeguards in place had thus prevailed.

This makes sense: as appropriate as it may be to exceptionally postpone elections during a pandemic for health protection reasons<sup>1</sup>, it is not a permanent solution. If democracy is not to be damaged, the democratic rule that elections take place at regular intervals must not be continually suspended. However, not only must the health of those involved be diligently protected, but also democratic electoral standards must continue to be upheld. Some autocrats are using

1 Such »humanitarian postponements« (James/Alihodzic 2020: 328) of elections have already occurred in isolated cases, for instance due to the Ebola epidemic in West Africa.

(or have used) the crisis to further reduce the scope for opposition and – where they have not been postponed – to influence elections in their favour. But even democratic governments, provided they respond effectively to the crisis, can benefit politically from the elections. They must always be judged on the extent to which they deal responsibly with the pandemic during elections and at the same time observe democratic »rules of the game«. This section therefore deals with the holding of elections from the point of view of both protecting health and conducting democratic elections.

There is no doubt that the COVID-19 pandemic poses major challenges for the organisation of elections. This already includes: the planning of the elections, which requires additional resources and materials (protective equipment, disinfectant, etc.); close coordination with health authorities in order to be able to react appropriately to infection developments; the recruitment and training of election personnel, which should preferably not include risk groups and must be trained again separately; and last but not least, clear information and instructions for voters on how to behave before, during and after the elections. Clarifications by health and electoral authorities are particularly needed where disinformation about the necessary health protection measures is spread and unfounded accusations of electoral fraud are made, as for example the US President Donald Trump did before the 2020 elections.

Where voters are required to actively register, it must continue to be ensured that this is possible for all voters, especially for those at particular risk, subject to appropriate health precautions. Where appropriate, the collection of signatures required for the registration of parties and candidates should also be facilitated, which can be considerably hampered by contact restrictions and limitations on freedom of assembly and movement. In Romania, for instance, the number of required supporting signatures was halved and contestants could submit their documents electronically before the 2020 elections. Special arrangements can also be made for the internal nomination of candidates and any preliminary elections. In preparation for the 2021 general elections, for example, the governing coalition in Germany is planning a corona emergency regulation, according to which the nomination of candidates from the parties does not have to take place – as so far required by the electoral law – during party conferences or similar gatherings, but can be carried out by way of postal votes and electronic voting if necessary.

Furthermore, the election campaigns take place under considerably more difficult conditions. The risk of infection and to health means that large-scale election campaign events are sometimes not possible or only possible with special safety precautions. The same applies to door-to-door campaigning, which is still practised in some states. Apart from binding guidelines and information cam-

paigns, agreements with political parties are particularly useful to ensure that the risk of infection is contained during the election campaign. Negligent behaviour – such as non-compliance with relevant protective measures and hygiene rules – must be consistently prevented. However, there are many examples of irresponsible behaviour by individual politicians and their supporters around the world. Notable examples are (especially the early) election campaigns of, once again, Donald Trump.

At the same time, not only must health requirements be agreed among the parties and individuals running for election, but fair campaign conditions must also be established. The COVID-19 pandemic inevitably brings the actions of those in power into focus, thus providing them with the opportunity to distinguish themselves as »hands-on crisis managers«. This is not only accompanied by an increased risk that state neutrality will not be respected in the election campaign. While the government appears in the media on a daily basis in times of crisis, the opposition is also sometimes not very visible, especially when major public events cannot be held. Due to the pandemic, the election campaign is shifting (even more) from the streets to the media. This makes balanced and fair media coverage of elections even more important, and biased reporting, especially in favour of those in power, becomes even more significant. At the same time, traditional election campaign rules have so far either not been applied or only partially applied to social media, which – after television – are already the most important source of information on elections for many people.

In Serbia, for example, populist President Aleksandar Vučić used the Corona crisis to give the Serbian Progress Party led by him further electoral advantages. As a top crisis manager and campaigner, he was omnipresent on television and in the tabloids close to him, was the face of his party in the elections (although he did not even run in the parliamentary elections) and completely blurred the boundaries between office and election campaign. The political opposition, which was split anyway, hardly received any media attention, was not allowed or unwilling to hold large public meetings because of COVID-19, and was unable to stand up to the president and his party on social media. At the same time, it could not counter the clientelism of the government and the Serbian Progress Party. The granting of a one-off Corona payment to every Serb just before the elections did the rest. Part of the opposition in the politically polarised country boycotted the elections.<sup>2</sup>

However, most public attention in elections during Corona was and still is focused on the voting. It must therefore be ensured that all eligible voters, even if

2 Cf. Dzihic 2020 and the ODIHR report on the elections there.

they belong to risk groups, can cast their votes without a (significantly) increased risk of infection.<sup>3</sup> This requires special precautions to be taken at the polling station. These range from the spatial conditions of the polling station to a variety of protective and hygiene measures for the electoral staff, the voters, and when handling the election documents. In some countries, such as South Korea, temperatures were even taken at the entrance to polling stations. However, from a universal suffrage perspective, it is important that voters who show initial symptoms, are in quarantine or have been found to be infected with COVID-19 are not simply excluded from the elections, as was initially envisaged by the electoral authorities in Croatia until the Constitutional Court intervened.<sup>4</sup> Special protective measures must be taken to allow such persons to exercise their right to vote in special polling booths or outside normal voting hours in their own polling stations (as in South Korea) or by way of mobile ballot boxes. Where permitted and possible, early voting and postal voting are particularly useful.

Postal voting was quickly introduced as an alternative to going to the polling station after the outbreak of the pandemic, in order to provide adequate protection for voters and electoral staff (and also to allow particularly vulnerable or even infected persons to vote). However, so far hardly any countries have seen a complete switch to postal voting. An exception is the second round (run-off) in the Bavarian local elections on 29th March 2020, which was conducted entirely by postal vote. The electoral authorities were able to build on the profound experience of the electoral staff and voters who were already familiar with postal voting.<sup>5</sup> While in the first round of the local elections on 15th March 2020, the percentage of voters who voted by post was already over 70% in some municipalities, in the second round – with even slightly higher voter turnout – voting was then carried out exclusively by means of postal votes. Organisational measures to make this possible included the automatic sending of postal vote documents to all eligible voters, additional emptying of post boxes, and the installation of additional post-boxes for ballot papers, for example in town halls.

In Poland, on the other hand, where the government – without any significant experience with postal voting<sup>6</sup> – initially wanted to implement a complete switch

3 For a human rights perspective with a specific focus on »vulnerable groups«, see Binder/Drnovsky 2020.

4 See the ODIHR report on the elections.

5 In Bavaria, 39.4% of voters cast their votes by postal vote in the 2019 European elections, 38.9% in the 2018 state elections and 37.3% in the 2017 federal elections. Bavaria thus has the highest rate of postal votes in federal elections among the federal states of Germany, with a nationwide rate of 28.6% in 2017.

6 In Poland, postal voting for people with disabilities and for voting abroad was not introduced until 2011, then in 2014 it was made accessible to all Polish voters, but only

to postal voting almost overnight in order to »save« the (for them favourable) original election date, the elections were ultimately postponed in the face of social and political resistance, constitutional concerns and probably also foreseeable problems in organising the elections. In addition to voting at the polling stations, voters were then allowed to vote by post, but this was used by very few voters within the country.

While the complete switch to postal voting alone is not seriously being considered in the vast majority of countries, the increased use of postal voting to *complement* voting at the polling station is particularly appropriate in countries where the postal system is secure and where there is already experience with postal voting. This will be of particular benefit to voters who are exposed to particularly significant health risks. This should be easily possible in Germany. A real political issue, however, was the extension of postal voting in the USA, which Donald Trump tried to discredit politically in the run-up to the 2020 elections and also fought against in court. His unsubstantiated accusations that postal voting would be used for systematic electoral fraud contributed to voters' uncertainty and undermined their confidence in a clean election. At the same time, they were a strategy to de-legitimise a possible victory of the Democrats which then actually occurred.

And what about electronic voting? Has the hour struck for all those who have been campaigning for the introduction of online voting for years? This is the impression one might get if one reads some of the publications of international election consulting organisations. Experts from International IDEA, for example, declared that »online voting has never faced a situation as favourable as today«<sup>7</sup>, or even spoke of a »golden opportunity for online voting«<sup>8</sup> The International Foundation for Electoral Systems (IFES) identified a growing interest of electoral authorities in internet voting, held a webinar on the future of internet voting in June 2020 and compiled advice for »electoral decision makers«<sup>9</sup>. However, the advantages of online elections, which during the Corona pandemic (could) mean the possibility to vote from home, were also contrasted with the dangers and problems concerning security, secrecy, transparency and above all trust in the elections. As has already been pointed out, the introduction of online elections comes with many prerequisites, especially if they are to comply with democratic electoral principles. The Corona crisis may well provide a political

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used by a few tens of thousands of voters (mainly abroad), and in 2019 it was again restricted to people with disabilities due to security concerns; see Lada 2020.

7 Fernández Gibaja 2020.

8 Wolf 2020.

9 Applegate et al. 2020.

impetus to make online voting possible in the medium or long term in national elections. However, Internet voting was and is unsuitable as a short-term response to the pandemic, as almost no country already has the necessary systems in place.

Voting in person at the polling station remained the norm for the 2020 elections, sometimes supplemented by the increased use of early voting, postal voting and other absentee voting methods. However, despite COVID-19, voter turnout did not drop everywhere as feared. While some states recorded a decline in numbers, such as Northern Macedonia, Iceland, Croatia, Lithuania and (with a partial boycott by the opposition) Serbia, voter turnout rose noticeably in Poland, New Zealand and South Korea, for example. The influence of the pandemic on the election results is also not clear, even if the governing parties were able to prevail in many cases. Having said that, South Korea's governing party undoubtedly benefited in the parliamentary elections from the rigorous containment of the Corona crisis under President Moon Jae-in, and New Zealand's Prime Minister Jacinda Ardern scored a historic victory with the Labour Party in the October elections, precisely because of her much-praised crisis management. Among the electoral autocracies, Emomali Rahmon, the president of Tajikistan, won 92% of the official vote, the highest victory of 2020, in elections that can hardly be considered competitive. The fiercest election protests came after the presidential elections in Belarus in August. Remarkably, neither the pandemic nor state repression stopped tens of thousands of people from demonstrating against election fraud for many weeks.

This leads to the question of what the situation was and is regarding election observation during the COVID-19 crisis. Observation by domestic observers and party representatives undoubtedly suffered as a result of the restrictions on freedom of action and movement in the run-up to the elections and on election day. International organisations were additionally hampered by travel restrictions and often sent only small-scale election observation missions. Individual German long-term observers and/or core team representatives, some of whom lived locally, were integrated into OSCE/ODIHR and EU missions, for example to observe the local elections in Ukraine and the national elections in Georgia, Moldova and the USA. In view of the risks of infection, the Centre for International Peace Operations (ZIF) had initially decided not to send short-term observers. And in Belarus? The problem there was not so much the pandemic as the autocracy: local election observers were already under pressure in the run-up to the August 2020 elections. An independent international election observation by the ODIHR did not take place due to the regime's late invitation. Instead, the »Commonwealth of the Independent States – Election Monitoring Organization« (CIS

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– EMO), founded in Russia, confirmed with little credibility that the elections were an expression of the free will of the Belarusian people.<sup>10</sup>

In conclusion, democratic elections can be held even during the Corona pandemic if adequate safeguards are in place. However, this is no small feat in terms of election organisation and requires the willingness of all parties involved to take joint responsibility for ensuring adequate health protection and to comply with democratic rules of play, even under difficult conditions.

**Fig. 6: National elections held and postponed during COVID-19 in 2020**

Country	Election type	Date	New date
Tajikistan	Pa	01.03.2020	---
Israel	Pa	04.03.2020	---
Vanuatu	Pa	19.03.2020	---
Guinea	Pa/Ref	22.03.2020	---
Mali	Pa	29.03./ 19.04.2020	---
Kiribati	Pa	07.04.2020	14.04./ 21.04.2020
Northern Macedonia	Pa	12.04.2020	15.07.2020
Syria	Pa	13.04.2020	19.07.2020
Iran	Pa (2nd round)	17.04.2020	11.09.2020
South Korea	Pa	15.04.2020	---
Sri Lanka	Pa	25.04.2020	05.08.2020
Serbia	Pa	26.04.2020	21.06.2020
Bolivia	Pr, Pa	03.05.2020	18.10.2020
Poland	Pr	10.05.2020	28.06./ 12.07.2020
Dominican Republic	Pr, Pa	17.05.2020	05.07.2020
Burundi	Pr, Pa	20.05.2020	---
Suriname	Pa	25.05.2020	---
Saint Kitts and Nevis	Pa	05.06.2020	---
Kiribati	Pr	22.06.2020	---
Mongolia	Pa	24.06.2020	---

10 »CIS mission: No facts questioning legitimacy of Belarus presidential election«, Belarusian Telegraph Agency (BELTA), »Elections in Belarus conducted in accordance with legislation, head observer says«, TASS, Russian News Agency, both 10th August 2020.

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Iceland	Pr	27.06.2020	---
Malawi	Pr	02.07.2020	---
Croatia	Pa	05.07.2020	---
Singapore	Pa	10.07.2020	
Belarus	Pr	09.08.2020	---
Trinidad and Tobago	Pa	10.08.2020	
Ethiopia	Pa	29.08.2020	21.06.2021
Montenegro	Pa	30.08.2020	---
Jamaica	Pa	03.09.2020	
New Zealand	Pa	19.09.2020	17.10.2020
Jordan	Pa	20.09.2020	---
Anguilla	Pa	29.09.2020	---
Kyrgyzstan	Pa	04.10.2020	---
Tajikistan	Pr	11.10.2020	---
Lithuania	Pa	11.10./ 25.10.2020	---
Guinea	Pr	18.10.2020	---
Seychelles	Pr, Pa	22.-24.10.2020	---
Egypt	Pa	24.-25.10./ 07.-08. 11.2020	---
Tanzania	Pr, Pa	28.10.2020	---
Cote de'Ivoire	Pr	31.10.2020	---
Georgia	Pa	31.10.2020	---
Republic of Moldova	Pr	01.11.2020	---
Jordan	Pa	10.11.2020	
Belize	Pa	11.11.2020	---
USA	Pr, Pa	03.11.2020	---
Saint Vincent and the Grenadines	Pa	05.11.2020	---
Myanmar	Pa	08.11.2020	---
Burkina Faso	Pr, Pa	22.11.2020	---
Kuwait	Pa	05.12.2020	---
Romania	Pa	06.12.2020	---

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Venezuela	Pa	06.12.2020	---
Ghana	Pr, Pa	07.12.2020	---
Chad	Pa	13.12.2020	24.10.2021
Central African Republic	Pr, Pa	27.12.2020	---
Niger	Pr, Pa	27.12.2020	---

Source: own compilation based on data from International IDEA ([www.idea.int](http://www.idea.int)).

Pr = Presidential elections, Pa = Parliamentary elections (lower house), excluding partial and by-elections

## CLOSING REMARKS

For liberal-representative democracy, universal, equal, direct, secret and free suffrage is an overriding right. In the countries of the Council of Europe, there is a tendency, reinforced by the Council of Europe and the OSCE, to grant the right to vote in national elections to as many nationals as possible (but not the entire resident population), both legally and in practice. Not only are the remaining restrictions on the right to vote (prisoners, people with mental disabilities, etc.) the subject of discussion, but also effective voter registration and a wide range of arrangements to enable those eligible to vote who cannot cast their vote(s) at the polling station or within the voting territory on election day. However, given the risks involved, measures are called for to ensure the integrity of the elections.

In addition, (serious) election observation missions around the world are urging for existing electoral manipulation to be prevented. Ultimately, the importance of universal and equal suffrage and the democratic nature of the elections will be undermined if free and secret voting is not guaranteed and voters' decisions are distorted. The practices of electoral manipulation are manifold, as has been shown. Before election day, political competition can be distorted if the opposition is hindered and persons and parties loyal to the regime are strongly favoured. Typical examples are the abuse of state resources for election campaign purposes and the control of the media and civil society. Before or during voting, pressure can be exerted on certain groups of the population, such as state officials, to vote for the regime party. On election day itself, serious electoral offences include multiple voting by the same person, vote buying, ballot box stuffing, and electoral fraud during the counting, aggregating and documenting of votes, or when results are forwarded.

Such practices occur in election autocracies, sometimes on a large scale. To a lesser extent, however, irregularities and sporadic attempts at electoral manipulation can still be detected in states which do not yet have a well-established democratic electoral culture. Over the past 30 years, considerable international pressure for reform has been exerted on transition countries to align their electoral laws and practices with international standards and to prevent election manipulation. In addition to the right to vote and stand for office, the recommendations also concerned the election campaign and the regulation of the media, election observation, the various activities on election day, including the counting of votes, as well as the documentation of the election results and the

handling of election complaints. However, these and other regularly put forward recommendations are not always taken up. Ultimately, there is a lack of a reliable procedure to ensure that the recommendations are implemented.

The result, however, is the only apparently paradoxical phenomenon that the (former) transition countries in particular now have comprehensive and detailed electoral laws, while the electoral laws of established democracies sometimes contain regulatory gaps and in some cases include provisions that are not advisable for young democracies. These include, for example, regulatory shortcomings with regard to election campaigning or election observation, or the fact that in established Western European democracies elections are organised by executive authorities and not by independent election commissions such as those established worldwide in the course of the democratisation processes of the late 20th century. This can be compensated for by a consolidated democratic culture and election practice, but even in established democracies there is a general need for action and regulation, not only with regard to universal suffrage, but also with regard to limiting excessive campaign expenditures, curbing hate speech and disinformation during the election campaign, especially in social media, and the security of new technologies.

At the same time, it is a truism that liberal democracy does not exhaust itself in elections. For democracy to flourish, strong democratic institutions and responsible politicians are just as important as a democratic culture and public sphere and a vibrant civil society that becomes involved peacefully and makes use of a wide range of socio-political opportunities for participation. Not only the consolidation, but also the extension and deepening of democratic principles to wide areas of political and social life constitute the quality of democracy. A functioning state that regulates, respects the principles of the rule of law, allows for freedom, ensures security, and, as far as possible, provides social safety nets, is also of fundamental importance – even or especially in times of globalisation. Such conditions do not exist everywhere. Despite or precisely because of the continued existence of autocracies and the threat of the erosion of liberal democracies, the categorical differences between democratic and non-democratic multi-party elections must not be blurred, even under adverse circumstances. The requirement of free and fair elections must continue to be adhered to and these remain an indispensable procedure for the democratic selection and legitimisation of political leaders.

# APPENDIX

## I. Standards and reports of international organisations

### African Union

African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

African Union: African Charter on Democracy, Elections and Governance, 2007.

African Union: African Union Election Observation Manual, Addis Abeba: AU, 2013.

African Union: Report of the African Union Election Observation Mission to the 18 February 2016 Presidential Election in Uganda.

African Union: Report of the African Union Election Observation Mission to 11 August 2016 General Elections in the Republic of Zambia.

African Union: Report of the African Union Election Observation Mission for the 8–10 September 2016 Parliamentary Elections in Seychelles.

African Union: Report of African Union Election Observation Mission for 7 December 2016 General Elections in the Republic of Ghana.

African Union: Report of the African Union Election Observation Mission to the 6 April 2017 National Assembly Elections in the Republic of The Gambia.

African Union: Report of the African Union Election Observation Mission to the 3rd June 2017 National Assembly Elections in the Kingdom of Lesotho.

African Union: Report of the African Union Election Observation Mission to the 23rd August 2017 General Elections in the Republic of Angola.

African Union: Report of the African Union Election Observation Mission to the 8 August General Elections and 26 October 2017 Fresh Presidential Elections in the Republic of Kenya.

African Union: Report of the African Union Election Observation Mission to the 10 October and 26 December 2017 General Elections in the Republic of Liberia.

African Union: Report of the African Union Election Observation Mission to the 26–28 March 2018 Presidential Elections in the Arab Republic of Egypt.

African Union: Report of the African Union Election Observation Mission to the 7 and 31 March 2018 General Elections in the Republic of Sierra Leone.

African Union: African Union Election Observation Mission to the 7 October 2018 Presidential Election in the Republic of Cameroon. Preliminary Statement, 9 October 2018.

African Union: Report of the African Union Election Observation Mission to the 30 July and 8 September 2018 Harmonised Elections in the Republic of Zimbabwe.

African Union: Report of the African Union Election Observation Mission to the 21 May 2019 Tripartite Elections in the Republic of Malawi.

African Union: Election Observation Mission to the 24 November 2019 Presidential Election in the Republic of Guinea Bissau. Preliminary Statement.

African Union: Election Observation Mission to the 27th November 2019 General Elections in the Republic of Namibia. Report, December 2019.

Union Africaine: Rapport de la Mission d'Observation Electorale de l'Union africaine pour les élections législatives et municipales du 12 novembre 2017 en République de Guinée Equatoriale.

Union Africaine: Rapport de la Mission d'Observation Electorale de l'Union africaine pour les élections législatives du 23 février 2018 en République de Djibouti.

Union Africaine: Rapport de la Mission d'Observation Electorale de l'Union africaine pour la Présidentielle des 29 juillet et 12 Août 2018 en République du Mali.

Union Africaine: Rapport de la Mission d'Observation Electorale de l'Union africaine pour les élections législatives du 2 au 4 septembre 2018 en République du Rwanda.

Union Africaine: Rapport de la Mission d'Observation Electorale de l'Union africaine pour l'élection Présidentielle des 7 novembre et 19 décembre 2018 en République de Madagascar.

### **Council of Europe and Venice Commission**

#### **Venice Commission**

CDL-AD(2002)023rev2-cor Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18–19 October 2002).

CDL-AD(2004)003 Report on Electoral Systems – Overview of available solutions and selection criteria, adopted by the Venice Commission at its 57th Plenary Session (Venice, 12–13 December 2003).

CDL-AD(2004)012 Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12–13 March 2004).

CDL-AD(2004)047 Report on Media Monitoring during Election Observation Missions, adopted by the Council for Democratic Elections at its 10th meeting (Venice, 9 October 2004) and by the Venice Commission at its 61st Plenary Session (Venice, 3–4 December 2004).

CDL-AD(2005)009 Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries, adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and by the Venice Commission at its 62nd Plenary Session (Venice, 11–12 March 2005).

CDL-AD(2005)032 Guidelines on media analysis during election observation missions prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission, adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Venice Commission at its 64th Plenary Session (Venice, 21–22 October 2005).

- CDL-AD(2005)036 Declaration of Principles for International Election Observation and Code of Good Conduct for International Election Observers and Pledge to Accompany the Code of Good Conduct for International Observer prepared by the United Nations Electoral Assistance Division (UNEAD), The National Democratic Institute for International Affairs (NDI), and The Carter Center (TCC) (7 July 2005), endorsed by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Venice Commission at its 64th Plenary Session (Venice, 21–22 October 2005).
- CDL-AD(2005)043 Interpretative Declaration of the Stability of the Electoral Law, adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and by the Venice Commission at its 65th Plenary Session (Venice, 16–17 December 2005).
- CDL-AD(2006)018 Report on electoral law and electoral administration in Europe – Synthesis study on recurrent challenges and problematic issues, adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8–9 June 2006) and by the Venice Commission at its 67th Plenary Session (Venice, 9–10 June 2006).
- CDL-AD(2008)012 Joint Opinion on amendments to the Election Law of Bosnia and Herzegovina by the Venice Commission and OSCE/ODIHR, adopted by the Council for Democratic Elections at its 24th meeting (Venice, 15 March 2008) and by the Venice Commission at its 75th Plenary Session (Venice, 13–14 June 2008).
- CDL-AD(2008)013 Report on Dual Voting for Persons belonging to National Minorities, adopted by the Council for Democratic Elections at its 25th meeting (Venice, 12 June 2008) and by the Venice Commission at its 75th Plenary Session (Venice, 13–14 June 2008).
- CDL-AD(2008)037 Comparative Report on threshold and other features of electoral system which bar parties from access to Parliament, adopted by the Council for Democratic Elections at its 26th meeting (Venice, 18 October 2008) and by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008).
- CDL-AD(2009)01 Joint Opinion on the Electoral Code of Georgia as revised up to July 2008, adopted by the Council for Democratic Elections at its 26th meeting (Venice, 18 October 2008) and by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008).
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### **Additional websites**

Administration and Cost of Elections (ACE) Project: [www.aceproject.org](http://www.aceproject.org)

Caribbean Elections: [www.caribbeanelections.com](http://www.caribbeanelections.com)

Election Integrity Project: [www.ElectoralIntegrityProject.com](http://www.ElectoralIntegrityProject.com)

Electoral Institute for Sustainable Democracy in Africa (EISA): [www.eisa.org.za](http://www.eisa.org.za)

European Platform for Democratic Elections: [www.epde.org](http://www.epde.org)

IFES International Foundation for Electoral Systems: [www.ifes.org](http://www.ifes.org)

IIDH/CAPEL: [www.iidh.ed.cr/capel/](http://www.iidh.ed.cr/capel/)

International IDEA (Institute for Democracy and Electoral Assistance): [www.idea.int](http://www.idea.int)

Wahlrecht.de: [www.wahlrecht.de](http://www.wahlrecht.de)

[www.legislationline.org](http://www.legislationline.org)