



International Foundation
for Electoral Systems

Legal Considerations When Delaying or Adapting Elections



Legal Considerations When Delaying or Adapting Elections

Author:

Katherine Ellena
Senior Global Legal Advisor

Lead Editor:

Erica Shein
Director of the Center for Applied Research and Learning

Editors:

Chad Vickery
Vice President of Global Strategy and Technical Leadership

Angela Canterbury
Director of Strategic Communications and Advocacy

IFES COVID-19 Briefing Series: Legal Considerations When Delaying or Adapting Elections
Copyright © 2020 International Foundation for Electoral Systems. All rights reserved.

Permission Statement: No part of this work may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system without the written permission of IFES.

Requests for permission should include the following information:

- A description of the material for which permission to copy is desired.
- The purpose for which the copied material will be used and the manner in which it will be used.
- Your name, title, company or organization name, telephone number, fax number, e-mail address and mailing address.

Please send all requests for permission to:

International Foundation for Electoral Systems
2011 Crystal Drive, Floor 10
Arlington, VA 22202
Email: editor@ifes.org
Phone: 202.350.6701

Contents

Foreword	1
Acknowledgments	2
Executive Summary	3
Introduction	5
Major Findings	6
Postponing Elections	6
Modifying Election Processes	13
The Role of the Courts	18
Recommendations	21

Foreword

The current global health crisis deepened uncertainty in many fields, and democracy is no exception. The novel nature of the COVID-19 pandemic presents a variety of dilemmas for governments, parliaments, election administrators and judges when it comes to effectively protecting health – and ultimately, human life – and to upholding rights linked to political participation and representation.

Tough decisions are being made around the world regarding electoral processes, but none should be made disregarding international standards and best practices. During a global health crisis that demands coordinated action for the protection of fundamental rights, close monitoring and international cooperation are acutely in demand. Now, more than ever, democracies around the world need each other, and international organizations, governments and civil society must cooperate to find creative solutions under the current pandemic.

In a significant contribution to the global debate on the challenges posed by COVID-19, IFES is issuing a series of briefing papers that shed light on different aspects that may affect democracies. This second paper is particularly relevant, as it focuses on constitutional and legal features that arise from decisions made – or to be made – regarding electoral processes under the current context. In this sense, this is a most welcome contribution to debates on constitutional justice and international cooperation under the current pandemic and, more broadly, under emergency situations.

From the outset, the author lists the relevant international standards and principles that guide and bound decisions under emergencies. With a well-grounded view, and relying on examples from different legal traditions and institutional designs, she also points out the importance of the timing and context under which solutions are implemented, with an emphasis on the transparency, inclusiveness and communication of each decision. Moreover, we are also reminded of the implications of the hierarchy of laws and the role courts may play when interpreting the legal framework for the implementation of emergency measures or to solve any controversies around said measures.

For constitutional judges and other legal experts, this paper represents an excellent tool to assess the alternatives at their disposal when considering the modification of operational or legal aspects of electoral processes in order to protect public health. It is also a reminder that, as we face unprecedented situations, we may be called to issue rulings and develop guidelines to strengthen governance and uphold rights in our battle to protect human life.

In my experience, to achieve this, international cooperation between judges is crucial. The systematic exchange of points of view through a consultative peer network reminds us of the common ground from which we fulfill our duties. While our constitutions, laws and precedents are the stronghold of our decisions, international best practices and experiences enhance the alternatives at our disposal. This paper makes a significant contribution to engage in this exchange with relevant information, sharp questions and a framework that helps to identify viable solutions and opportunities.

Justice José Luis Vargas Valdez

Electoral Tribunal of the Federal Judiciary of Mexico
Founder of the Global Network on Electoral Justice

Acknowledgments

The author and editors would like to thank: Justice José Luis Vargas Valdez for providing a thoughtful foreword to the paper and for his ongoing partnership with IFES on electoral justice; Jérôme Leyraud and Rebecca Cox for their thoughtful peer review of the draft paper; Adele Ravidà, Typhaine Roblot, Renata Levovski and Ioana Cosma for sharing detailed information on current legal issues facing North Macedonia, Myanmar, Kyrgyzstan and the Democratic Republic of the Congo; Alexandra Brown for research support; and Keaton Van Beveren, Janine Duffy and Abigail Gampher for their copy editing and design work.

Executive Summary

Introduction

Periodic elections underpin the legitimacy of governments and ensure that power can be preserved or transferred based explicitly on the will of the governed. This foundational principle for democratic systems of governance is being challenged by the COVID-19 pandemic. At the time of writing, the primary response of [57 countries and five territories](#) to the pandemic has been to postpone elections, some indefinitely.¹ Such election postponements may not be clearly provided for or even contemplated in the law, making the decision to delay or cancel an election complex. These decisions are also usually beset with political controversy; this does not argue for a political solution to a legal problem, but it does require a consideration of the political and social context and reinforces the importance of transparency and consultation.

In addition, as focus moves globally toward pandemic recovery (versus response), countries are grappling with modifications to allow electoral processes to move forward safely. When such changes are considered, careful thought must be given to the legal framework underpinning elections to ensure that imperative operational changes do not undermine election rules or set negative precedents. These operational considerations are thoroughly canvassed in the first paper in this International Foundation for Electoral Systems (IFES) COVID-19 Briefing Series, [Safeguarding Health and Elections](#).² This paper considers the legal and constitutional considerations that countries may face when postponing or modifying election processes, and sets out guidance to aid decision-making.

Defining the Problem

Because periodic elections are a fundamental right³ and are crucial to facilitating peaceful and democratic transfers of power, they are often baked into a country's law or constitution. Occasionally, the legal framework may provide for continuity of government beyond a mandated term, but in many other cases it is silent. At the same time, international law allows for the derogation of some rights — including the right to vote and stand for election — in emergency situations, albeit with very strict guardrails to prevent abuse.⁴ Where emergency measures conflict with constitutional deadlines, pressure to move ahead with an election may imperil public health and limit participation, or risk a constitutional crisis.

Beyond the postponement of elections, many countries are considering modifications to how elections are conducted, including — but not limited to — introducing or expanding postal voting. Discussions around internet voting have also gained momentum.⁵ In some cases, only simple modifications may be required: for example to the calendar for elections or to basic procedural aspects such as queue control. However, more complex alterations to the electoral process may necessitate a variety of legal amendments. Where modifications are being considered, careful thought must therefore be given to the electoral legal framework underpinning elections, and the integrity of the entire process — both real and perceived.

The responsibility for making these difficult decisions varies by country and can become fraught, especially where the legal basis for postponement or modifications is not entirely clear. Additional constitutional interpretation may be needed by the courts or whichever body has the authority to determine constitutional questions. It is inevitable in some contexts that decisions to postpone or modify elections will become politicized and heavily contested. Partisan actors are likely to challenge these decisions in the

courts, with varying motivations. Unfortunately, there is no clear body of law to guide judicial decision-making and support reasonable and fair remedies that protect both democracy and public health.

Major Findings and Recommendations

Legal amendments in a crisis situation present both risks and opportunities. The potential for emergency power to be abused for political gain cannot be understated. To guard against this risk, it is important to understand the different types of electoral integrity vulnerabilities, and ensure these vulnerabilities are not introduced or exacerbated through election postponement or emergency amendments. Conversely, opportunities to introduce new permanent measures that facilitate enfranchisement — particularly of vulnerable or marginalized groups — should be capitalized on. The table below sets out key international principles, good practice and legal considerations to guide decision-making on election postponements and modifications.

Figure 1: Key International Principles, Good Practice and Legal Considerations

Election Postponements	Election Modifications
International Principles and Good Practice <ul style="list-style-type: none"> Any decision to postpone elections should be transparent, consultative and inclusive. Any measures that derogate political and electoral rights in emergency situations must be necessary, proportional, nondiscriminatory, temporary, limited in scope and clearly communicated. Any postponement to periodic elections should be limited in duration and focus on the minimum time needed to prepare for and ensure safe elections, with broad-based political agreement if possible, to ensure the restoration of rights. 	International Principles and Good Practice <ul style="list-style-type: none"> Any amendment process must be consultative and inclusive. Any measures that derogate political and electoral rights in emergency situations must be necessary, proportional, nondiscriminatory, temporary, limited in scope and clearly communicated. International standards set out in the International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights, Convention on the Elimination of all Forms of Discrimination Against Women and Convention on the Rights of Persons With Disabilities and other conventions should be protected. Legal certainty and stability must be preserved. Rules must be clear and precise, and amendments clearly communicated.
Key Legal Issues to Consider <ul style="list-style-type: none"> Are there rules on term limits and electoral deadlines, where do these reside, and how can these be legally modified or temporarily overridden via use of emergency provisions? Are there legal or constitutionally mandated deadlines for transfers of power? Are there legal provisions for continuity of power or for caretaker governments, and are these applicable? Which body has legal authority for setting and/or moving election dates? Are there provisions for decision-making if the laws are silent on election postponements? 	Key Legal Issues to Consider <ul style="list-style-type: none"> Is there flexibility in the law regarding methods of carrying out election processes? Are there timelines set in the legal framework for key electoral processes? What are the specific processes and timelines for legal or regulatory amendment? Does the election management body (EMB) have statutory authority to develop by-laws, regulations and procedures? Is there an electoral code of conduct? Are there provisions in the legal or regulatory framework requiring transparency, inclusion, disability access and consultation?

Learn more by visiting the full collection of papers in the [IFES COVID-19 Briefing Series](#).⁶
Find more resources at IFES' [COVID-19 Survival Guide for Democracies](#).⁷

Introduction

At the start of 2020, 106 countries and territories were scheduled to hold at least one national or subnational election or referendum.⁸ Prior to the rapid spread of COVID-19 across the globe, some of these elections were held, and in a few high-profile cases – such as South Korea, Guinea and Mali – general elections have continued, even at the height of the pandemic. However, to date the primary response of many countries with elections scheduled has been to postpone them, sometimes indefinitely.⁹ At the time of writing, national and local elections and referendums in [57 countries and five territories](#) are postponed, which represents around a quarter of the world's countries.¹⁰ These decisions to delay elections are important and often necessary from a public health standpoint. However, they may be far from simple from a legal and constitutional perspective. Decisions are usually also being made in a highly charged political environment and postponements, even if necessarily, may be perceived to benefit one political faction over another.

In addition, as focus moves globally toward pandemic *recovery* (versus response), countries will grapple with how to modify election procedures to allow electoral processes to move forward, while minimizing the risk for transmission of the new coronavirus. This includes modifications to the myriad of activities that make up an election – such as voter registration, candidate nomination and campaigning – not just Election Day itself. Some countries are also considering changing the process for voting completely to avoid the need for voters to physically go to the polls.¹¹ Again, these decisions may be necessary to preserve both democratic rights and public health. However, the legal or constitutional basis for modifications must be carefully considered to preserve the legitimacy of the election process and outcome, to build trust in results and to set positive, rather than negative, precedents for future electoral contests. These challenges are by no means limited to nascent democracies, but are also facing well-established democracies as the world grapples with the current pandemic.

The major findings in this paper are divided in three main parts, looking first at legal issues relevant to the postponement of elections; second, at the need to modify election processes once a decision is made to move ahead with an election, and how this can be done within election law frameworks; and finally, the potential role of the courts in both situations. The paper concludes with recommendations and best practices to inform the decision-making process.

Major Findings

Postponing Elections

The decision to postpone a democratic election as a result of a national or international crisis is significant. It may be a *necessary* decision — given the severity of the crisis, such as COVID-19, and the country's readiness and ability to respond effectively — but that calculation is complex and highly consequential. Elections underpin the legitimacy of governments and representatives at the national and subnational level. Periodic elections and terms of office ensure power is not concentrated and perpetuated in certain individuals or factions but is preserved or transferred based on the will of the governed.

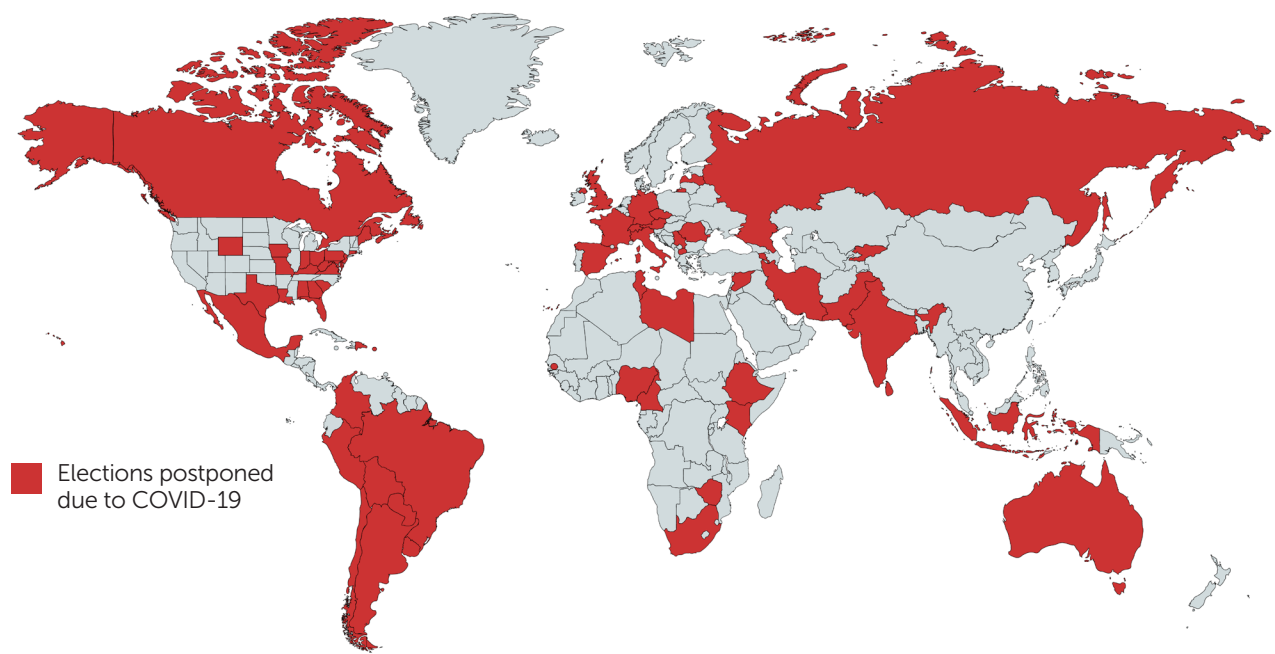


Figure 2: Shaded countries and states represent those in which an election has been postponed in response to COVID-19.
Created with mapchart.net.

International Principles Related to Election Postponements

The international principles governing political and electoral rights are set out in international law, and it is well established that the rights to vote and stand for election — on a periodic basis — are fundamental rights.¹² The same is true for other civil rights that are important for democratic elections, including freedom of expression, freedom of movement and freedom of assembly.

Despite the ramifications for the periodicity of elections and the exercise of these fundamental civil and political rights, delayed or postponed elections do not *necessarily* contravene international principles. International law allows for the derogation of some rights — including the right to vote and stand for election — in emergency situations, albeit with very strict guardrails to prevent abuse.¹³

As IFES has [outlined previously](#),¹⁴ the ICCPR General Comment 29 on Article 4 offers additional clarity and detail on the boundaries of the derogation clause. First and foremost, certain rights are considered to be so fundamental that they are *nonderogable* even in times of extreme emergency: the right to life; the right to be free from torture and other inhumane or degrading treatment or punishment; the right to be free from slavery or servitude; freedoms of thought, conscience and religion; and the right to be free from retroactive application of criminal laws.

While political and electoral rights are not among those that are nonderogable, states must meet two preliminary conditions to invoke ICCPR Article 4 in a way that impacts these rights: “the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency ... for the maintenance of the principles of legality and rule of law at times when they are most needed.”¹⁵ General Comment 29 clearly states that “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation” and if countries consider invoking Article 4 to declare a state of emergency, “they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.”¹⁶

Finally, General Comment 29 also provides that emergency measures must be “exceptional,” and “the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.”

From this framework, IFES has identified four indicators that help to understand whether state actions during this time of crisis are within the guardrails provided by international principles.¹⁷ **The emergency measures must be:**

- **Proportional:** The measures taken must be commensurate to the problem.
- **Nondiscriminatory:** The measures must not discriminate on the basis of individual or community characteristics, including, but not limited to, gender or gender identity, language, religion, social or ethnic origin, disability or sexual orientation.
- **Temporary:** The measure must be specifically limited in duration and make provisions for an end point.
- **Limited in geographic and material scope:** The measures must be appropriately narrow and targeted to the problem, in both geographic scope and significance.

Hence, while international principles allow for election postponements because they allow for the derogation of certain fundamental rights during an emergency, it is equally clear that an election postponement can only be justified under the limited circumstances outlined above, with strict guardrails in place and with a time horizon.

Clear consideration also needs to be given as to whether emergency provisions, including election postponement, are “justifiable” based on the nature of the emergency. State of emergency provisions are usually developed to respond to immediate and significant emergencies such as natural disasters and are not primarily designed to respond to a prolonged health crisis. While a health crisis such as the COVID-19 pandemic may present exceptional lingering circumstances and effects, it may not necessarily “threaten the life of the nation” on an ongoing basis. Finally, General Comment 29 also emphasizes the importance of notification and transparency regarding emergency provisions and decision-making.

These principles provide an important framework for states to consider when making decisions around the timing of a postponement, the geographic and material scope of a postponement and the circumstances that will allow for the resumption of the electoral process.

Term Limits, Election Deadlines and the Hierarchy of Laws

Despite the flexibility afforded by public international law, election postponements may not be clearly provided for or even contemplated in national legal frameworks. Term limits and deadlines for elections are usually built into a country's legal or constitutional framework, making any postponement legally difficult. Usually this is by design, to make manipulation of political terms difficult and to protect against undemocratic power grabs.



International principles allow for election postponements, albeit under limited circumstances, and with strict guardrails in place. Despite this, election postponements may not be clearly provided for or even contemplated in national legal frameworks.”

For example, in the **United States**, there is very little flexibility to postpone general elections at the national level. Legislation requires general elections to take place on the first Tuesday after the first Monday in November,¹⁸ while the Constitution requires the president to be sworn in on January 20.¹⁹ While Congress could in theory amend the law to delay the election, constitutional deadlines for inauguration would only permit very limited delays. Hence, the United States has never postponed a presidential election. Even after the terrorist attacks of 9/11, the House voted by way of a simple resolution never to postpone a presidential election because of terrorism, and to ensure that no single individual or agency be given the authority to postpone the date of a presidential election.²⁰

In **New Zealand**, it is possible to postpone elections, but only with a supermajority. As New Zealand does not have a written Constitution, term limits are set out in the electoral legislation, which provides that general elections must take place every three years. Accordingly, the last possible date for an election in 2020 is November 21. However, these legislative provisions could be amended by a 75 percent parliamentary majority, as occurred once during World War I and twice during World War II.

Occasionally, legal frameworks may provide some flexibility around setting or moving election dates. For example, the **Bougainville** Constitution provides that “where in this Constitution a time limit is imposed for the doing of an act ... and in a particular case it is not practicable to comply with that limitation, the period shall be deemed to be extended by whatever period is necessary to make compliance practicable.”²¹ While it is important to ensure that miscellaneous provisions are not used to manipulate elections, this example does illustrate the fact that there may be provisions in the legal frameworks of countries that are outside the electoral laws and the emergency laws, but may be relevant to resolving potential conflicts between the two or filling any lacunae in the law.

Countries sometimes have clauses in their constitutions or electoral legal frameworks allowing for the postponement of elections due to emergency situations. Many countries have already relied on such clauses to postpone elections or referendums due to COVID-19, including **Chile, France, Serbia** and **Sri Lanka**. Emergency clauses found specifically within electoral laws rather than as part of broader emergency powers are generally contemplated for unforeseen short-term or localized disruptions to elections: for example, due to natural disaster or violence. Depending on how these provisions are framed, and the timing of a country's election, it is possible such provisions could be applied to the current pandemic situation. In **New Zealand**, for example, the chief electoral officer can adjourn voting for up to three days, and then subsequently for recurring seven-day periods.²² These provisions in the law seem designed as a last resort to respond to an unforeseen event. However, conceivably they could also be invoked when the disruption is known prior to the start of the election process, as one

of the potential triggers for a potential adjournment is “an epidemic notice given under section 5(1) of the Epidemic Preparedness Act 2006 being in force.”²³

As these country examples illustrate, it is important to clarify where the rules around term limits and electoral deadlines reside in the hierarchy of laws. As IFES has written about previously, an understanding of the hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law will apply in practice.²⁴ This helps determine whether provisions already exist that allow for postponements in exceptional circumstances, or if not, how easy the relevant term limits and deadlines are to modify. A legislative deadline or term limit may be easier for lawmakers to adjust during an emergency than a constitutional deadline. Or, emergency provisions in a constitution may allow decision-makers to override deadlines in the electoral laws or to enact emergency legislation. This does not suggest that term limits should not be protected in constitutional frameworks. However, the pandemic is creating extraordinary situations that constitutions, electoral laws and emergency powers legislation may not have contemplated. In some situations, such as the United States, any postponement will be legally or politically impossible, and focus must be instead on modifications to electoral processes and frameworks (discussed below) to protect public health as elections move forward.

The Silence of the Laws

Lacunae in legal frameworks present new challenges as electoral processes and emergency powers collide. Occasionally, the constitutional or legal framework in a specific country may provide for continuity of government beyond a mandated term, but in many other cases it is silent.

In **Myanmar**, the Constitution explicitly provides that “after the expiry of the incumbent term, the President and the Vice-Presidents,” who are elected indirectly, “shall continue their duties until the time the new President is duly elected,”²⁵ but no similar provision exists for members of Parliament (MPs). Hence, if elections are postponed beyond the end of a legally mandated term of office, questions may arise as to the legitimacy of office holders, even if a state of emergency is in place. Any decision to postpone would be significant, as Myanmar is facing a major general election this year — the second since a civilian government came to power in the 2015 democratic transitional elections. The timing of elections in Myanmar is determined by the Constitution and election laws, and there are three relevant sets of provisions in the 2008 Constitution. Taken together, these provisions require that – if there is to be no legislative interregnum, which would be constitutionally problematic – the election be held no later than January 2021.²⁶

In **North Macedonia**, the Constitution provides that the mandates of the judges of the Constitutional Court, the president, the government and members of the Republican Judicial Council are extended for the duration of the state of war or state of emergency.²⁷ However, the provision is silent about the current unprecedented situation where a state of emergency has been declared, but a dissolution of Parliament has already occurred. Hence, no legal norms clearly regulate whether Parliament can convene; if Parliament convenes, whether MPs would have a mandate until new MPs are elected, and whether their powers would be the same; whether Parliament reconvening would impact existing executive decrees promulgated during the state of emergency; and whether the speaker can amend the decision to call elections.

Where emergency measures conflict with constitutional deadlines for elections, or if there is silence as to how these legal provisions interact, this can result in pressure to move ahead with an election, or to risk a real or perceived constitutional crisis. In the Autonomous Region of **Bougainville**, forthcoming general elections are highly anticipated and heavily contested in light of an independence referendum held at the end of 2019. The Constitution requires general elections to be held every five years,²⁸ but

Bougainville is currently under a state of emergency that explicitly postponed the elections.²⁹ The postponement raised the question of whether the mandate of current representatives runs out on June 8 (as the anniversary of the return of the writ in the last election) and whether — without elections — the government of Papua New Guinea could take over governance of Bougainville. However, under the Constitution, the term of office for parliamentarians is aligned with the return of the election writ, not the anniversary date of the last election.³⁰ Nevertheless, in the current political climate, a potential delay is seen not just as a constitutional but a sovereignty issue, and following a political agreement, the electoral process is now planned to commence as soon as the state of emergency lapses in June.

In **France**, a “state of health emergency” has been introduced to offer more flexibility in handling the crisis while maintaining fundamental freedoms. It appears to be a form of intermediary status between full emergency and no emergency that could help authorities to solve the dilemma of either (a) postponing elections for as long as a traditional state of emergency is in place, since these declarations often suspend elections and leave the resumption of electoral processes in limbo; or (b) forcing EMBs to organize elections according to standard procedures as soon as a state of emergency is lifted, without any intermediary measures to allow them to consider and implement amendments and modifications.

It is important to ensure that the introduction of certain executive or legislative measures are not used as a means to circumvent the ICCPR guardrails discussed above. For example, emergency measures in **Zimbabwe** are being introduced via amendments to the health laws, not as part of a formal declaration of a state of emergency. Some commentators have criticized this approach, while also noting that statutory instruments made under the Public Health Act cannot override a mandatory provision of the Constitution, which requires by-elections to be held within a 90-day period.³¹

In some situations, there may be no legal basis for an election postponement, and new legislation will be required. In the **United Kingdom**, emergency legislation had to be introduced to provide a legal basis for postponing the May 2020 local elections for a year due to the COVID-19 pandemic.³² The new bill provides for existing councilors to serve an additional year, and for those elected in 2021 to serve a three-year term instead of the normal four-year term to allow the normal electoral cycle to be restored once the current crisis is over.³³ It is important that the new legislation clearly provides for a return to the legal status quo following the emergency, given the potential for legal term extensions to be precedent-setting.

Ultimately, depending on the specific circumstances in the country and the type of gap or lack of clarity in the law, there may be a requirement for constitutional interpretation, for political consultation and agreement, or for legal amendment. Regardless of the solution chosen, the international principles set out above should inform decision-making, and it is imperative for decision-making to be transparent and consultative.

The Timing of Election Postponements

The *timing* of an election postponement is also important to consider. A postponement that happens in the midst of the electoral process — for example after voter registration and candidate nomination have been completed — may bring additional complexities, including with respect to enfranchisement. Because the ICCPR also requires that a derogation of rights be time-bound, the need to determine a new date for Election Day can be complex, especially if the health crisis is still evolving.

In **Spain**, local elections were originally “suspended” in two regions, Galicia and Basque Country, as a response to national and regional emergency orders. However, as there was considered to be no explicit legal basis for suspending the elections midstream, and doing so would have had ramifications

for fundamental rights affected by the suspension, both regions subsequently cancelled the electoral process, requiring the electoral process to restart.³⁴ The decision was also based on the fact that the national emergency order afforded no certainty on when it would be possible to vote, hence the orders to cancel did not establish an alternative date. The national order has since been amended, delinking the electoral process with the state of emergency, and elections have now been scheduled for July 12, 2020.

In **Kyrgyzstan**, local elections for certain regions had been set for April 12, 2020, but on March 21 the government introduced an “emergency situation regime” throughout Kyrgyzstan. On March 24, the president signed a decree introducing a state of emergency in select cities and territories that as a result postponed elections in those areas.³⁵ Because the election process was already under way, the decree provided that candidates who had resigned from official positions were eligible to run for office and could resume those positions in the interim, until a new timeline for elections could be established. While these measures may have been “proportional” to the emergency situation by targeting key risk areas, it is not a stretch to see that in certain national elections, select postponements or cancellations in key opposition-stronghold areas could be a way of manipulating the overall result.

In **North Macedonia**, Parliament was dissolved in February as the electoral process commenced, and a caretaker government was established as part of a political agreement to raise trust in the April 12, 2020 national elections.³⁶ However, on March 18, the president declared a state of emergency and the caretaker government subsequently issued a decree ceasing all election-related activities during the state of emergency.³⁷ This presents a complex scenario whereby a postponement is taking place during an electoral process and with a caretaker government in place — raising questions both of timing and of decision-making authority. The state of emergency is governed by the Constitution³⁸ and the Law on the Government,³⁹ but the Election Code is silent on what to do during a state of emergency. Hence, North Macedonia is in the midst of an electoral process, but the situation it now faces is largely unregulated.

Delaying Democracy: Who Decides?

The responsibility for making potentially difficult legal and operational decisions regarding the postponement of elections varies between countries and can become fraught, especially where the legal basis for postponement is not clear-cut. In terms of setting the date of an election, in some countries the EMB is mandated with setting the date of the election within the bounds of constitutional deadlines (for example, Ethiopia); in some, it rests with the executive (New Zealand); and in others, it is set in law (the United States).

However, while the legal authority for setting an election date may sit with a certain body, the authority for postponing an election may reside elsewhere. In the **New Zealand** example outlined above, the executive sets the date of the election within legislative deadlines, but only a supermajority in the legislature could postpone it beyond those deadlines.

Even if a particular body has the authority to decide on a postponement, consultation and communication will be important. In **Canada**, the Acho Dene Koe First Nation, an indigenous tribe, has a customary elections code, meaning the election procedures are set for and by its membership, but there is nothing in the code that deals with a postponement or rescheduling of an election.⁴⁰ In postponing the election until November 2020, the chief and council said their consultations considered the following: the current state of emergency; the difficulty finding a venue that would respect the public health order and allow the right number of people to count ballots; and the fact that Indigenous Services Canada

had introduced a regulation allowing First Nations leaders to extend their roles and duties for up to six months without an election.⁴¹


In the **North Macedonia** example outlined above, the decree put in place by the caretaker government on March 21 prescribes ceasing all election activities and provides that already-completed election activities will be considered valid and will not need to restart. The EMB has been mandated by the decree to produce a timeline for resumption of election activities the day after the state of emergency is over but does not have the authority to set the actual election date.

In **Ethiopia**, general elections were scheduled for August but have been postponed based on a state of emergency.⁴² However, questions remain regarding the expiry of mandates, the legality of the election postponement and when and how a new election date will be set. Ethiopia is somewhat unique in that the ultimate authority on constitutional issues is the upper house of the legislature, not the courts, but the upper house can ask the Constitutional Council of Inquiry (CCI), made up of judges, lawyers and politicians and chaired by the Supreme Court president, to provide constitutional interpretation.⁴³ The CCI has asked for amicus curiae submissions and, at the time of writing, is holding livestreamed hearings on the issues, illustrating the importance of transparency and consultation.

In **Uruguay**, there are constitutionally mandated dates for elections, with local elections due to be held on May 10, 2020, but postponed because of COVID-19. Constitutional reform was considered too difficult in the midst of the pandemic, so following consultations with political parties, the Parliament approved, almost unanimously, a law giving the Electoral Court the power to set a new election date. Recognizing the risks associated with setting this precedent, this mandate was given to the court for these elections only, and with a final deadline of October 4. The legal argument advanced for justifying these temporary powers was that the Electoral Court has final authority over elections under the Constitution.⁴⁴ The Electoral Court has now scheduled these elections for September 27.⁴⁵


As these examples illustrate, wherever the decision-making authority rests for election postponements, careful consultation is required to examine the issues at stake and the options on the table. If both electoral deadlines and emergency powers are provided for in the Constitution without any specific guidance on how they interact, additional constitutional interpretation may be needed by the courts or whichever body has the authority to determine constitutional questions, as is currently the situation in Ethiopia at the time of writing.

Ultimately, according to international principles, any suspension of electoral and political rights during an emergency must be exceptional and temporary, and therefore wherever possible when an election is postponed, a new date should be set for the rescheduled election. A rescheduled election date will



Meaza Ashenafi
 @ashenafi_meaza

Today the Council of Constitutional Inquiry (CCI) made an open call for constitutional law experts to submit an amicus curiae brief in the matter submitted to it by @FDRHOPR. Refer to the Call (in Amharic) below.



7:59 AM · May 11, 2020 · Twitter Web App

Tweet from the president of the Supreme Court of Ethiopia seeking input from constitutional experts on the issue of the election postponement

need to be informed by operational considerations, particularly around any new mitigating mechanisms that need to be introduced to protect the health of stakeholders involved in the election process, along with new training and education imperatives. It may also need to account for modifications to laws or regulations governing elections that are required as a result of new processes being put in place.

Modifying Election Processes

Beyond the postponement, suspension or cancellation of elections, many countries are considering modifications to how elections are conducted to adapt to the circumstances presented by the pandemic. In some instances, this includes significant changes in how people vote: for example, through the introduction or expansion of postal voting. Discussions around internet voting have also gained momentum, but with significant voices opposing the idea of introducing it in this context.⁴⁶ In other instances, it involves more minor, but important, modifications to election procedures to protect public health.

As IFES has noted elsewhere with respect to decision-making in response to the pandemic, “it is essential that election management bodies (EMBs) ... make sensible and well-informed decisions ... [that are] informed by health authorities and might vary depending on each country’s public health capabilities, level of spread of the disease, and other contextual factors.”⁴⁷ Consultation with political parties and candidates, along with extensive public outreach and communication, are needed as well.



Measures to avoid crowded in-person polling stations, such as extending advance voting, curbside voting and mail-in ballots, would allow easier access for people with disabilities and older citizens in all elections.

At the same time, when changes are being considered, careful consideration must be given to the legal framework underpinning elections. In many cases election laws set out specific processes and timelines that may require amendment to account for operational changes. This is true not only for polling but also other parts of the electoral process, discussed further below. An understanding of the legal framework, the amendments that might be required, and legal certainty and stability are very important.

Amendments in a crisis situation present both risks and opportunities. Governments wield significant power during a state of emergency, and the potential for this power to be abused for political gain cannot be overstated. To guard against this, it is important to understand the different types of electoral integrity vulnerabilities that exist: (1) electoral fraud, which is deliberate wrong-doing by election officials or stakeholders that distorts the will of the voters; (2) electoral malpractice, which is the breach by a professional of his or her relevant duty of care, resulting from carelessness or neglect; and (3) systemic manipulation, which is the use of legal provisions, rules and procedures that run counter to democratic principles and that purposefully distort the will of voters.⁴⁸ Each of these vulnerabilities can be exacerbated or deliberately introduced in a crisis situation. Systemic manipulation in particular must

be guarded against when countries are introducing emergency amendments that could inadvertently or deliberately undercut fundamental electoral principles in subtle ways.

With respect to opportunities in a crisis, it is possible that some operational modifications to election processes may actually bolster enfranchisement, particularly of vulnerable or marginalized groups, and would be beneficial to maintain for the longer term. For example, measures to avoid crowded in-person polling stations, such as extending advance voting, curbside voting and mail-in ballots, would allow easier access for people with disabilities and older citizens in all elections. IFES will be considering this issue in a forthcoming paper as part of this [IFES COVID-19 Briefing Series](#).⁴⁹ An amendment process also may provide an opportunity to fix existing problems with the legal framework or make adaptations that allow election practitioners to account for future uncertainties such as health hazards and to adjust election planning accordingly.

When considering changes or modifications to election processes, it is important to protect and advance the fundamental principles underlying democratic elections, such as fairness, competitiveness and secrecy of the vote. To do so, it is important that countries adhere to general principles around law reform that are equally relevant in a crisis situation.

International Principles Governing Electoral Legal Amendments

Regardless of the overall structure of elections in a given country, and despite extenuating crisis circumstances, the legal framework for elections should be unambiguous, understandable and transparent, and the parties that function within it must understand what the laws are and what they mean in practice. This requires adhering to the rule-of-law principle that the laws themselves must be “publicly known and relatively settled.”⁵⁰ Hence, when considering amendments to the legal framework for elections, three key principles should be followed:

(1) Stability and legal certainty: Elections are by nature rules-based exercises, and changing the rules too close to the game, or without regard to flow-on effects, can be damaging. This is particularly true in an environment where public trust in electoral processes or outcomes may already be low. The Venice Commission has affirmed that “stability of the law is crucial to credibility of the electoral process” and recommends no legal changes in the year prior to an election.⁵¹



Elections are by nature rules-based exercises, and changing the rules too close to the game, or without regard to flow-on effects, can be damaging.”

(2) Clarity: Laws must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and they must be accessible to the public.⁵² Legal clarity is of particular importance in enabling individuals to determine the extent of liability for specific conduct.⁵³

(3) Inclusiveness: An inclusive and consultative process builds trust and increases the sense of ownership and political buy-in among stakeholders, making acceptance and understanding of changes more likely.⁵⁴

Unfortunately, some countries may not have the luxury of time in responding to COVID-19 while maintaining the electoral calendar, and the preservation of legal certainty and stability will be a particular challenge. In the face of a health crisis, there is an imperative to protect both the integrity and safety of the electoral process, and exceptional procedures may be necessary. However, drastic changes should be limited, and the requirement for inclusiveness and consultation will be even greater. Consideration

should also be given in the longer term to ensuring the legal framework for elections is robust enough to preserve international standards, while flexible enough to allow for an effective response to different types of crises.

Election Amendments and the Hierarchy of Laws

Legal frameworks for elections are made up of one or more pieces of legislation governing all aspects of the process for electing political institutions.⁵⁵ Differing levels of specificity and flexibility are built into the law depending on the particular country context. The current crisis context is illuminating challenges around either a rigid or flexible legal framework. Some countries have a very prescriptive electoral code, laying out the specifics of election administration and polling processes in significant detail. Sometimes this type of legal framework is developed because there is little trust in institutions, and there is a desire to carefully prescribe — and in some cases constrain — institutional authority. Ideally, the EMB should be given the authority to develop and update specific by-laws or regulations while protecting fundamental rights in the constitution and legislation, which are more difficult to amend.⁵⁶ This then gives the EMB the ability to determine how the law should be implemented in practice, and to adapt procedures accordingly without needing to modify the law.



Where operational details such as queue control and staggered polling times are set out in the administrative regulatory or procedural framework, it will be easier for an EMB to make changes quickly.

As noted above, understanding the hierarchy of laws helps to clarify how the different levels of law will apply in practice, what details exist at each level, and what will require modification.⁵⁷ When modifying an electoral process — whether in crisis situations or not — it is important to identify and understand where amendments might be possible or necessary.

Where operational details of how an election runs are set out in the administrative regulatory or procedural framework, it will be easier for an EMB to make changes quickly, if it has authority to draft and amend administrative regulations

and procedures, which ideally it should. Some modifications may require no regulatory or procedural changes, but simply an adjustment in planning and execution. For example, in the recently held **South Korea** parliamentary elections, the EMB encouraged voters to utilize existing early voting provisions⁵⁸ that allowed eligible voters to cast ballots ahead of Election Day, which in turn dispersed the number of voters at a polling station. The EMB also made administrative changes to extend postal voting, which already existed under the law, to COVID-19 patients and those in quarantine.⁵⁹ As noted by International IDEA in its analysis of the South Korea elections: “these measures ... could not have been pulled off so timely and seamlessly, hadn’t numerous legal and procedural provisions to facilitate inclusion and participation of voters been already part of its electoral framework.”

Another lesson from the South Korea experience is the use of “soft law” mechanisms to set out modified procedures. For voters going to the polls on Election Day, the South Korea EMB developed a Code of

Conduct for Voters that set out strict measures to protect public health and the integrity of the polls. A code of conduct is a written set of rules developed by an EMB to govern the behavior of certain groups. A code of conduct is not necessarily legally binding, although it can be, but has moral and political authority and can be a powerful tool to supplement the legal framework for elections.⁶⁰



A code of conduct is not necessarily legally binding, but has moral and political authority and can be a powerful tool to supplement the legal framework for elections.”

Regardless of whether a modification may be made at the procedural, regulatory or legislative level, consultation remains fundamental. This is particularly true when a new voting process is being introduced or an existing limited process is being extended to a wider swath of voters. For example, globally available options for external voting — such as proxy voting, in-person balloting at designated locations, or postal/electronic/fax voting — each have their own limitations with respect to the provision of a secret and secure vote.⁶¹ Provision of these special polling options may help to widen the franchise but may also engender political controversy.⁶² There may also be underlying systemic manipulation vulnerabilities where the introduction of a new process stands to benefit a political incumbent.

The current situation regarding presidential elections in **Poland** is instructive. The presidential election was scheduled to take place on May 10, 2020, and the ruling party declined to declare a state of emergency —with many commentators suggesting that this was due to concerns that delaying the election would harm the incumbent’s chances of reelection and would prevent changes to electoral legislation.⁶³ Subsequently, the ruling party introduced new legislation to facilitate voting entirely by mail.⁶⁴ The now-passed Act on Special Rules allows both postal and in-person voting, and shifts many critical functions of the independent EMB to the Ministry of State Assets, including “powers to design the ballot template, design the mail voting package and ... determine the manner of handling completed ballots and related materials ...”⁶⁵ The minister of state assets is a member of the president’s party, and the director of the Polish Post was replaced with an ally of the president’s party.⁶⁶

The amendments were put forward about a month ahead of the scheduled election date, violating international standards for legal stability close to an election,⁶⁷ as well as domestic standards.⁶⁸ Now that the legislation has been adopted, Poland’s ruling coalition has agreed to postpone the election. The plan, announced in a statement by members of the ruling coalition, was to allow May 10 to pass without holding elections, have the Supreme Court, whose acting president was handpicked by President Duda, confirm the invalidity of elections that were not held, and have the speaker of the lower house call new presidential elections “as soon as possible.”⁶⁹ The Polish situation demonstrates the potential for all three types of integrity vulnerabilities — fraud, malpractice and systemic manipulation — to be introduced as part of emergency amendments to election processes.

Practical Considerations for Legal, Regulatory or Procedural Amendments

While the introduction of new polling systems may be rare, it is likely that more minor modifications to electoral processes are going to be necessary in almost every election taking place globally in the short to medium term. Stakeholders need to start thinking now about what these modifications might be, and what legal or regulatory amendments they might require. These adjustments are likely to be necessary at all stages of the electoral process, from voter registration to counting and reconciliation of results. As these modifications and amendments are being made, it is important to ensure fundamental electoral principles are preserved and that integrity vulnerabilities are not introduced.

For example, effective budgeting, procurement, expenditure control and monitoring systems are essential for successful management of voting operations, and a clear legal and regulatory framework governing the EMB's use of its financial resources is essential.⁷⁰ In a crisis situation, this becomes even more challenging, as countries may need to consider whether the EMB has the financial authority necessary under the law to accommodate modifications such as the purchase of personal protective equipment (PPE) for poll workers.

With respect to voter registration processes, these must be fair, comprehensive and inclusive, and potential voters must be aware of the registration process and have reasonable opportunities and relatively easy access to complete it.⁷¹ In the wake of the pandemic, this may require legal or procedural changes to achieve — for example, by adapting how voters prove identity or residency or by restarting the voter registration process to achieve enfranchisement of newly eligible voters, as was the case in **Spain**. In some instances, certain mechanisms may exist in the law that could be extended — for example alternative mechanisms for verifying identification or residency that are used for pastoralists or indigenous communities.

Campaigning is also a challenge in the pandemic. In **Lithuania**, the campaign period for the October 2020 parliamentary elections started on April 10, and there is no constitutional possibility for postponement. The EMB has allowed campaign finance registration documents to be filed by email during the lockdown, subject to later submission of hard copies, but consideration may also need to be given to the fact that under current lockdown conditions, the advantage of incumbency is potentially exacerbated.⁷²

Montenegro's Law on Financing of Political Entities and Election Campaigns restricts state and local spending for a six-month period in advance of a major election and requires that data on social welfare payments be published at regular intervals throughout campaign periods. Such measures can prevent misuse of state funds to secure votes — yet the health crisis necessitates higher than normal spending on social support programs at present, and elections are set to be held no later than October 2020. Restrictions on freedoms of movement and assembly will inevitably impact the way campaigns are conducted, and new measures may be needed to preserve a level playing field. Here again there is a need to be vigilant about the potential for manipulation of legal provisions — for example, those that may restrict the ability of candidates and parties to challenge government responses and communications related to the pandemic.

With respect to candidate nomination, in general a citizen should be permitted to stand for election and to be duly elected to office in his or her country, and it is therefore critical to ensure that the restrictions on candidacy and the nomination process are clearly stated in the electoral law and consistently applied.⁷³ In **Romania**, the government issued an emergency ordinance in April postponing the 2020 local elections, but the ordinance also allowed candidates to register with half the number of support signatures previously required, and introduced the possibility of submitting lists of signatures in an electronic format.

A unique complication during the pandemic relates to out-of-country voting (OCV). While the legal frameworks of many countries around the world provide for the enfranchisement of expatriates, the degree to which these voters are enfranchised in practice is mixed. In the **Dominican Republic** the constitutional mandate for the president and Congress ends on August 16, 2020, and elections scheduled for May 17 have been postponed to July 5 due to COVID-19.⁷⁴ The EMB has noted the difficulty of facilitating OCV, as the mechanism for it depends on the restrictions being imposed by host countries. Well over half a million citizens are registered for OCV and may be disenfranchised. A similar challenge was encountered during the **South Korea** elections.⁷⁵

These examples illustrate the need for countries to carefully consider the myriad of potential consequences the pandemic might have on different parts of the electoral process, and what the legal and regulatory response might need to be to mitigate these impacts in a way that preserves electoral integrity. In particular, as modifications are made to laws, by-laws, regulations or procedures, drafters must carefully consider what integrity vulnerabilities might emerge as a result of operational changes and craft amendments in a way that minimizes these vulnerabilities. At the same time, the principles of legal certainty, clarity and inclusiveness must guide any amendment process, whether legal or procedural.

Finally, public outreach, communication and education will be critical, not only because new rules and procedures need to be conveyed to stakeholders, but also because of the potential deterrent effect the pandemic may have on turnout and participation. In **Mali**, which went ahead with parliamentary runoff elections on April 19 despite the pandemic, voter turnout in the capital city of Bamako was historically low — at a reported 7.5 percent.⁷⁶ While the EMB noted that general turnout across the country was higher — around 36 percent — very low levels of turnout may have flow-on implications for the real or perceived legitimacy of mandates. Differences in turnout between urban and rural areas is also a trend to watch: in the February 2020 elections in **Iran**, the national turnout was 43 percent, whereas in Tehran it was 25 percent.⁷⁷ Capital cities tend to have higher population density and higher numbers of COVID-19 cases, so the toll is likely to be heavier on urban voters. The legitimacy of governments may be affected when a country's powerful capital city or economic centers are perceived as not significantly contributing to election outcomes, and hence the importance of voter education — especially around health safety and mitigation measures — is magnified.

The Role of the Courts

It is inevitable in some contexts that decisions to postpone or modify elections will become politicized and heavily contested. Partisan actors are likely to challenge these decisions in the courts, with varying motivations. Courts may also be asked to render a judgment on the legal validity of emergency powers, decisions to postpone elections and the introduction of new rules governing election processes. As law professor Michael Morey has noted about the **United States**: “[m]any states lack ‘election emergency’ laws that empower officials to adequately respond to these crises. As a result, courts are frequently called upon to adjudicate the consequences of election emergencies as a matter of constitutional law, often applying vague, subjective, ad hoc standards in rushed, politically charged proceedings.”⁷⁸

“[M]any states lack ‘election emergency’ laws that empower officials to adequately respond to these crises. As a result, courts are frequently called upon to adjudicate the consequences of election emergencies as a matter of constitutional law, often applying vague, subjective, ad hoc standards in rushed, politically charged proceedings.”

In the **Democratic Republic of the Congo** (DRC), the Constitutional Court was asked to determine the legality of the state of emergency put in place by the president. According to the Constitution,⁷⁹ the president can announce a state of emergency after consultation with the prime minister and presidents of the two Chambers, but details regarding the state of emergency must be contained in a law.⁸⁰ However, this law does not currently exist in the DRC. The Constitution requires the Constitutional Court to verify the validity of any Presidential Ordinance setting out restrictive measures in response to a state of emergency, something that the court in the DRC has now done.

In **India**, the Supreme Court upheld the State Election Commission's (SEC) decision to postpone local elections in the state of Andhra Pradesh – a decision that was contested by the state government.⁸¹ At the same time, the court directed the SEC to also postpone the application of the code of conduct for elections, which prohibited certain types of government development activities ahead of an election. Such measures are intended to mitigate very real concerns around incumbency advantage and the abuse of state resources ahead of elections. While this postponement is important to allow the government to respond appropriately to the crisis, it highlights the need for heightened awareness of the potential escalation of such abuses during the pandemic to reinforce popular support for incumbent governments.

In **Malawi**, the May 2019 presidential elections were annulled by the Constitutional Court in February 2020, citing "widespread, systematic and grave irregularities," and new elections were ordered to be held within 150 days, using a two-round system to replace the first-past-the-post system used in 2019. The Supreme Court upheld this ruling on May 8, and as a result, elections are to be scheduled for late June but an election date has not been determined yet.⁸² The Supreme Court ruled that the 2019 voter register must be used, no new voter registration can take place and only the original candidates may stand.⁸³ The president remains in power during the interim period. A state of disaster has been declared, including a ban on large public events, which restricts campaign activities. There are concerns that the elections could face challenges if they go ahead in late June, due to the limitations and restrictions necessitated by the pandemic, as well as risks to health. On the other hand, there is pressure to resolve the political crisis.

In **Bolivia**, the constitutional situation was already complicated before the COVID-19 outbreak began. The presidential and parliamentary elections of October 2019 were annulled due to irregularities, and an interim president was sworn in with the support of the Constitutional Court. The constitutionally mandated five-year term of the Legislative Assembly has already expired, although the Constitutional Court approved a law that extended their mandate. There has been pressure to hold elections as soon as possible on the grounds of constitutional and political legitimacy. Elections were scheduled for May 3 but due to the pandemic were postponed. The EMB proposed that they be permitted to select a date between June and September, once scientific evidence around the pandemic became clearer.⁸⁴ However, the Legislative Assembly passed a law fixing August 2 as the last possible date for elections, and challenges to this law have now been brought before the Constitutional Court. A particular complication is that the Constitution makes voting obligatory and subject to administrative sanctions.⁸⁵ Although special measures are being established to try to protect the health of voters, some fear that many citizens will not risk going to vote.

In the **United States**, the Supreme Court was required to weigh in on a partisan dispute over the timing and process of the presidential primary in Wisconsin.⁸⁶ Ahead of the April 7, 2020, election, there was a partisan divide – with Democrats wanting to postpone the elections like in many other states, and Republicans wanting to move forward with elections as scheduled.⁸⁷ Under Wisconsin's legal framework, Democratic Governor Tony Evers was not able to shift the date of the election without the consent of the Republican-controlled legislature.⁸⁸ However, the day before the election, Governor Evers issued Executive Order No. 74, relying on emergency powers to suspend in-person voting until June 9, 2020.⁸⁹ This prompted the Wisconsin Legislature to file an emergency motion for a temporary injunction in the Wisconsin Supreme Court.⁹⁰

The Wisconsin Supreme Court granted the motion, holding that the governor did not have grounds, under either the Constitution or the emergency management statute, to amend or rewrite statutory provisions.⁹¹ With the election proceeding, and in response to the increased demand for mail-in ballots for the election and a backlog in processing requests, the Democratic National Committee and the

Democratic Party of Wisconsin filed a joint motion for preliminary injunction, in part to seek an extension for the deadline to receive absentee ballots.⁹² The motion was granted, but then later overturned by the United States Supreme Court,⁹³ which held that ballots must be postmarked on or before Election Day to be valid. This subsequently caused confusion, as there is no legal standard for “postmarked” under Wisconsin law (as exists for “received by”) — and election officials have had to determine what to do with batches of postal ballots that have no postmark.⁹⁴



That question went at the heart of a seemingly arcane matter that is sure to bedevil states in November: whether to count mail-in ballots based on when they arrive or when they are postmarked, which, if Wisconsin is to be a guide, is already threatening to become the ‘hanging chad’ of the 2020 election.”⁹⁵

Because countries are just starting to grapple with legal challenges related to elections and the current health crisis, there is no established body of law to guide judicial decision-making and outline reasonable and fair remedies that protect both democracy and public health. Some key considerations for courts will be whether there should be different types of scrutiny for different types of elections, and what legal and operational elements should inform judicial decision-making around postponements and modifications. For example, key elements may include constitutional deadlines, poll worker safety, the existence of interim governance measures, the availability of alternative voting processes and the ability to procure necessary PPE and election materials. It will also be important to consider the types of remedies that are or should be available to the courts with respect to election postponements or modifications. For example, is it appropriate for a court to mandate the use of an alternative method of polling? These are questions without a clear answer — yet.

Recommendations

1. **Consultation and coordination are fundamental** for any postponement or for any constitutional, legal or regulatory amendment process. Relevant stakeholders must be part of consultations on any proposed postponement or amendment, the changes need to be communicated clearly and the legal justification for changes must be clearly and thoroughly disclosed.
2. According to international principles, any **suspension of electoral and political rights during an emergency must be temporary**, and, therefore, wherever possible when an election is postponed, a new date should be set for the rescheduled election.
3. The **timing of an election postponement** is important to consider, especially when determining a new date for Election Day. Decision-makers should seek to consider electoral rights impacted by any postponement and formulate measures to restore those rights.
4. As modifications and amendments to electoral procedures are made, it is important to **ensure fundamental electoral principles are preserved** and to ensure election integrity vulnerabilities are not introduced as part of emergency amendments.
5. Opportunities to **introduce new permanent measures that facilitate enfranchisement** — particularly of vulnerable or marginalized groups — should be capitalized on.
6. **A variety of legal elements should be considered holistically** when making decisions around election postponements and modifications:
 - The source of authority for setting or moving election dates, and legal or constitutionally mandated deadlines for transfers of power;
 - Provisions for continuity of power beyond the end of a term, or for caretaker governments;
 - Legal or constitutional authority for temporary derogation of rights or postponement of elections in emergency situations;
 - Laws or regulations enabling flexibility or modification of methods of carrying out election processes;
 - Specific processes and requirements for legal or regulatory amendment;
 - Timelines set in the legal framework for key electoral processes, such as voter registration, candidate registration, campaigning, certifying results and the resolution of disputes;
 - Statutory authority for the EMB to develop regulations and procedures; and
 - Provisions in the legal or regulatory framework requiring certain forms of transparency, inclusion of specific groups, disability access and consultation.
7. These **legal elements must be considered alongside operational considerations** (such as cost considerations and the ability to organize new elections), political considerations (such as opposition agreement to postponements or modifications), and contextual considerations (such as the need for transparency, consultation and public education).

Endnotes

- 1 IFES, Elections Postponed Due to COVID-19 (2020), <https://www.ifes.org/publications/global-impact-covid-19-elections> (last visited June 2, 2020).
- 2 IFES, Safeguarding Health and Elections, <https://www.ifes.org/publications/ifes-covid-19-briefing-series-safeguarding-health-and-elections>, (last visited May 26, 2020).
- 3 International Covenant on Civil and Political Rights, art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171.
- 4 Katherine Ellena & Erica Shein, Emergency Powers and the COVID-19 Pandemic: Protecting Democratic Guardrails, IFES (March 30, 2020), available at <https://www.ifes.org/news/emergency-powers-and-covid-19-pandemic-protecting-democratic-guardrails>.
- 5 Meredith Applegate, Thomas Chanussot, & Vladlen Basysty, IFES, Considerations on Internet Voting: Overview for Electoral Decision-Makers (April 7, 2020), available at https://www.ifes.org/sites/default/files/considerations_on_internet_voting_an_overview_for_electoral_decision-makers.pdf.
- 6 IFES, COVID-19 Briefing Series, <https://www.ifes.org/ifes-covid-19-briefing-series>, (last visited May 26, 2020).
- 7 IFES, COVID-19: A Survival Guide for Democracies, <https://www.ifes.org/covid-19>, (last visited May 26, 2020).
- 8 IFES, Election Guide, <http://www.electionguide.org/elections/?inst=&cont=&yr=2020> (last visited May 26, 2020).
- 9 IFES, Elections Postponed Due to COVID-19, (2020), <https://www.ifes.org/publications/global-impact-covid-19-elections> (last visited May 26 June 2, 2020).
- 10 *Id.*
- 11 Anthony Banbury, Elections and COVID-19 — *What We Learned from Ebola*, DEVEX (Apr. 8, 2020), available at <https://www.devex.com/news/opinion-elections-and-covid-19-what-we-learned-from-ebola-96903>.
- 12 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
- 13 Ellena & Shein, (March 30, 2020) (“International Covenant on Civil and Political Rights, Article 4: ‘In time of public emergency which threatens the life of the nation ... the States Parties ... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’”).
- 14 *Id.*
- 15 UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, August 31 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> (emphasizing the importance of transparency in communicating the purpose and content of emergency measures, and of notifying the United Nations Human Rights Committee of these measures).
- 16 *Id.*
- 17 Ellena & Shein, (March 30, 2020)
- 18 3 U.S.C. § 1 (1948).
- 19 U.S. Const. art. XX.
- 20 H.R. 728, 108th Cong. (2004). See also Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523 (2005), available at <https://ir.lawnet.fordham.edu/ulj/vol32/iss3/4>.

- 21 Autonomous Region of Bougainville Const. sch. 2.14.
- 22 Graeme Edgeler, *Pandemic Preparedness and the New Zealand General Election*, Public Address (March 15, 2020 1:00 PM), available at <https://publicaddress.net/legalbeagle/pandemic-preparedness-and-the-new-zealand/>.
- 23 Andrew Geddis, Comment to *Pandemic Preparedness and the New Zealand General Election*, PUBLIC ADDRESS (March 15, 2020 1:00 PM), available at <https://publicaddress.net/legalbeagle/pandemic-preparedness-and-the-new-zealand/>.
- 24 Michael Clegg, et al., IFES, *The Hierarchy of Laws: Understanding and Implementing the Legal Frameworks that Govern Elections* (September 22, 2016), available at https://www.ifes.org/sites/default/files/2016_ifes_hierarchy_of_laws.pdf.
- 25 Const. art. 61(b) (2008) (Myanmar).
- 26 Const. § 119, 123, 151, 154, 171 (2008) (Myanmar); Myanmar Elect. L. § 34 (2010) (providing the EMB announces the election date). Under Sections 119 and 151 of the Constitution of Myanmar, the term of the legislature (made up of upper and lower houses) is five years from the first day of their first session. In 2016, the legislature was convened and MPs were sworn in on February 1, which means that the current term will end on January 31, 2021. Under Section 123, the first regular session of a term of the lower house “shall be held within 90 days after the commencement of the general election”. The schedule of the upper house is linked to that of the lower house (Section 154a), as are the schedules of the state and region legislatures (section 171a). The exact deadline in January is a practical one relating to how quickly it would be feasible to announce the election results and assemble the winning candidates in Naypyitaw for a February 1 convening of the Pyithu Hluttaw in accordance with Section 123 of the Constitution. Myanmar Constitution § 123. In 2015 most results were announced within a week with a few remote constituencies being announced by two weeks.
- 27 Const. art. 128 (N. Maced.).
- 28 Const. art. 107 (Bougainville).
- 29 Autonomous Bougainville Government, *Autonomous Bougainville Government Declares State of Emergency* (March 24, 2020), available at <http://www.abg.gov.pg/index.php/news/read/autonomous-bougainville-government-declares-state-of-emergency>.
- 30 Const. art. 57 (Bougainville).
- 31 *Election Watch 1-2020 – Suspension of Election Activities*, Veritas Zimbabwe (May 17, 2020), available at <http://www.veritaszim.net/node/4168>.
- 32 Neil Johnston, HC Briefing Paper, No. 08856, *Coronavirus Act: Elections*, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwiA5b_AsanpAhXnkHIEHfiBDRIQFjAFegQIBBAB&url=http%3A%2F%2Fresearchbriefings.files.parliament.uk%2Fdocuments%2FCBP-8856%2FCBP-8856.pdf&usq=AOvVaw0VnmvwFXhLAEQ5ag59AdIs. As the Explanatory Notes to the Coronavirus Bill noted, “there is no existing legislative provision that allows for any of the statutory polls scheduled for 7 May to be postponed. There are some powers to move poll dates by secondary legislation, but these are only available significantly in advance and can no longer be used for 7 May polls.”
- 33 *Id.*
- 34 The rationale for canceling versus “suspending” the elections was the difficulty in rectifying fundamental rights that were affected by a suspension midway through the electoral process. For example, it would be impossible to enroll new voters or add additional candidates, thereby disenfranchising people who turned 18 in the interim.
- 35 Aizhmal Dzhambankulova, *In Kyrgyzstan, Because of the Coronavirus, the Elections Were Transferred to Local Keneshes*, Kloop (March 23, 2020), (stating that Bishkek, Osh, Jalal-Abad cities, Nookat and Kara-Suu districts of Osh region, and the Suzak district of Jalal-Abad region postponed elections).
- 36 Ilcho Cvetanoski Skopje, *North Macedonia, Coronavirus Stops Elections*, Osservatorio Balcanie Casucaso Transeuropa (March 13, 2020), available at <https://www.balcanicaucaso.org/eng/Areas/North-Macedonia/North-Macedonia-coronavirus-stops-elections-200237>.

- 37 The North Macedonia Law on Government foresees the formation of a transitional government 100 days before parliamentary elections are held, in order to administer the electoral process. *Id.*
- 38 Article 125 of the North Macedonia Constitution provides that state of emergency exists when major natural disasters or epidemics take place. A state of emergency on the territory of the Republic of Macedonia or on part thereof is determined by the Assembly on a proposal by the president of the republic, the government or by at least 30 representatives. The decision to establish the existence of a state of emergency is made by a two-thirds majority vote of the total number of representatives and can remain in force for a maximum of 30 days. If the Assembly cannot meet, the decision to establish the existence of a state of emergency is made by the president of the republic, who submits it to the Assembly for confirmation as soon as it can meet. See Const. art. 125 (N. Maced.). Article 126 provides that, during a state of war or emergency, the government, in accordance with the Constitution and law, issues decrees with the force of law. The authorization of the government to issue decrees with the force of law lasts until the termination of the state of war or emergency, on which the Assembly decides. See Const. art. 126 (N. Maced.). Article 127 provides that, during the state of war, if the Assembly cannot meet, the president of the republic may appoint and discharge the government, as well as appoint or dismiss officials whose election is within the sphere of competence of the Assembly. See Const. art. 127 (N. Maced.).
- 39 N. Maced L. Gov. art. 10, 36.
- 40 Anna Desmarais, *Fort Liard First Nation postpones election due to COVID-19*, CBC (April 22, 4:28 PM), available at <https://www.cbc.ca/news/canada/north/fort-liard-first-nation-election-covid-1.5541358>.
- 41 Statement of Marc Miller, Minister of Indigenous Services, First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases) Coming into Effect (April 16, 2020), available at <https://www.canada.ca/en/indigenous-services-canada/news/2020/04/statement-by-the-minister-of-indigenous-services-on-the-first-nations-election-cancellation-and-postponement-regulations-prevention-of-diseases-com.html>.
- 42 Const. art. 93(4)(b) (Eth.) (stipulating that “[t]he Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.”).
- 43 Const. art. 82 (Eth.) (establishing the CCI).
- 44 Constitución de 1967 con reformas hasta 2004 [Constitution] art. 77 (Uru.), available at https://www.constituteproject.org/constitution/Uruguay_2004.pdf?lang=en.
- 45 Corte Electoral [Electoral Court] Apr. 17, 2020, No. 10853 (Uru.), available at <https://www.corteelectoral.gub.uy/circular-n-10853>.
- 46 Meredith Applegate, Thomas Chanussot, & Vladlen Basysty, (April 7, 2020).
- 47 IFES, Guidelines and Recommendations for Electoral Activities During the COVID-19 Pandemic (March 19, 2020), available at https://www.ifes.org/sites/default/files/guidelines_and_recommendations_for_electoral_activities_during_the_covid-19_pandemic_march_2020.pdf.
- 48 Chad Vickery & Erica Shein, IFES, Assessing Electoral Fraud in New Democracies: Refining the Vocabulary (May 9, 2012), available at https://www.ifes.org/sites/default/files/assessing_electoral_fraud_series_vickery_shein.pdf.
- 49 IFES, COVID-19 Briefing Series, <https://www.ifes.org/ifes-covid-19-briefing-series>, (last visited May 26, 2020).
- 50 Rachel Kleinfield Belton, Carnegie Endowment for International Peace, Competing Definitions of the Rule of Law, Implications for Practitioners 16 (2005), available at https://carnegieendowment.org/files/CP55_Belton.FINAL.pdf.
- 51 Guidelines and Explanatory Report of the European Commission for Democracy Through Law (Venice Commission), No. 190/2002, *Code of Good Practice in Electoral Matters* (October 30, 2002).
- 52 UNHRC, *CCPR General Comment No. 34: Article 19: Freedoms of Opinion and Expression: International Covenant on Civil and Political Rights*, September 13, 2011, CCPR/C/GC/34.

- 53 UNHRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, August 27, 2001, CCPR/CO/72/NET.
- 54 UNHRC, *CCPR General Comment No. 25: Article 25: Participation in Public Affairs and the Right to Vote*, July 12, 1996, CCPR/C/21/Rev.1/Add.7. ("Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives ...").
- 55 Helena Catt, Et. Al., *International IDEA, Electoral Management Design 336* (2006), available at <https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition>.
- 56 Michael Clegg, Et. Al., (2016).
- 57 *Id.*
- 58 Antonio Spinelli, *International IDEA, Managing Elections under the COVID-19 Pandemic: The Republic of Korea's Crucial Test* (February 2020), available at <https://www.idea.int/sites/default/files/publications/managing-elections-during-pandemic-republic-korea-crucial-test.pdf>.
- 59 *Id.*
- 60 Michael Clegg, Et Al., (2016).
- 61 The International IDEA handbook on external voting succinctly describes these limitations as follows: "Proxy voting may be rather problematic from the perspective of democratic theory because there is no guarantee that the vote cast by the proxy—and thus possibly even the result of the election—reflects the will of the original voter. A proxy could use this procedure to obtain an additional vote and thus infringe the principle of equal suffrage. Voting in diplomatic missions may deny some external electors the right to vote if they cannot travel to the polling stations. Voting by mail may not be as transparent as voting in a diplomatic mission in the presence of state officials—and voting in a diplomatic mission depends on the perceived impartiality and integrity of those state officials." Dieter Nohlen & Florian Grotz, *The Legal Framework and an Overview of Electoral Legislation, in Voting From Abroad: The International IDEA Handbook*, International IDEA & Instituto Federal Electoral (2007).
- 62 Andrew Ellis, *The History and Politics of External Voting, in Voting from Abroad: The International IDEA Handbook*, International IDEA & Instituto Federal Electoral (2007).
- 63 See, e.g., Zosia Wanat, *Polish government rams through electoral system changes*, Politico (April 6, 2020), available at <https://www.politico.eu/article/polish-pis-rams-through-electoral-system-changes/> ("The country's health service is underfunded and there are growing complaints from business about the scale of the government's economic rescue effort. If the situation deteriorates significantly, Duda could have trouble winning a second five-year term.").
- 64 Claudia Ciobanu, *Democracy Digest: Ten ways to undermine Polish election*, Balkan Insight (May 1, 2020), available at <https://balkaninsight.com/2020/05/01/democracy-digest-ten-ways-to-undermine-polish-election/>.
- 65 Opinion on the Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020 (Senate Paper No. 99), OSCE, Op. No. ELE-POL/373/2020 (April 27, 2020), para. 20.
- 66 Claudia Ciobanu, (2020).
- 67 Opinion on the Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020 (Senate Paper No. 99), OSCE, Op. No. ELE-POL/373/2020 (April 27, 2020), para 12.
- 68 Claudia Ciobanu, (2020). (explaining that a document filed with the Senate by the Polish Supreme Court stated that electoral law cannot be modified less than six months before an election).
- 69 Claudia Ciobanu, *Poland Postpones Presidential Election*, Balkan Insight (May 7, 2020), available at <https://balkaninsight.com/2020/05/07/poland-postpones-presidential-election/>.
- 70 ACE: The Electoral Knowledge Network, *Introduction: Bugeting Systems*, <http://aceproject.org/ace-en/topics/vo/introduction/vo30/vo33b/default> (last visited May 26, 2020).
- 71 ACE: The Electoral Knowledge Network, *Voter Registration: Guiding Principles of Voter Registration*, <http://aceproject.org/ace-en/topics/vr/vr20> (last visited May 26, 2020).

- 72 European Platform for Democratic Elections, Rapid Assessment: Covid-19 & Elections in Europe, <https://www.epde.org/en/news/details/rapid-assessment-covid-19-elections-in-europe.html>, (last visited May 26, 2020).
- 73 ACE: The Electoral Knowledge Network, Parties and Candidates: Guiding Principles of Parties and Candidates, <https://aceproject.org/ace-en/topics/pc/pc20> (last visited May 26, 2020).
- 74 Laura Castellanos, *Castañeros Guzmán: "JCE trabaja a todo vapor para realizar sí o sí elecciones del 5 de julio,"* Junta Central Electoral (May 8, 2020), <https://jce.gob.do/Noticias/castanos-guzman-jce-trabaja-a-vapor-para-realizar-si-o-si-elecciones-del-5-de-julio>.
- 75 Antonio Spinelli, (2020).
- 76 *Mali: Parliamentary Elections Hitch-Free*, AllAfrica (April 20, 2020), <https://allafrica.com/stories/202004210310.html>.
- 77 *Iran Elections: Record Low Turnout but Hardliners Set for Win*, BBC (February 23, 2020), <https://www.bbc.com/news/world-middle-east-51605942>.
- 78 Michael T. Morely, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 546 Emory L.J. 545, available at <https://law.emory.edu/elj/content/volume-67/issue-3/articles/election-emergencies-voting-natural-disasters-terrorist-attacks.html>.
- 79 Const. art. 85, 145 (Dem. Rep. Congo).
- 80 Const. art. 85 (Dem. Rep. Congo).
- 81 *Supreme Court upholds SEC decision to postpone Andhra Pradesh Local Body Polls*, Times of India (March 19, 2020, 1:58 PM), http://timesofindia.indiatimes.com/articleshow/74708189.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
- 82 Owen Khamula, *Malawi Supreme Court Gives Deadline on Swearing-In President: Parliament to Set Voting Day*, Nyasa Times (May 15, 2020), <https://www.nyasatimes.com/malawi-supreme-court-gives-deadline-on-swearing-in-president-parliament-to-set-voting-day/>.
- 83 Laura Angela Bagnetto, *Malawi's Supreme Court Rules in Favour of Election Rerun, But Only With Original Candidates*, Radio France Internationale (August 5, 2020), <http://www.rfi.fr/en/africa/20200508-malawi-s-supreme-court-rules-in-favour-of-election-rerun-but-only-with-original-candidates>.
- 84 Organo Electoral Plurinacional, Bolivia, <https://www.oep.org.bo>.
- 85 Const. art. 26(II)(2) (Bol.) (making voting obligatory)
- 86 Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S.Ct. 1205 (2020).
- 87 Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. Times (April 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html>.
- 88 Reid J. Epstein, (2020).
- 89 Executive Order No. 74, Office of the Governor, State of Wisconsin (April 7, 2020), available at <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession.pdf>.
- 90 Emergency Motion for Temporary Injunction, Wisconsin Legislature v. Evers (Wis. 2020), available at <https://fox11digital.com/news/PDFs/Motion-for-TRO-FINAL.pdf>.
- 91 Order for Temporary Injunction, Wisconsin Legislature v. Evers, No. 2020AP765-OA, p. 3 (Wis. 2020).
- 92 Opinion and Order, Wisconsin Legislature v. Evers, 20-cv-249-wmc (W.D. Wis. 2020), available at <https://www.courtlistener.com/recap/gov.uscourts.wiwd.45522/gov.uscourts.wiwd.45522.170.0.pdf>.
- 93 Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S.Ct. 1205 (2020), available at https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf.
- 94 Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. Times (April 13, 2020), <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html>.
- 95 Jim Rutenberg & Nick Corasaniti, (2020).



International Foundation
for Electoral Systems