

# THE HIERARCHY OF LAWS:

## Understanding and Implementing the Legal Frameworks that Govern Elections





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the Legal Frameworks that Govern Elections

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## Introduction

All countries have a legal foundation, generally consisting of a founding document, such as a constitution, and the laws passed by the national legislature and other levels of law-making authority. These laws function in a hierarchy, which determines how they rank in authority and how the authority and scope of each level is derived from the constitution.<sup>1</sup> The hierarchical structure varies from country to country, and depends on the form of government.<sup>2</sup>

“The people are the only legitimate fountain of power, and it is from them that the constitutional charter...is derived.”

–James Madison, *The Federalist*  
No. 49, 1788

However, there are general principles that are common to most countries and are key to determining the purpose of each piece of law within a legal and regulatory framework, and ultimately enforcing their authority and validity.

This paper is intended as a guide for election practitioners who are interpreting, developing, and implementing legal and regulatory frameworks for elections, and who should understand the hierarchy of these laws. For each level of that hierarchy, this paper sets out the law’s purpose; the actor with drafting responsibility; the source of authority; the actor with enforcement responsibility; the amendment process; and why it has more authority than the form of law one step below it. Understanding these principles of hierarchy can help election management bodies (EMBs) fully execute their legal mandate to develop and enforce rules and procedures that give effect to electoral laws, and ultimately protect fundamental civil and political rights.

Understanding the hierarchy of laws helps with developing a clear and consistent legal and regulatory framework for elections, by ensuring the appropriate content and detail is contained in each level of hierarchy.

## The Hierarchy of Laws

Respect for the hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law will apply in practice. In general, the fundamental levels of hierarchy consist of: a constitution or founding document; statutes or legislation; regulations; and procedures. This paper also **touches on treaties**

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<sup>1</sup> Governments with no legal foundation are not recognized as legal nations (*de jure*), but as ungoverned or having only a *de facto* government. See Wheeler, Everett P. "Governments De Facto." *The American Journal of International Law* 5.1 (1911): 66-83.

<sup>2</sup> These forms include presidential, parliamentary and totalitarian systems, including those with a one-party rule, and monarchies. For example, in a federal nation such as the United States, the laws of the individual states are very important and are only subservient to federal laws in specific fields. In some federal nations, particularly those without a long state history, the states may have far less authority and legislate in fewer fields. In unitary states, legislative power is centralized in the federal legislature and local government legislates only relatively fewer and minor issues. In some nations, the constitution defines all of the hierarchical structure down to all levels and in others it provides for the national legislature to determine the process of delegation of authority from one level to a lower level. For example, in many federal nations, such as Canada, the constitution defines the fields in which states or provinces may legislate, but allows the state or province to decide what local matters are delegated to cities or counties.

and international obligations, executive orders and presidential decrees, common law/case law, codes of conduct, and policies. Each of these elements fits into – or interacts with – the hierarchy of laws in different ways, depending on the system of government in a particular country.

In terms of the basic elements of the hierarchy, a constitution states the grounding legal and democratic principles that its government is obligated to uphold, and because of this is considered the supreme law in a country to which all other laws must adhere. A statute is a law enacted by a legislature to govern society, and its authority is derived from the constitution or founding document of a country, which authorizes the legislature to enact it. Regulations are issued under the authority of a statute by a division of the government or by a special body, such as an EMB. For this reason, they are sometimes referred to as “delegated” legislation, and they provide administrative and technical detail to carry out the purpose of the statute. Finally, procedures describe the required steps necessary to complete a process, and are generally written by an administrative body to ensure that the law and regulations are applied consistently and fairly to all parties.

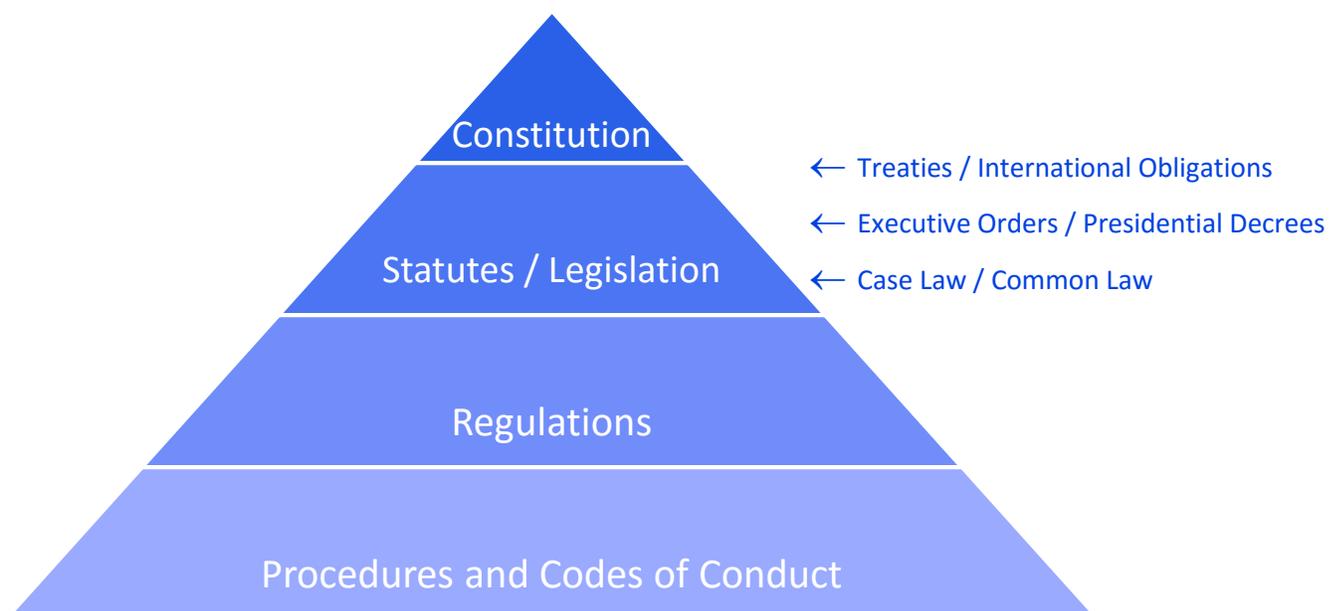


Figure 1: The Hierarchy of Laws

<b>The Hierarchy of Laws – A Snapshot</b>	
<b>Constitution</b>	<ul style="list-style-type: none"> <li>✓ Establishes the innate characteristics of the country and its sovereignty; outlines the rights and responsibilities of its citizens – as such it is the supreme law.</li> <li>✓ Establishes the country’s governance structure.</li> <li>✓ All other laws must adhere to the constitution.</li> <li>✓ The constitution should reflect and adhere to a country’s international obligations.</li> </ul>
<b>International Laws</b>	<ul style="list-style-type: none"> <li>✓ Trans-border agreements that have different impacts on the country’s law, depending on the treaty language and the way a country’s constitution manages them.</li> <li>✓ Sometimes only a limited degree of compliance with treaties, and some treaties that enshrine fundamental rights are not always followed through in the signatory nation’s constitution, or through domestic enforcement.</li> <li>✓ No legal way to enforce compliance, unless the treaty sets up a dispute resolution process.</li> </ul>
<b>Statutes / Legislation</b>	<ul style="list-style-type: none"> <li>✓ Statutes are enacted by the legislative branch of government, and govern a wide range of issues that require regulation in a modern, democratic state – including elections.</li> <li>✓ Must adhere to the constitution and international law.</li> <li>✓ Amended by the same process as first enacted, and enforced by a country’s enforcement agencies.</li> </ul>
<b>Common Law / Case Law</b>	<ul style="list-style-type: none"> <li>✓ Common law is law made by the courts, not legislature, and is not a level of hierarchy per se.</li> <li>✓ It consists of the judgments of courts, to interpret the wording of statute law, to protect the principles of natural justice, to fill a gap in the law, or to deal with an unforeseen situation not covered by statute.</li> <li>✓ A judgment of a court may award damages, punishment, sanction or other remedial action, enforced by a country’s enforcement agencies.</li> </ul>
<b>Regulations</b>	<ul style="list-style-type: none"> <li>✓ A form of delegated legislation, developed and enacted by ministers, department heads, or by an independent body or commission, to administer their responsibilities</li> <li>✓ Must adhere to the constitution, international law, and governing statute, and can be enforced in the same way as statutory law.</li> <li>✓ Provide detail on the administration of principles in the law.</li> <li>✓ A violation of a regulation can be treated as an offense and enforced as such.</li> </ul>
<b>Procedure</b>	<ul style="list-style-type: none"> <li>✓ A procedure is a description of the required steps necessary to complete a process.</li> <li>✓ Procedures are generally written by an administrative body to ensure that the law and regulations are applied consistently and fairly to all parties.</li> <li>✓ Enforcement of a procedure is generally achieved by requesting compliance as a condition of completing a process or receiving a benefit (for example, candidacy) – rather than sanction or punishment.</li> </ul>
<b>Codes of Conduct</b>	<ul style="list-style-type: none"> <li>✓ A written set of rules, principles or standards to govern the behavior of certain groups.</li> <li>✓ It is a best practice for EMBs to develop codes of conduct to govern external actors such as candidates, media, election observers, security personnel, and election officials.</li> <li>✓ Enforcement of codes of conduct depends on whether they are considered “soft” or “hard” law. Codes of conduct are considered “soft law” when they are not passed by a lawmaking body and thus rely on voluntary compliance.</li> </ul>
<b>Guidelines, Instructions, and Policies</b>	<ul style="list-style-type: none"> <li>✓ Terms such as “guidelines” and “instructions” are uncertain in meaning and can result in ambiguity, particularly with regard to enforceability.</li> <li>✓ “Policies” are broad, informative statements of intent regarding principles to be followed, priority of programs.</li> <li>✓ These should not be used as if they were elements of the structure of the hierarchy of laws.</li> </ul>

## Constitution or other Founding Document

### What is the purpose of a constitution?

A constitution establishes a country's innate characteristics and sovereignty, and outlines the rights and responsibilities of its citizens. Ideally, it guarantees basic human rights of the people, defines the system of governance, the legislative, executive and judicial branches (and their separation), and the obligations and duties of each element of government.

### Who drafts a constitution?

The basic structure of a country can change in many ways – through evolution, revolution, *coup d'état*, division, conquest, or by a number of independent countries coming together by agreement. In these instances, either an existing constitution will apply or a new constitution or founding document will be developed to govern the new or changed country. The drafting of a constitution may be initiated by a *de facto* government, a temporary governor, an intervening country or group of countries or, most commonly following conflict, by a body such as the United Nations (UN). Frequently, the UN or a group of countries proposes financial aid and peacekeeping assistance on the condition that democratic institutions are established or re-established, and the first step is often the development of a new constitution. A drafting group may be an elected assembly or a committee of elders, politicians, respected citizens or experts, including international participants.

### A New Constitution in Kosovo

Kosovo declared independence from Serbia in February 2008 after several years of conflict, unrest, and administration by the United Nations. This followed 17 rounds of negotiations between Serbian and Kosovar officials, led by United Nations Special Envoy Martti Ahtisaari, who proposed a plan that included the adoption of a new constitution within 120 days after a declaration of independence. A Constitutional Commission was established, composed of 21 Kosovo members, 15 appointed by the President of Kosovo, three by the Assembly holding seats reserved for minorities especially Serbs, and three members of other minority communities also appointed by the Assembly. By the end of 2007, the Commission produced a draft constitution, directly derived from the Ahtisaari plan. Sections of the constitution were published for input, while a mix of national and international experts helped with review. After the Declaration of Independence, the constitution was published for public comment, garnering more than 1,000 comments from the public. The Commission also held public hearings on the draft. The final draft was completed in April 2008 and was adopted in June 2008.

In Iraq, a National Assembly was elected for this purpose. The assembly prepared a draft with UN advice, which was then adopted by a national referendum, and a Council of Representatives was subsequently elected. In Timor-Leste, following a referendum on independence from Indonesia in 1999, a Constituent Assembly was elected in 2001 specifically to draft a new constitution for the country. This process was supported by the UN and backed by an international peacekeeping force, and Timor-Leste's first-ever constitution went into effect in 2002. However, the process of developing a new constitution is often the subject of political controversy and disruption. In Libya, a Constituent Assembly of 60

members was elected to draft a new constitution, but rival militias disrupted the process. In Yemen, a drafting committee was established with support from neighboring Gulf States, but was also disrupted by a sectarian coup. These examples illustrate the significance of a constitution as the foundational legal document governing a state, and the sensitivity of the drafting process that can divide rival groups if they fear their rights may be diminished or if they are seeking to implement alternate models of governance.

As a best practice, a constitutional drafting group consults widely with local stakeholder groups, including political parties, regional representatives, human rights organizations, civil society, academics, the legal profession and public finance experts. The group may also consult international representatives for advice on international best practices. As further outlined below, it is important that a country's constitution adheres to international law. In some countries, such as the United Kingdom and New Zealand, constitutional principles may be found in several statutes, treaties and even court cases, rather than one founding document (in the United Kingdom, this is sometimes termed "the unwritten constitution"). In this instance the principle of hierarchy remains the same – collectively these laws are considered paramount, and all subordinate levels of law must align with their provisions.

#### **What is the source of a constitution's authority?**

In a democracy, a constitution's authority comes from the support of the people, as the proposed draft must be approved by the population. Normally, approval is directly granted by a referendum in which a majority of the eligible voters agrees to its adoption. Sometimes a special majority or "super-majority" is needed (i.e., approval by more than 50 percent of voters). There might also be a requirement for a minimum percentage of registered voters to vote. These special requirements must be considered on balance; requiring a significant over-majority can cause a proposal to fail despite the wishes of most of those who voted.

#### **Who interprets and enforces a constitution?**

In the case of a constitution, there is generally no subsisting enforcement power by the authority that created it. This is because its legal force was authorized by the people *en masse*, not by a legislature. There are some national legislatures that create committees for the implementation of a constitution, such as in Afghanistan, but they are facilitators, not enforcers. Generally, a supreme court or constitutional court may determine whether a law or an executive action is contrary to the principles of the constitution,<sup>3</sup> and a typical judgment might state that a provision is unconstitutional and will not be enforced. It may also add an order that the legislature must repeal or amend the law within a set period. Provisions of the constitution are enforced by the executive (i.e., by law enforcement and prosecution authorities).

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<sup>3</sup> See the U.S. Supreme Court decision in *Marbury v. Madison*, 5 U.S. 1 Cranch 137 (1803), which held that the judiciary's role is "to say what the law is." And, "[i]f two laws conflict with each other, the Court must decide on the operation of each."

### **How is a constitution amended?**

The constitution itself should contain detailed provisions for its amendment. In some countries an amendment may be approved by the national legislature, usually by an over-majority. In some federal countries, the approval of state legislatures is required. However, amendments are often approved by public referendum, in which case the proposed amendment must be presented on the ballot clearly and in a simple form. The wording on the ballot should not show political bias or promotion (for example, *“improving representation by increasing the number of members to...”*) but should be a clear and objective statement of the changes to be made. In cases where amendment is achieved by referendum, the law may require debate and approval by the national legislature, followed by a time period for public discussion before the referendum is held. This period might be as long as a year.

If amendments must be approved by a referendum, the choice of the required majority for an amendment to pass is important. As it is the supreme law, it should not be easy for a short-term majority to alter it, but also not be so difficult that a popular amendment fails to pass. A requirement for large over-majorities may unduly impede amendments that are needed to respond to changing circumstances. In the United States, changes require a very high proportion of approval by state legislatures. In Liberia, a two-thirds referendum majority is needed for amendments, and in 2011 three of four proposed amendments failed, two of them despite being supported by many more people than opposed them. Canada has set different amending processes depending on the provision that is to be changed. For example, changes to basic human, democratic and justice rights must be approved by the federal Parliament of Canada and the legislative assemblies of all provinces; other general amendments must be approved by the federal Parliament of Canada and the legislative assemblies of 70 percent of the provinces representing 50 percent of the population.

### **Why does a constitution have more authority than the form of law one step down?**

The constitution is at the top of the hierarchy as it protects the basic sovereignty and character of the country and the rights of the people from sudden changes and to prevent or slow down changes that might be attempted by a short-term political majority that does not have wide or long lasting public support. It also protects the fundamental rule of law principle; that is, law should govern nations, not individuals or the executive of the moment.

## **Treaties/International Obligations**

### **What is the purpose of treaties and international covenants?**

Treaties are agreements between two or more countries, entered into after negotiation. Their purpose is to create international rules or standards by which the involved parties agree to abide. Much of international law has been written and enforced through treaties. Treaties have been used to end wars, foster trade and promote human and civil rights, among other goals.

### Who drafts treaties and international covenants?

Treaties and covenants are written by the negotiating parties, or an intergovernmental organization such as the UN.

### What is the source of a treaty's authority?

For some treaties, the act of ratification brings the treaty and all of its obligations into force. Other treaties may require countries to make changes in domestic law that will direct or enable it to fulfill treaty obligations. International human rights instruments may take the form of conventions or covenants, which are legally binding instruments concluded under international law. Examples of key multilateral treaties governing the electoral process include the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities, all of which have broad global acceptance. They may also take the form of declarations, which have moral weight but are not legally binding on countries (although some declarations, such as the United Nations Declaration on Human Rights, and the United Nations Declaration on the Rights of Indigenous Peoples have acquired wide acceptance and arguably evolved to reflect principles of customary international law that govern the behavior of countries).

Treaties do not have absolute authority. There are many cases in which countries do not comply with their provisions or even later reject them. Further, the negotiation of enforcement and dispute resolution procedures can be difficult, due to different interpretations of national sovereignty between the negotiating countries (i.e., countries may disagree on the degree to which they should be subject to oversight, sanctions, arbitration and the like). The practical authority that treaties do have is derived from the fact that those who agreed to them have both individual and collective interest in their success. In addition, compliance may increase the influence a nation will have in negotiating future treaties. Some treaties establish dispute resolution bodies, such as the European Court of Human Rights.

### Who interprets and enforces treaties?

There is no general international judicial or penal system to interpret treaties, address breaches, or settle disputes. However, some treaties establish special tribunals to deal with disputes. Alternately, parties to a treaty can agree to settle disputes through an existing international body. International courts, such as the International Criminal Court and International Court of Justice can have full or limited authority, depending on whether a nation submits to their jurisdiction. The treaties establishing both of these courts set out a hierarchy of applicable international law. In reality, these courts have limited jurisdiction, narrow mandates, and many challenges in operation. Some treaties establish bodies to

#### The European Union Example

Treaties only override a national legislature if the signatory nation has agreed to this and follows through by making its legislation conform to the treaty. The most extensive example of this is the European Union (EU). EU member states generally apply EU regulations domestically, in areas such as transportation, food safety rules and agriculture. The Court of Justice interprets EU law to make sure it is applied in the same way in all EU countries, settles legal disputes between national governments and EU institutions and, in certain circumstances, decides on cases of rights infringement regarding EU institutions.

monitor compliance. For example, the United Nations Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights. Another example is the settling of disputes under the North American Free Trade Agreement by the World Trade Organization.

### **How are they changed?**

Treaties are amended by the agreement of the signatories.

### **Why do they have more authority than the form of law one step down?**

Treaties do not fit well into the hierarchy because they are trans-border agreements, not just within one nation, and have different impacts on the country's law, depending on the treaty language and the way a country's constitution manages them. Certain multilateral treaties, such as international human rights instruments, have acquired strong moral weight and widespread acceptance.

The ranking of a treaty *within* a domestic legal framework depends entirely on its terms. Generally, treaties relate to national issues and relationships between or among countries in an international context. This means that, to make them effective, the national laws of the signatory countries must be, or be made to be, consistent with the treaty. Some treaties address subjects that fall under the authority of both national and sub-national governing institutions in some or all of the signatory countries. In these cases, the sub-national legislatures must also make their laws conform. Agricultural and environmental issues are relevant examples of this type of treaty subject.

## **Statutes/Legislation**

### **What is the purpose of a statute?**

A statute is a law enacted by a legislature. Statutes are formal rules to govern behavior and transactions, protect individual rights and promote social policies. Statutes are the mechanism by which states define the rules necessary to maintain social order and security, and to promote economic and social interests. These statutes also give jurisdiction to those bodies responsible for enforcing the laws in practice. The statute law of a state develops over time as new laws are adopted and existing laws are amended or repealed. Some new statutes establish law in a new field. For example, there were few environmental laws 40 years ago, few laws governing cyber activity 20 years ago and few directed at terrorism 15 years ago.

### **Who drafts statutes?**

Draft legislation may be presented to a legislative body by a government department, by a minister, legislative committee, an individual legislator, or group of legislators. Generally, the first stage is the development of a legislative policy. Then, the precise wording of a bill to carry out the policy is drafted by a professional legislative drafter, usually a lawyer. In some cases, the first draft as presented has been prepared by a politician, political staff or by special interests such as non-profit organizations, trade associations or lobbyists. Countries vary in their adherence to a standard drafting style, but standardization is a best practice, as it supports continuity, consistency and clarity, which ultimately helps facilitate implementation and interpretation of statutes.

Generally, after presentation of a bill to the legislature, the bill will be debated and approved in principle, and then referred to a committee for detailed study. Alternately the bill may be referred to a committee for study before any debate in the larger body. The committee studies the bill in detail, may receive witnesses, hold public hearings and recommend amendments. It may also propose technical changes to conform to a standard drafting style. The committee then reports back to the full body. The committee's report is debated and approved with or without further amendments, referred back to the committee or rejected. A bill that is approved at this stage is then debated in its final form for final approval. These stages may differ from country to country, but generally the process is similar.<sup>4</sup> In a presidential system, a bill must be signed by the president to become law. A refusal to sign may usually be overridden by a special majority of the legislature. In parliamentary systems the approval by the head of state may be purely ceremonial, as in the United Kingdom, Canada and Australia.

### What is the source of a statute's authority?

The authority of a statute is derived from the constitution or founding document of a state, which authorizes the legislature to enact it. The constitution will usually outline the subjects on which the national legislature and, in the case of a federation, the state legislatures, may legislate. Therefore, after passage by the legislature and the completion of the full enacting process (which may include the signature by the head of the executive and a form of promulgation), the statute has the full authority of law.

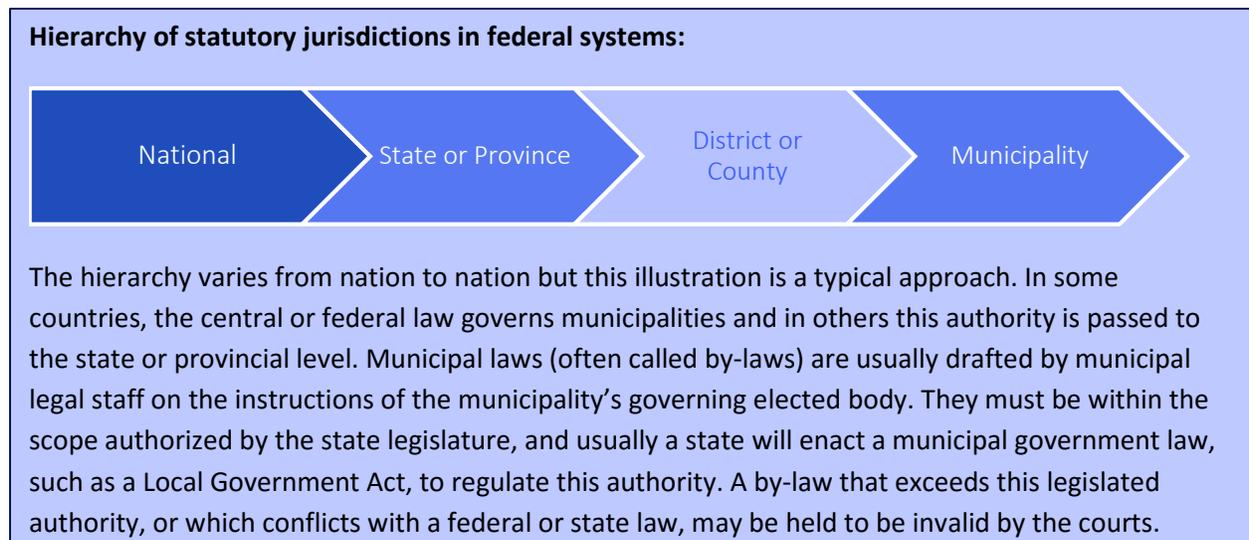


Figure 2: Hierarchy of statutory jurisdictions in federal systems

<sup>4</sup> There are usually two legislative bodies in a congress or parliament, and the process will be similar in both. In the U.S., the two bodies (Congress and the Senate) may pass different versions of a bill, which then have to be unified by a negotiation to achieve a single version for approval by both bodies.

### Who interprets and enforces statutes?

Statutes are interpreted by the judiciary and enforced by the executive (i.e., the police and the prosecutors). In some cases, a special enforcement authority is authorized by law for a specific field of law. An example of a special authority is that usually created for election law – the EMB or election complaints commission that is usually created for election matters. These bodies usually have the authority to deal with any administrative violations of election regulations and offenses under the election law. They can also refer any offense arising in the election process that appears to be a criminal offense to the state prosecutors.

### How are they changed?

A statute may be amended by the same process as it is first enacted. That is, a law that amends an existing statute is itself a statute and goes through the same process through the legislature as a bill. In most countries, statutes are subject to challenge in the courts relating to their constitutionality (i.e., whether they deal with a subject permitted by the constitution or conflict with the constitution, or a statute of a higher level legislature as per Figure 1 above). In some countries, they may be challenged on the basis that they were not properly enacted or were not subjected to the prescribed process for enactment. For example, some countries have a requirement that certain types of bills go through a public hearing stage, and if this does not happen, the validity of the statute can be challenged.

### Conflicts between Laws or Legal Provisions

A law or legal enactment of a lower level that conflicts with one of a level above is deemed to be invalid (*ultra vires*) to the extent of the conflict. This process is essential to prevent overlaps and clashes between and among laws. Whether there is conflict will be determined by a court.

### Why do they have more authority than the form of law one step down?

Statutes are enacted by a legislature of elected representatives, and the authority of a statute is derived from the constitution or founding document of a state. At lower levels in the hierarchy, the rule-making body may be made up of appointed members (for example, an EMB).

### What determines whether a subject will be legislated at a national level or at a sub-national level?

The constitution of a nation usually defines the governance structure, the different levels of government and the subjects or fields of law they may legislate. Some issues, such as national finance and taxation, foreign relations, defense, citizenship, customs and duties and international trade are always governed and legislated at the national level. Other matters, such as local government, local commerce, domestic relations, and local taxes are often dealt with at a sub-national level. Issues such as agriculture, transportation and the environment may be dealt with at both levels. Most countries have a national criminal law, although the U.S. has both federal and state criminal codes. Election law in a federal nation is generally dealt with by federal law for the election of federal bodies and by state law for the election of state bodies. In the U.S., the administration of elections for the national Congress is governed by the laws of each state. Issues such as voter registration, time of voting and ballot design differ from state to state.

## Presidential Decrees/Executive Orders

### What is the purpose of presidential decrees/executive orders?

Executive orders are legally-binding directives to an executive agency by the president or other executive acting within his or her constitutional authority. Presidential decrees are similar to executive orders in that they are legally binding and issued by the president or executive; however, they constitute a broader category in that they are not necessarily directed to an executive agency. They allow the president or executive to enact certain types of laws without having to gain approval from the legislature. The procedures governing both will most likely be found in the state's constitution and are usually specific on the limits of executive power.

### Who drafts presidential decrees/executive orders?

Executive orders and decrees are generally drafted by the legal and drafting experts in the president's office. They may also be prepared by a government department and then approved by the executive.

### What is the source of a presidential decrees/executive orders' authority?

The constitution normally enumerates those matters on which the president may make orders. Defense emergencies are obvious examples. Appointments of certain senior officials and some foreign military actions are other examples where presidential order or decree is used. In the electoral sphere, members of a national EMB are appointed by decree in some countries, sometimes following a wider nomination and selection process. Sometimes a decree may be used to rectify a lack of action by a legislature, if the president believes there is an urgent public interest at stake. The president may then issue a legislative decree on the subject. Legislative decrees and some other presidential decisions, such as certain appointments, are subject to the later ratification by the legislative branch. These cases often cause political controversy. Refusing to sign a law passed by the national legislature (a veto) is another form of presidential order that may be authorized by a constitution. Countries vary in the balance of authority between the legislature and the president.

### Who interprets and enforces presidential decrees/executive orders?

Like statutes, orders and decrees are initially enforced by the state enforcement authority – the police – followed by prosecution in the courts.

### Afghanistan: Elections under Presidential Decree

Elections in Afghanistan in 2009 were administered under a law issued by presidential decree. The president had the authority to issue the decree, although it was subject to the power of rejection by both houses of Parliament. The *Wolesi Jirga* (lower house) rejected the decree, but the *Meshrano Jirga* (upper house) concluded that it could not consider the decree as the constitution barred lawmakers from amending election laws “during the last 12 months of the legislative term.” Therefore, the decree stood as valid for the 2009 elections. New electoral laws were passed by the *Wolesi Jirga* and *Meshrano Jirga* in 2013, ahead of the 2014 presidential and parliamentary elections.

### How are they changed?

Orders and decrees may be amended, extended, curtailed or terminated by a later order or decree. Conflicting legislation will normally invalidate them and they can be invalidated by decision of a court.

### Why do they have more authority than the form of law one step down?

The power to issue presidential decrees or executive orders and their place in the hierarchy of laws should be specified in the constitution. Because this kind of authoritarian law-making may be more easily abused than other forms of legislating, it should be subject to timely check by the courts or legislature. The constitution should also be clear about the effect of a presidential order and its position *vis-a-vis* a lower authority (e.g., a sub-national or state statute).

## Common Law/Case Law

### What is the purpose of common law or case law?

Common law is not a level of hierarchy *per se*, nor is it law on a particular subject. Common law is law made by the courts, not by the legislature. Only a minority of countries accept the concept of common law, but where it is recognized, it is a source of authority in law. It consists of the judgments of courts, and is also referred to as case law. This can be a judgment to interpret the wording of statute law, to protect the principles of natural justice, to fill a gap in the law, or to deal with an unforeseen situation not covered by statute. The common law consists of written decisions (not a codification or summary of the judgments) and the judgments may be cited in subsequent litigation, when other courts may approve of, follow, or distinguish the original judgment. These later judgments modify the common law.

Common law can relate to a subject that is normally legislated at national or at a sub-national levels. It may relate to civil or criminal issues and therefore may function within various levels of the hierarchy of laws, at least in countries where it is recognized. Many rules originally established by common law are eventually incorporated, amended or removed by statute law. In such cases, the statute then replaces the common law rule. In some countries that recognize common law, there are some important areas of the law that are still grounded in common law, including aspects of the law governing torts and contracts.

### Who drafts common law or case law?

Common law is comprised of judgments emanating from the court system.

### A Note on the Hierarchy of Courts

In most countries the judiciary also operates in a hierarchy, with different levels of courts that each has a different jurisdiction to interpret and apply the law. This may include district or state courts, federal courts, appeal courts, and a supreme court. This hierarchy provides routes of appeal – a fundamental right – so each court will have greater authority than the levels of courts below. Some courts have jurisdiction on both civil and criminal matters, but some courts are restricted to one or the other, or have a specific jurisdiction (e.g., special election courts).

### What is the source of authority for common law or case law?

In countries where case law is accepted, national history or constitutions recognize its authority. However, the authority of case law can be controversial among those who disagree with the direction taken by the courts.

### Who interprets and enforces common law or case law?

A judgment of a court will generally set out a remedy – for example, awarding damages, stating rights to property, or ordering remedial action. In cases when the matter deals with a crime or other offense, a punishment or sanction may be ordered. In arguing a case, counsel may quote applicable judgments as well as statute law. Judgments are enforced by law enforcement agencies and other regulatory bodies.

### How is it changed?

A senior court may overrule the decision of a lower court, which effectively changes the common law. A legislature may enact law that amends, restricts or reverses a rule of common law.

### How does its authority relate to other levels of jurisdiction?

Generally, a rule of common law set by a senior court binds lower courts. The application of federal court decisions to state or provincial courts depends on the court structure of the nation. Decisions of a court of a state or province may be cited as persuasive but not binding on courts of other states. For example, a U.S. state court decision applies in another state only when adopted by a federal court or a court of the other state, or is incorporated into statute. An example of the hierarchy of courts is illustrated below.

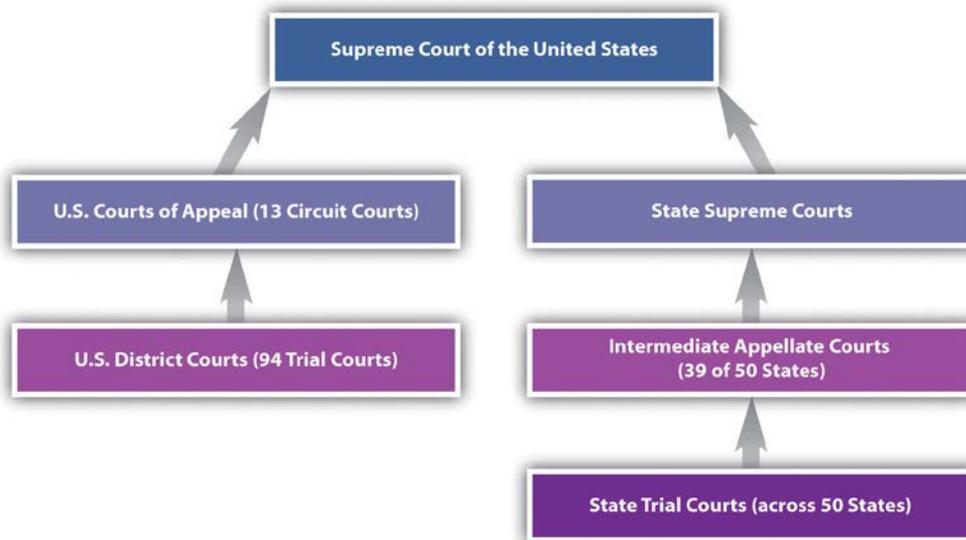


Figure 3: Hierarchy of Courts in the United States of America (from [www.saylor.org](http://www.saylor.org))

## Regulations

### What is the purpose of a regulation?

Regulations (sometimes called rules or by-laws) are issued under the authority of a statute by a division of the government or by a special body, such as an EMB. For this reason, they are sometimes referred to as “delegated” legislation. They provide administrative and technical detail to carry out the purpose of the statute. In an electoral context, an election law normally authorizes the EMB to issue regulations that specify, for example, how voters may exercise their rights under the law regarding each stage of the election. The statute often gives power to a committee of the legislature, or courts, to examine the regulations issued and review their scope and effectiveness, as well as their conformity with the general policy behind the legislation. This keeps control over their direction and prevents regulations effectively changing policy. However, mandatory review or approval of the regulations of an independent body, such as an EMB, could create conflicts of interest and constitute political interference with the EMB’s independence.

### Who drafts regulations?

Regulations are usually drafted by the legal staff of the authority issuing them, under the policy instructions of the authority. Regulations are often drafted in the same style as statute legislation, and should use wording consistent with the statute. Sometimes a state will establish special commissions or regulatory boards, and the legislation that establishes these will usually authorize them to issue regulations and orders on certain issues in order to carry out their function. This may include a power to set minor penalties such as fines for violations.

“If you have ten thousand regulations, you destroy all respect for the law.”

—Winston Churchill,  
House of Commons, 1949

An EMB is usually empowered to issue regulations and procedures to administer the stages of the election such as voter registration, candidate registration, campaigns, polling and counting and to issue orders dealing with specific situations, such as setting closing dates. Some election laws are so detailed that few regulations are needed. A regulation may be quite short and should be easily comprehensible to a wide audience. A procedure (discussed below) is typically more detailed and may be longer. Procedures generally require thorough training for election staff.

There is a tendency for EMBs to combine regulations and procedures. The effect of this can be to bury important rules that all voters or candidates must know in a document that is full of process detail, and as a result the rules become almost invisible. A table of examples that distinguish between what may be enshrined in a constitution, what should be set out in legislation, what should be covered by a regulation, and what should be contained in a procedure, is set out at the end of this document.

### **What is the source of a regulation's authority?**

The authority of a regulation comes from the grant of regulation-making power in the statute. The regulation usually cites its authority.<sup>5</sup> One example is a polling and counting regulation issued by an EMB under the specific authority of an election law. This regulation typically specifies the detailed steps that must be taken to cast ballots and count them. It cannot change the law or the basic rights of voters set in law. However, it is an element of law and must be complied with. A violation may be punished.

### **Who interprets and enforces regulations?**

While the issuing authority is in some cases given the power to impose penalties for violations, regulations are typically interpreted by the courts and enforced by police in the same manner as statutes. In some cases, the rule-making body – such as an election commission or election complaints commission – is given both the judicial power of interpretation and the executive power of enforcement in the election law.

### **How are they changed?**

Regulations may be amended by another regulation issued the same way.

### **Why do they have more authority than the form of law one step down?**

Their authority is a result of being a form of delegated legislation and they are therefore backed by the legislature that authorized them. The legislature has said, in effect: “as you are the experts, you can specify the details to make the law work in practice.” Because regulations are a form of delegated legislation, they can be legally enforced in a similar way to statutes, in that a violation or failure to adhere to regulations can be subject to sanction, or other legal or remedial action. Or, if they are determined to be beyond the authority outlined in the governing statute, they can be found *ultra vires* by a court. This is not the case for lower-level forms of law.

## **Procedures**

### **What is the purpose of a procedure?**

A procedure is a description of the required steps necessary to complete a process. The result of failing to follow a procedure is that the process it covers has not been completed, and the process has failed. This is in contrast to regulations, whereby a violation or failure to adhere to a regulation may incur some kind of sanction or other legal or remedial action. In cases where the procedure is being followed by a person or group who wishes to obtain some right, status, or benefit, such as the right to stand as a candidate in an election, there is normally an opportunity to follow the process again, properly.

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<sup>5</sup> For instance: “Pursuant to the requirements of § 24.2-404 of the Code of Virginia, a voter who does not have an acceptable form of identification listed in § 24.2-643 of the Code of Virginia may obtain a voter photo identification card free of charge through any general registrar's office or the Department of Elections if...” 1VAC20-40-90. Voter Photo Identification Cards.

Election procedures are mainly instructions regarding process details, documentation and records, and are generally directed at EMB staff. The voter will be guided in the procedure by the EMB staff, and the procedures may include various forms to be used to stakeholders in the electoral process (for example, during candidate nomination or when filing an election complaint). If EMB staff fail to follow the procedure they may be corrected (i.e., ordered to conform), or may be disciplined if the failure was negligent or deliberate. If the failure of staff persons to follow the procedure was shown to be a deliberate offense against a law or regulation, they will be subject to punishment. A “procedure” is intended to guide the completion of a process, rather than set the rules for the process. If an applicant for electoral candidacy fails to follow the set procedure, he or she fails to become a candidate. There is no need for punishment in this instance. Rules that impose penalties for interfering with the right to stand as a candidate, or for any attempts to cheat on the required qualifications for candidacy, should be in the law or regulations.

In drafting regulations or procedures, the need for due process (fundamental procedural safeguards to ensure fair treatment) must be considered. Although elections have a tight and inflexible timeframe, the election calendar must be planned in such a way to ensure due process is protected.

#### **Regulation vs. Procedure**

If a provision is intended to create a general obligation or prohibition, and to establish punishment for non-compliance, then the provision belongs in a regulation, not a procedure.

#### **What is the source of a procedure’s authority?**

Procedures can be written as law by a legislature or as regulations by an administrative body, and so their source of authority is the same as that of either laws or regulations, although this is rare.

More commonly, procedures are written by an administrative body to ensure that the law and regulations are applied consistently and fairly to all parties in a legal action. Hence, their authority in part may come from constitutional provisions protecting procedural due process rights. Ultimately, a procedure’s authority stems from the administrative body’s legal mandate.

#### **Who interprets and enforces procedures?**

Procedures are enforced by the administrative body in charge of implementing the statute or regulation creating the procedure. Failure to comply with a procedure means that the required process will not take be completed (or completed properly), so procedures are also enforced by the parties wishing to complete the process.

#### **How are they changed?**

Procedures can be changed in the same way that the either laws or regulations are changed, depending on whether the procedure is housed in a law or regulation.

## Codes of Conduct

### What is the purpose of a code of conduct?

A code of conduct is a written set of rules developed by an organization, company, legislature, or government institution (such as an EMB) to govern the behavior of certain groups. EMBs often write codes of conduct to govern election officials, as well as external actors such as candidates, media, election observers, security personnel, and election officials during an election period. For example, the Election Commission of Pakistan has written codes of conduct for media, political parties, observers, candidates, and security personnel. Many parliaments around the world have written codes of conduct to regulate their own behavior and to improve how they are perceived by the public. The Sri Lankan Parliament decided to write a code of conduct for parliamentarians and other politicians after a spate of “unruly” behavior on the House floor though failed to pass it into law, while the United Kingdom Parliament instituted a code of conduct after a bribery scandal.

Codes of conduct are beneficial for many reasons. The process of writing down, discussing, and agreeing on what should be considered acceptable behavior may increase the goodwill and professionalism of the parties involved. Public perception of the regulated group is many times improved by instating a code of conduct. Further, since codes of conduct often fall under “soft law,” they allow legislatures and other administrative bodies to use their official capacity to encourage or proscribe behavior in ways that would be too vague for traditional legislation. For instance, a code of conduct may encourage candidates to act with “integrity” or to avoid engaging in “corrupt practices” without having to define these terms to the specificity required of laws.

### Who drafts codes of conduct?

In the election context, codes of conduct are most often written by the EMB. As a best practice, this should be done in an inclusive, consultative manner with the stakeholders whose behavior is being regulated. In particular, political parties and candidates should be involved in the development of codes of conduct, as a means of securing buy in for agreed-upon rules that will govern behavior. Codes of conduct should also be developed for EMBs and their staff.

### What is the source of authority for codes of conduct?

As codes of conduct are generally administrative acts without the force of law, they fall under the category of “soft law,” which means they are legally relevant but not binding. Their authority derives from the right of administrative bodies to manage their own day-to-day operations or to encourage positive behaviors in other groups (such as political parties, observers, security personnel, and media). Occasionally, codes of conduct may be written and passed by a legislature (functioning as “hard

#### Code of Conduct for Elections

Some countries choose to develop a comprehensive code of conduct covering all stakeholders (e.g., Zambia and Nepal), while others develop targeted codes of conduct for different groups of electoral stakeholders (e.g., Pakistan and Nigeria). Regardless of the model chosen, it is a best practice that the conduct of all electoral officials (permanent or temporary) is governed by a code of conduct with clear enforcement mechanisms.

law”), although this is less common. There is also international support for codes of conduct to regulate parties, candidates, and media during elections. The Inter-Parliamentary Council’s Declaration on the Criteria for Free and Fair Elections recommends that states “[e]ncourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period.” The United Nations Convention Against Corruption similarly encourages states to “endeavor to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honorable and proper performance of public functions.”

### **Who interprets and enforces codes of conduct?**

Enforcement of codes of conduct depends on whether they are considered “soft” or “hard” law. Codes of conduct are considered “soft law” when they are not passed by a lawmaking body and thus rely on voluntary compliance. Codes of conduct that are considered “hard law” have the weight and enforceability of a statute when they are written and passed by a legislature. Some countries have made adherence to a code of conduct a condition of candidacy to ensure compliance. Compliance may also come from a fear of sanctions by the administrative body, either through negative employment actions by the EMB to enforce internal compliance, or through public shaming by the EMB or other organizations to enforce external compliance by outside groups like political parties. They may be relevant in legal proceedings where customs or internal rules may be offered as evidence, and so in these instances compliance is enforced by fear of litigation. Codes of conduct may be self-enforcing when compliance serves the interests of the group, or when the code of conduct is merely enumerating pre-existing normative behaviors.

### **How are they changed?**

Codes of conduct can be changed in the same manner as they are drafted, for example, by the EMB.

## **Policies**

### **What is the purpose of a policy?**

The term “policy” is used in different senses related to governance:

- *General state policy* – the political principles and direction set by a government, which forms the basis of its administration;
- *Legislative policy* – a statement of the political purpose to be achieved with a new law, the way the purpose is to be achieved and a set of instructions for the professional legislative drafters who will draft a bill; and
- *Administrative policy* – statements and guidelines issued by an authority regarding the way it intends to administer its duties and exercise its discretion.

The policies issued in elections are of the third type. They are generally broad, informative statements of intent regarding principles to be followed, priority of programs, or an administrative step completed. For example, Nepal’s Election Commission has instituted a “gender and inclusiveness policy” that lists a

number of gender and inclusivity-related objectives and the principles required to achieve them, like “[a]ll relevant laws, rules and directives for the election shall be improved and amended from the gender perspective.” Policies are not laws and therefore do not fall within the hierarchy. A policy is a statement of principle or a goal. A law is a set of rules to fulfill a policy by enforcing the principle and ensuring the goal is achieved.

#### **Who drafts policies?**

Policies are written by the authority that intends to apply them, but are not drafted in legislative terms.

#### **What is the source of a policy’s authority?**

Policies do not have authority in the sense that a law does. They serve to provide information and to build confidence that there will be an open and fair process. They also guide and inform the development and drafting of regulations and procedures. As confidence in the integrity of an election is the key to acceptance of the result, well written and well communicated policy statements are important. However, they are not laws.

#### **Who interprets and enforces policies?**

As a policy is a statement of principle or a goal, they are not subject to enforcement in the same way as the different levels of laws. The authority that issues a policy is responsible for internal adherence to the implementation of that policy.

#### **How are they changed?**

Policies can be changed at any time in the same manner as they are drafted.

## Examples of Constitutional Principles, Laws, Regulations and Procedures for Elections

### **Voter Registration**

- A constitution may enshrine the right to vote.
- A law may specify who qualifies to register as a voter.
- A regulation may include a list of documents acceptable to prove identity.
- A procedure may state the order of the stages of registration, the size of photographs, the duties of registration staff, and the forms to be used.

### **Candidate Nomination**

- A constitution may enshrine the right to stand for election
- A law may specify who qualifies to stand as a candidate for election.
- A regulation may specify the fees and signatures required of candidates, if that is not in the law.
- A procedure may describe the process to receive and process candidate nomination papers, specify how signatures should be set, and specify the forms to be used.

### **Polling**

- A constitution may provide for elections by secret ballot.
- A law may specify who is responsible for conducting polling, and how the polling date is fixed.
- A regulation may set the voting hours, and specify the mark to be used on a ballot.
- A procedure may specify the exact duties of staff, the layout of the polling station, the process of sealing the box and recording seal numbers, and the forms to be completed.

### **Counting**

- A constitution may identify the election system.
- A law may specify how and where the votes will be counted.
- A regulation may state who may be present at the count and set rules on validity of ballots.
- A procedure may describe the completion of results sheets and distribution of copies and the placement of election materials in the boxes.

### **Election Complaints and Disputes**

- A constitution may enshrine the right to file a complaint or appeal.
- A law may specify which body has jurisdiction over election complaints and disputes.
- A regulation may set out the rules for complaints adjudication.
- A procedure may detail the information that must be provided during the complaints process.

## Resources

- Convention on the Elimination of all forms of Discrimination Against Women  
(<http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>)
- Convention on the Rights of Persons with Disabilities  
(<http://www.un.org/disabilities/convention/conventionfull.shtml>)
- International Covenant on Civil and Political Rights  
(<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>)
- Inter-Parliamentary Council's Declaration on the Criteria for Free and Fair Elections  
(<http://www.ipu.org/cnl-e/154-free.htm>)
- United Nations Convention Against Corruption  
([http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf))
- United Nations Declaration on Human Rights  
(<http://www.un.org/en/universal-declaration-human-rights/index.html>)
- United Nations Declaration on the Rights of Indigenous Peoples  
([https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf))







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