



# ELECTION PROVISIONS IN CONSTITUTIONS

## EXECUTIVE SUMMARY

Almost all constitutions in the world protect the right to vote and to be elected. Many modern democratic constitutions include detailed articles on how to ensure voting rights, particularly in states emerging from decades of questionable electoral practices by undemocratic governments.

Obligations under international law, especially Article 25 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>, include significant electoral guarantees, many of which are reflected in democratic constitutions.

The rights to vote and to be elected are usually part of the constitution's human rights catalogue. Important elements included in Article 25 of the ICCPR are mostly found in constitutional language, including universal and equal suffrage, the secrecy of the vote, as well as "periodic" elections, an obligation to provide an "opportunity" to vote, and to stand as a candidate, and that states must guarantee the "free expression of the will of the electors." Other protections entail additional obligations, such as ensuring equal opportunity to vote for vulnerable groups like ethnic minorities or persons with disabilities or a quota for representation of disadvantaged groups.

Many constitutions include institutional arrangements to guarantee genuine elections, such as independent election management bodies, fair election dispute resolution mechanisms, or the right of transparent election observation.

Other constitutions concretise the ICCPR requirement of "genuine" elections by establishing general principles like transparency, accuracy, accountability, security, verifiability, and honesty. Such principles are useful as guidance to lawmakers and election administrators. They inform the interpretation of laws and empower election administrators to fill gaps in legislation in a way that respects the spirit of the constitution.

Constitution-making processes, especially those that serve as a transition away from dictatorship, are meant to enshrine principles of democracy and hold future decision makers accountable to those principles. Constitution-makers should take seriously their responsibility to prevent a reversion to authoritarianism by providing safeguards for genuine elections.<sup>2</sup> International law and good practice provide a blueprint of how to do so.

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<sup>1</sup> Adopted by General Assembly resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, in accordance with Article 49.

<sup>2</sup> See "Preventing Dictatorship: Constitutional Safeguards against Antidemocratic Consolidations of Power," Democracy Reporting International, July 2012, available at <[http://www.democracy-reporting.org/files/bp\\_29\\_safeguards\\_1.pdf](http://www.democracy-reporting.org/files/bp_29_safeguards_1.pdf)>.

## 1. INTRODUCTION

Almost all of the world's constitutions contain articles that deal with elections. Constitutions frame electoral guarantees around the individual right to vote and the right to stand as candidates in genuine, periodic elections. The right to vote implies institutional arrangements in a democracy, such as independent election administration and a requirement that elected institutions have real power.

International law provides detailed language on voting and associated rights, and how to implement them. Constitution-makers should look to international law to understand the obligations that states are under in the conduct of elections, and to build on good practices in election administration. The most important reference in international law regarding elections is Article 25 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966 with 167 state parties as of 2013.<sup>3</sup> The UN Human Rights Committee monitors treaty implementation and has published a series of General Comments that serve as the authoritative interpretation of the Covenant. Other treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Corruption, or the Convention on the Rights of Persons with Disabilities (CRPD), also include provisions relevant to elections.

The right to vote and to stand in elections includes a set of detailed obligations, which are laid out in Article 25 ICCPR:

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

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

The section below summarises how constitutions implement the key elections standards, chiefly those given by the ICCPR.

Constitutions should take guidance from the obligations included in these treaties and interpretations in protecting the right to vote. As a state's fundamental law, a constitution can provide a guarantee that other important legislation, such as the electoral law, reflects international standards.

## 2. VOTING AS A HUMAN RIGHT IN CONSTITUTIONS

Constitutions around the world deal with elections differently. Some of the oldest constitutions, such as the American constitution, say little about elections; rather, electoral issues are regulated in ordinary laws or regulations. More recent constitutions, like that of Kenya, include specific instructions about the way that state protects electoral rights, and how votes are to be counted. Usually elections are spelled out in more detail in newer constitutions and in particular in countries with a history of controversial electoral practices.

Giving expression to electoral rights and guarantees in constitutions is useful for a number of reasons. First, constitutions guide lawmakers and election administrators in the process of drafting electoral laws and regulations. By requiring compliance, constitutions ensure that the legal framework for elections adheres to a comprehensive set of electoral rights. Second, constitutions can support a rights-based interpretation of electoral laws. Where various interpretations of a norm may be possible, constitutional guarantees will suggest that the most rights-friendly interpretation should be used. Third, constitutions can fill the gap when electoral legislation leaves out an important rights protection. Fourth, constitutions make clear to citizens what rights they should expect in an election and provide a constitutional basis for an appeal to courts should those rights be violated.

In enumerating electoral rights, constitutions should both establish the right and, where appropriate, indicate which state body is responsible for protecting that right. Simply establishing the principle can make implementation unclear, while directing only one body can leave confusion as to whether that principle applies to other bodies. Such examples appear below. This section is organised around the key principles of international law as laid out in the ICCPR. Examples are given of how they are established in constitutions around the world.

### 2.1. THE RIGHT TO VOTE AND TO BE ELECTED AND UNIVERSAL SUFFRAGE

The Human Rights Committee's General Comment 25 states: "The right to vote at elections and referenda must be established by law." The General Comment further identifies the right to stand for election not only as an individual right, but also as necessary for fulfilling the broader right to vote with "free choice of candidates." ICCPR's requirement of universal suffrage means that the right to vote must be available to all citizens.

Virtually all democratic constitutions protect the right to vote in genuine periodic elections either through one article on the general right to vote, or through a guarantee of the right in every reference to a particular electoral event (parliamentary, presidential, local, referendum and so on).

General Comment 25 states that only "reasonable restrictions" may be placed on the right to vote, such as minimum age requirements. These restrictions must be based

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<sup>3</sup> The ICCPR uses language similar to Article 21 of the Universal Declaration of Human Rights. Many parts of the Universal Declaration are considered to be customary international law, thus binding states that have not ratified the ICCPR.

on “objective and reasonable criteria.” The General Comment further states that “literacy, educational or property requirements” are not reasonable, nor can the right to vote be limited on the basis of residence or descent, physical or mental disability or political-party affiliation.

Over 125 constitutions guarantee universal suffrage. The most common restriction on the right to vote, as allowed under international law, is the age of the voter. The vast majority of constitutions restrict voting to eighteen or more years of age.

Constitutions generally make restrictions on the right to be elected. Age is the most common restriction. Constitutions restrict the age of candidates for the lower house of parliament as follows:

Minimum Age for Candidacy	Number of Constitutions with this Minimum
17 years	1
18 years	20
19 years	1
20 years	1
21 years	54
23 years	3
25 years	42
30 years	7
35 years	1

Fifteen constitutions in the world compel voting by those eligible to do so, called compulsory, or mandatory voting.

## 2.2. EQUAL SUFFRAGE AND SPECIAL MEASURES

While universal suffrage relates to who is allowed to vote, equal suffrage means equal voting power. Each seat should represent a similar number of voters or population. General Comment 25 states: “The vote of one elector should be equal to the vote of another.” The General Comment recognises that this has implications for the delimitation of electoral districts and the method of “allocating votes,” which “should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”

The delimitation of electoral boundaries and allocation of seats is generally determined by subsequent legislation, but constitutions often determine the criteria or procedures used to determine the boundaries and seats of electoral districts. The Finnish Constitution (Section 25) requires that seats in parliament be distributed equally among electoral constituencies “on the basis of the number of Finnish citizens, into at least twelve and at most eighteen constituencies.” An exception is made for the Åland Islands, which “form their own constituency for the election of one representative.”

Article 161 of the Zimbabwean Constitution also assigns seats to constituencies “so far as possible” on an equal basis (3). The electoral commission is empowered to increase the number of seats by up to 20 per cent beyond would be granted

according to population, after taking into account specific characteristics of a constituency, such as small population or geographic isolation (6).

The Council of Europe’s Code of Good Practice on Electoral Matters states that a variation of 10 per cent in terms of voting power is acceptable, but that it should never exceed 15 per cent except for special circumstances, such as thinly populated areas or the protection of a concentrated minority. Concretely, this means that a seat should represent the same number of voters or population within a 10 per cent margin.<sup>4</sup>

Forty-seven constitutions require a census to calculate the population of constituencies. Article 82 of the Indian Constitution requires a readjustment of the seats assigned per constituency after each census.

In some federal systems, like that of the United States, federal law determines the number of representatives for each state, but the states themselves decide the boundaries of constituencies that would elect the total number of representatives.

International law empowers states to adopt special measures to enhance the representation of women, minorities and other historically marginalised groups.<sup>5</sup> Specifically, international law empowers states to employ quotas to ensure greater equality for women and provides that these measures should not be considered in contravention of the equality principle.<sup>6</sup> Some ways of promoting women representation, such as mixed lists, do not challenge the equality principle. The Tunisian Constitution of 2014, in Article 46, commits the state to seeking “parity between men and women in all elected assemblies.”

Some constitutions include quotas for marginalised groups. Article 62 (2) of the Romanian Constitution states that groups of citizens “belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each.” Article 80 of the Slovenian Constitution provides a similar guarantee of one deputy each to the Italian and Hungarian “national communities.”

Separate electoral rolls for particular sociological groups carry the risk of polarisation or discrimination through the separate classification of citizens. The Constitution of Bangladesh addresses this threat in Article 121: “No special

<sup>4</sup> Venice Commission, “Code of Good Practice in Electoral Matters,” 23 May 2003, page 7, available at <http://www.venice.coe.int/webforms/documents/CDL-AD%282002%29023rev-e.aspx>.

<sup>5</sup> Article 1, International Covenant on the Elimination of All Forms of Racial Discrimination; Article 4, Covenant on the Elimination of All Forms of Discrimination against Women; Article 5, Convention on the Rights of Persons with Disabilities.

<sup>6</sup> CEDAW Committee, General Recommendation 23, paragraph 15; Human Rights Committee, Concluding Observations, Bosnia and Herzegovina (2006), paragraph 11.

electoral roll shall be prepared so as to classify electors according to religion, race caste or sex.”

International law, including ICCPR and the Convention on Rights of Persons with Disabilities (CRPD), requires that persons with disabilities have equal access to the enjoyment of political rights. CRPD Article 29 requires that states ensure that “voting procedures, facilities and materials are appropriate, accessible and easy to understand and use” and that persons with disabilities be free to “vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government,” including by “allowing assistance in voting by a person of their own choice.” General Comment 25 states: “Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively.” General Comment 25 compels states to provide election information and materials in photographs or symbols easily understood by illiterate voters.

Full access to the voter register, to election information, to voting booths and to public office is also important to ensure real equality and “opportunity” to vote, as required by Article 25 of the ICCPR. Fifty-eight constitutions protect the equality of persons with disabilities under the law, and the constitutions of Brazil and Paraguay extend the same protections to illiterate persons. These protections indicate a need to make special efforts for accommodating illiterate voters or those with disabilities.

The day on which elections are held can have an effect on access. The Austrian Constitution (Article 26 (3)) designates election day as a national holiday, and fourteen constitutions require that elections be held on weekends.

### 2.3. SECRECY OF THE VOTE

The secrecy of the vote is required under Article 25 ICCPR. General Comment 25 elaborates that states “take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process.”

The secrecy of the vote is explicitly protected in over 150 constitutions. Article 15 of the Japanese Constitution states: “In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.” Similarly, Article 68 (1) of the Ugandan Constitution states: “At a public election or referendum, voting shall, subject to the provisions of this Constitution, be by secret ballot using one ballot box at each polling station for all candidates in an election and for all sides in a referendum.”

### 2.4. “PERIODIC ELECTIONS”: QUESTIONS OF TIMING

International law does not provide a requirement for how often elections must take place, but ICCPR does require that they be periodic. The General Comments state: “Elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.”

Constitutions usually regulate the intervals between parliamentary and executive elections. Among directly elected lower houses, term lengths vary as follows:

Term Length	Number of Constitutions with this Length
2 years	1 (United States)
3 years	5
4 years	64
5 years	77
6 years	2
7 years	1 (Ireland)
Determined by an organic law	2 (France, Greece)

In directly elected upper houses, the distribution is as follows:

Term Length	Number of Constitutions with this Length
4 years	9
5 years	7
6 years	10
8 years	2 (Brazil, Chile)
9 years	1 (Liberia)

In legislatures with longer terms, elections are often staggered to provide regular renewal, so that only a proportion of the seats are contested at any given election. In the United States, the entire House of Representatives is elected every two years, while in the Senate only one-third of the seats are contested every two years.

Among directly elected heads of state, the terms are as follows:

Term Length	Number of Constitutions with this Length
4 years	17
5 years	60
6 years	11
7 years	10

There are 133 constitutions that call for presidential elections. Among those, six specify that presidential and parliamentary elections are held on the same day; seven require that presidential and parliamentary elections be held on different days; and 110 do not specify.

Term lengths for executives and parliamentarians determine the regularity of elections and how they line up. If the

president's term is four years and the legislature's two years, then there will be a presidential/parliamentary election every four years, but a legislative election every two. If the president is elected every five years and the parliament every two years, then a parliamentary/presidential election will occur only once every ten years, and the president will face a legislative election at irregular intervals.

Other constitutions name circumstances under which a new parliamentary election must be held in a certain period of time, such as after a no-confidence vote in the government. Constitutions also empower different political authorities to call for elections. In Guatemala, calling for elections is the exclusive right of Congress (Article 169); in Mexico it belongs to the president; in Paraguay it is the Superior Tribunal of Electoral Justice (Article 289).

## 2.5. INDEPENDENT ELECTORAL AUTHORITIES

The fulfilment of other election obligations requires competent electoral administration, which General Comment 25 states must be independent. General Comment 25 assigns the responsibility of ensuring that elections are “conducted fairly, impartially and in accordance with established laws” to an “independent electoral authority” that should be established “to supervise the electoral process.” Principles of ensuring institutional independence are outlined in a number of international documents. The UN’s Basic Principles on the Independence of the Judiciary<sup>7</sup> provides some guidance (even though it is intended for courts), addressing issues like financial and regulatory independence, nomination and selection of members, remuneration, promotion, immunity and removal.

Various models exist for independent electoral authorities. The most common, found in over 80 constitutions, is a national elections commission. Two general models exist for the governance of an election commission: a cross-party model, where members of all major political parties have a seat on the commission, or an expert body, with non-affiliated experts. Article 264 of the Constitution of Colombia states that the National Electoral Council consists of seven members from “lists drawn up by the parties and political movements...reflecting the political makeup of the Congress,” but also that members “must possess the qualifications mandated by the Constitution for judges of the Supreme Court of Justice.” By contrast, Article 126 of the Tunisian Constitution of 2014 creates a commission of the second type: “The Commission shall be composed of nine independent, impartial and competent members, with integrity, who undertake their work for a single six-year term.” Another article guarantees the Commission’s “legal personality and financial and administrative independence.”

Another model is an electoral court, found in many constitutions of Central and South America. Staffed by judges, they tend to have similar functions to electoral commissions. In some older democracies, where there is trust in the impartiality of the civil service and no history of electoral fraud, the Ministry of Interior or other government agencies manage elections.

## 2.6. EFFECTIVE REMEDY

General Comment 25 requires that individuals have access to an “effective remedy” in courts should they feel their rights have been violated, a right also protected in a more general sense in Article 2 of the ICCPR. General Comment 25 goes on to require “access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.”

Constitutions often provide mechanisms by which electoral disputes are adjudicated either by the election administration, by the judiciary or by a combination of both. In some countries, the judiciary will only get involved if the decision of the elections commission is appealed. The Mexican Constitution creates a separate election court to hear appeals from the electoral process. Other constitutions assign election appeals to the administrative, constitutional, or Supreme Court.

## 2.7. INDEPENDENT SCRUTINY

General Comment 25 introduces the standard of “independent scrutiny of the voting and counting process.” The standard of independent scrutiny is a reflection of a wider obligation towards transparency. The UN General Assembly, in Resolution 59/201 (2004), identified transparency as an “essential element of democracy,” though without making a specific reference to elections. Furthermore, Articles 10 and 13 of the Convention against Corruption require state parties to enhance transparency in the public sector, which has implications for election administration and political finance.<sup>8</sup>

Election observation is an effective and professional way of ensuring the transparency of the elections. The Moroccan Constitution links the standard of independent scrutiny explicitly to election observation, both domestic and international. Article 11 states:

Free, honest and transparent elections constitute the foundation of the legitimacy of democratic representation.... The law defines the conditions and the modalities of independent observation and neutrality of the elections in accordance with the recognised international norms.

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<sup>7</sup> Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985, para 2.

<sup>8</sup> See “International Standards on Transparency and Accountability,” Democracy Reporting International and Centre for Law and Democracy, February 2014.

## 2.8. ELECTORAL SYSTEMS

International law leaves states free to choose their own electoral system, but according to General Comment 25, the system “must guarantee and give effect to the free expression of the will of the electors.”

Small changes to an electoral system can have a dramatic effect on the outcome of an election. For this reason, the legal framework for establishing a particular system is politically sensitive. Some constitutions include a reference to the type of electoral system to be used in parliamentary or presidential elections. In all cases, these constitutional provisions are further detailed by an electoral law, and many democratic constitutions make no reference to the type of electoral system to be used.

Over 70 constitutions worldwide require a proportional system in some form. Article 26 of the Austrian Constitution compels the electoral law to follow the “principles of proportional representation.” The Indian Constitution is more specific in Articles 55 and 80, whereby the proportional system is prescribed for presidential and parliamentary elections “by means of the single transferable vote.” Article 6 (Section 5(2)) of the Constitution of the Philippines calls for a mixed electoral system: “Party-list representatives shall constitute twenty per cent of the total number of representatives.”

The Danish Constitution gives the parliament explicit authority to make certain choices about the electoral system. Article 31 (2) states that the Electoral Act will “prescribe the manner of election and decide whether proportional representation shall be adopted with or without elections in single-member constituencies.”

## 2.9. GENUINE ELECTIONS, FREE WILL OF THE ELECTORS, AND GENERAL PRINCIPLES

The ICCPR requirement of “genuine” elections means that states should provide real and honest electoral competition. Electoral events cannot only be a formality. Some constitutions provide principles that give expression to the idea of free and genuine elections, such as transparency, accuracy, accountability, security, verifiability and honesty. Ballot secrecy, mentioned above, is another essential element of a free election. But the free expression of the will of the voters relates not only to balloting, but also to the campaign period so that voters can form independent opinions “free of violence or threats of violence, compulsion, inducement or manipulative influencing.”<sup>9</sup> In this way, elections are closely related to other political rights guaranteed in ICCPR.

Such principles are useful because they apply to all facets of the election administration and can be used by all citizens to defend their electoral rights. Article 81 of the Kenyan Constitution outlines “general principles for the electoral system,” including elections which are “free from violence,

intimidation, improper influence or corruption; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.”

Some constitutions, including Kenya’s, assign the implementation of certain electoral best practices to particular institutions. Constitutions should ensure that electoral principles apply to the entire system, but assigning specific bodies to watch and enforce their implementation can strengthen accountability.

Many constitutions direct the elections commission to adhere to certain principles. Article 156 of the Constitution of Zimbabwe requires that the Zimbabwe Electoral Commission ensure that “whatever voting method is used, it is simple, accurate, verifiable, secure and transparent.” The Constitution of the Dominican Republic, in Article 211, states that the Central Electoral Board will organise, direct and supervise elections, and will have the “responsibility of guaranteeing the freedom, transparency, equality and objectivity of the elections.” Constitutional requirements for electoral transparency are particularly common in Central and South America.

Other constitutions direct courts to ensure that elections adhere to certain principles. Article 152 of the Constitution of Burkina Faso states that the Constitutional Council “controls the regularity, the transparency and the sincerity of referendums, of presidential elections and of legislative [elections], and is the judge of electoral disputes. It proclaims the definitive results of the referendum, [and] of the presidential and legislative elections.” The Constitution of Niger includes a similar provision.

The counting and aggregation of votes is a sensitive and critical part of the electoral process, often the source of election fraud.<sup>10</sup> General Comment 25 provides some guidance on preventing fraud during counting: “The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents.” The Kenyan Constitution includes particularly detailed provisions on vote counting and aggregation as a means of preventing voter fraud. Article 86 compels the Independent Electoral and Boundaries Commission to ensure that:

- (a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

<sup>10</sup> See “Transparent voting saves lives,” *The Guardian*, 2 August 2009, available at <http://www.theguardian.com/commentisfree/2009/aug/02/transparent-voting-election-count>.

<sup>9</sup> Manfred Nowak, *CCPR Commentary* (Kehl: E.P. Engel, 2005), page 584.

- (d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

## 2.10. RELATED POLITICAL RIGHTS

ICCPR further compels states to protect rights related to, but not specific to elections. Article 19 protects the freedom of expression and the media, and articles 21 and 22 protect the rights of association and peaceful assembly. General Comment 25 ties these rights to voting: “Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.” The General Comment extends these rights explicitly to campaigning and political party formation and membership. Virtually all democratic constitutions protect these rights in a human rights catalogue.

## 3. CONCLUSION

Elections and constitutions are intertwined institutions of a democratic state: elections determine who governs; constitutions provide the limitations and rules on how they govern. In states run by the rule of law, the essential elements of an election are regulated in the constitution. Constitutional guarantees highlight that electoral rules are fundamental to the political process. They should not be easily changed by majorities of the day. Clear rules and principles for the conduct of a credible election are important especially when a country has little experience with them.

International law provides fundamental principles that should apply to constitutions, including:

- Right and opportunity to vote and to stand in elections
- Equality of the vote
- Universal suffrage
- Secret vote
- Periodic elections
- Free expression of the will of the electors
- Effective remedy for electoral disputes
- Independent election management
- Genuine elections

Many constitutions translate “genuine elections” into general principles, including transparency, accuracy, accountability, safety and honesty in the conduct of elections.

Constitutions vary in the degree to which they provide specific guidance for the implementation of these rules and principles, and in all cases they are further clarified by the electoral law, regulations by election administrators, and related legislation. But including these principles in constitutions is important to guide election administrators in their interpretation of the legal framework for elections, to fill gaps in the legal framework, and to provide a basis for citizens to seek a remedy when they feel their rights have been violated. In this way, the constitution can be the final guarantor of a credible electoral process.

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