

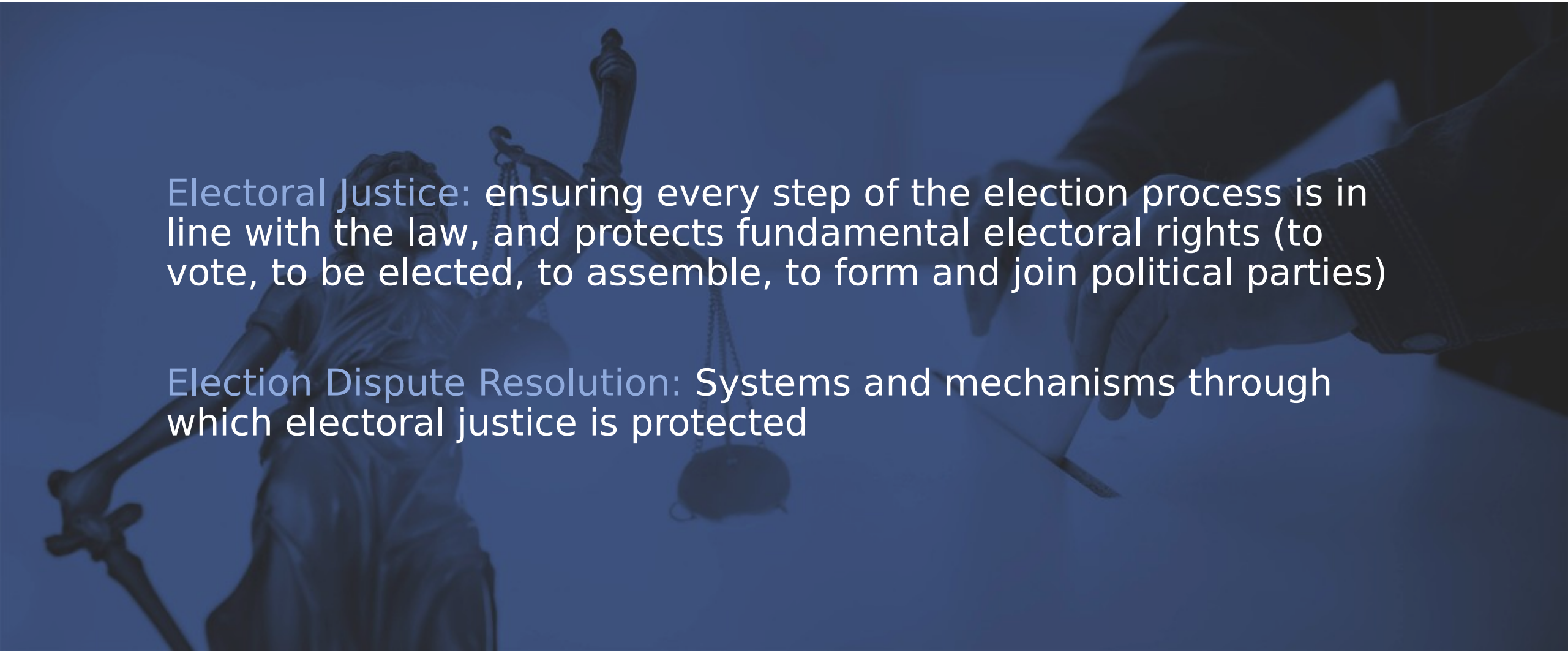
Ethiopia Cascade Training – Election Dispute Resolution
Election Benches of the Federal and Regional Courts

International Principles and Comparative Examples

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Electoral Justice: ensuring every step of the election process is in line with the law, and protects fundamental electoral rights (to vote, to be elected, to assemble, to form and join political parties)

Election Dispute Resolution: Systems and mechanisms through which electoral justice is protected

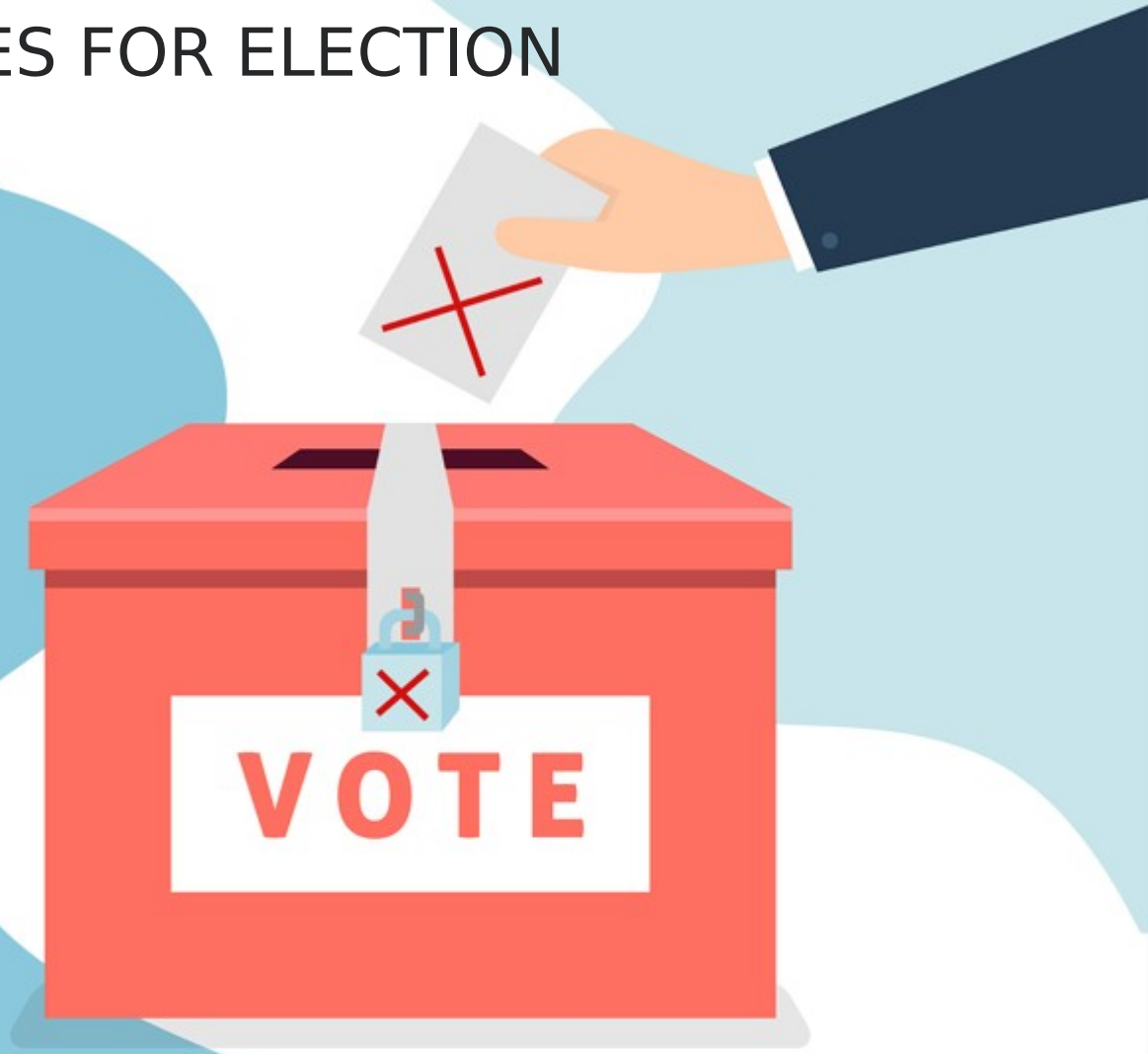
Kofi Annan Global Commission on Elections, Democracy and Security on the link between access to justice and electoral integrity:

“The effort to protect and promote the integrity of elections has to be an ongoing commitment. Legal frameworks need to be reviewed to ensure that: there is a genuine opportunity for political contestants to compete fairly; effective remedies can be applied by administrative bodies and the courts; political competitors can turn to legal redress, rather than violence or other extra-legal measures; and citizens have confidence that they can overcome any obstacles to their political enfranchisement.”

(from “Access to Justice and Electoral Integrity”: A Policy Brief of the Electoral Integrity Initiative of the Kofi Annan Foundation)

SEVEN KEY INTERNATIONAL PRINCIPLES FOR ELECTION DISPUTE RESOLUTION

1. A transparent right of redress
2. Clearly defined election standards and procedures
3. An impartial and informed arbiter
4. A system that judicially expedites decisions
5. Established burdens of proof and standards of evidence
6. Meaningful and effective remedies
7. The effective education of stakeholders



(from “Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections” (GUARDE), Chad Vickery, IFES 2011)

INTERNATIONAL PRINCIPLE 1: A TRANSPARENT RIGHT OF REDRESS

Principle

ICCPR Art. 2(3): “Each State Party…undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities….(c) To ensure that the competent authorities shall enforce such remedies when granted.”

AU Declaration on the Principles Governing Democratic Elections in Africa, IV (6): “Individual or political parties shall have the right to appeal and to obtain timely hearing against all proven electoral malpractices to the competent judicial authorities.”

Practice

- ✓ Fundamental right to judicial review with the prospect of an effective remedy
- ✓ Adequate processes to pursue a claim
- ✓ Transparency
- ✓ Clarity about legal standing to bring claims

Legal Standing

- It is important that the law defines which individuals or entities that are entitled to file election complaints
- Standing is useful in determining which complaints should/should not receive consideration
- There is a broad international spectrum of definitions of standing that vary from country to country

The US has stricter legal standing requirements compared to other countries The Supreme Court in *Lujan v. Defenders of Wildlife* set out a three-part test to determine legal standing for civil claims. In order to bring a case, a complainant must show injury in fact (i.e., that the plaintiff suffered harm), and that injury must be concrete, particularized, and actual or imminent (that is, not abstract). The complainant must also show that the defendant caused the harm, and a complaint must be capable of redress.



INTERNATIONAL PRINCIPLE 2: CLEAR STANDARDS AND PROCEDURES

African Charter on Human and Peoples' Rights obligates State Parties to adopt legislative or other measures to give effect to rights (Article 1).

ECOWAS Protocol on Democracy and Good Governance (A/SP1/12/01), Article 2(1): no substantial modification should be made to the electoral laws in the last six months before the elections, except with the consent of a majority of political stakeholders.

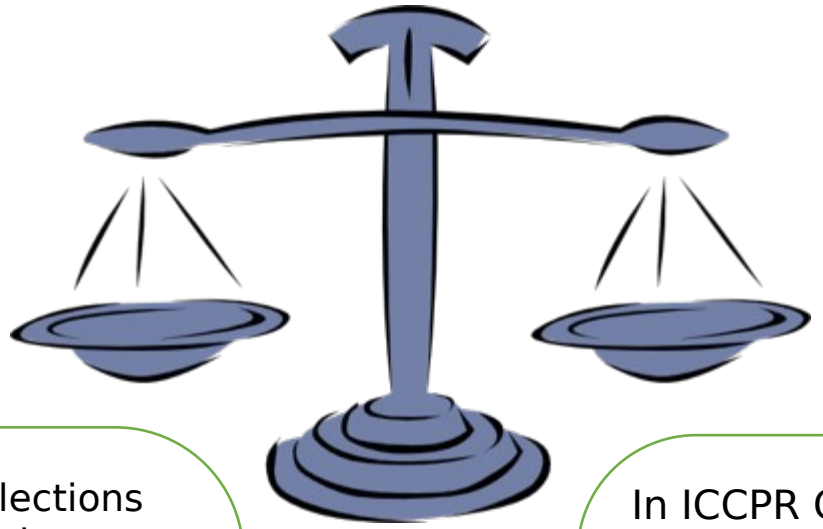
Why is it important to clearly define election standards and procedures?

- ✓ Reduce post-election litigation
- ✓ Avoid "forum shopping"
- ✓ Avoid overlapping jurisdiction and enable consistency in interpretation of the law
- ✓ Meet minimum guarantees according to international obligations and constitutional provisions

INTERNATIONAL PRINCIPLE 3: AN IMPARTIAL AND INFORMED ARBITER

ICCPR Art. 14(1): “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a **competent**, **independent** and **impartial** tribunal established by law.”

INTERNATIONAL PRINCIPLE 4: AN EDR SYSTEM THAT JUDICIALLY EXPEDITES DECISIONS



Expeditious Proceedings

Art. 17 African Charter on Democracy, Elections and Governance indicates that State Parties should redress election-related disputes in a timely manner.
In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Kenya Supreme Court Petition No. 2B of 2014: "Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment…**It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are**."

Proper Administration of Justice

In ICCPR General Comment 13, Article 14, the UN Human Rights Committee has stated that the proper administration of justice requires that principles such as **equality before the courts**, the **right of an** individual to be heard in his or her own defense, and the right to a fair and public hearing by a competent tribunal be respected. In *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others*, Kenya Election Petition (Machakos) No. 8 of 2013: "Without service, the opposite party is denied the opportunity to defend the case."

INTERNATIONAL PRINCIPLE 5: ESTABLISHED BURDENS OF PROOF AND STANDARDS OF EVIDENCE

Burden of Proof

For election challenges, the burden of proof will generally fall on the parties challenging the outcome of the election or alleging misconduct (to make a prima facie case)

*In **Namat Alieyev v. Azerbaijan**, the European Court of Human Rights (ECtHR) charged domestic courts with the responsibility of taking reasonable measures to investigate alleged irregularities when the evidence provided by an applicant is insufficient to decide the case but nonetheless strong enough to warrant additional inquiry.*

***Raila Odinga v. The Independent Electoral and Boundaries Commission (Kenya):** "…a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…"*

***Chakwera v. Mutharika and MEC (Malawi 2019):** The Malawi Law Society argued in an amicus brief that the burden of proof is fixed at the beginning of the trial and remains unchanged throughout. However, the court confirmed the more accepted international practice for election petitions that the burden may shift after a prima facie case is made.*



Standard of Evidence

The standard applied depends on many factors including the unique legal traditions of the country, the severity of the allegation and remedy sought, and the nature of the evidence to be introduced at trial

Chakwera v. Mutharika and MEC (Malawi 2019)
Preponderance of evidence: "to apply a higher standard for constitutional issues would place the focus on "the rights of those wielding the powers of State, instead of taking a human rights-based approach that puts the rights and will of the people at the centre of democratic rights.

Raila „Odinga v. The Independent Electoral and Boundaries Commission (Kenya 2017) *Clear and convincing evidence*

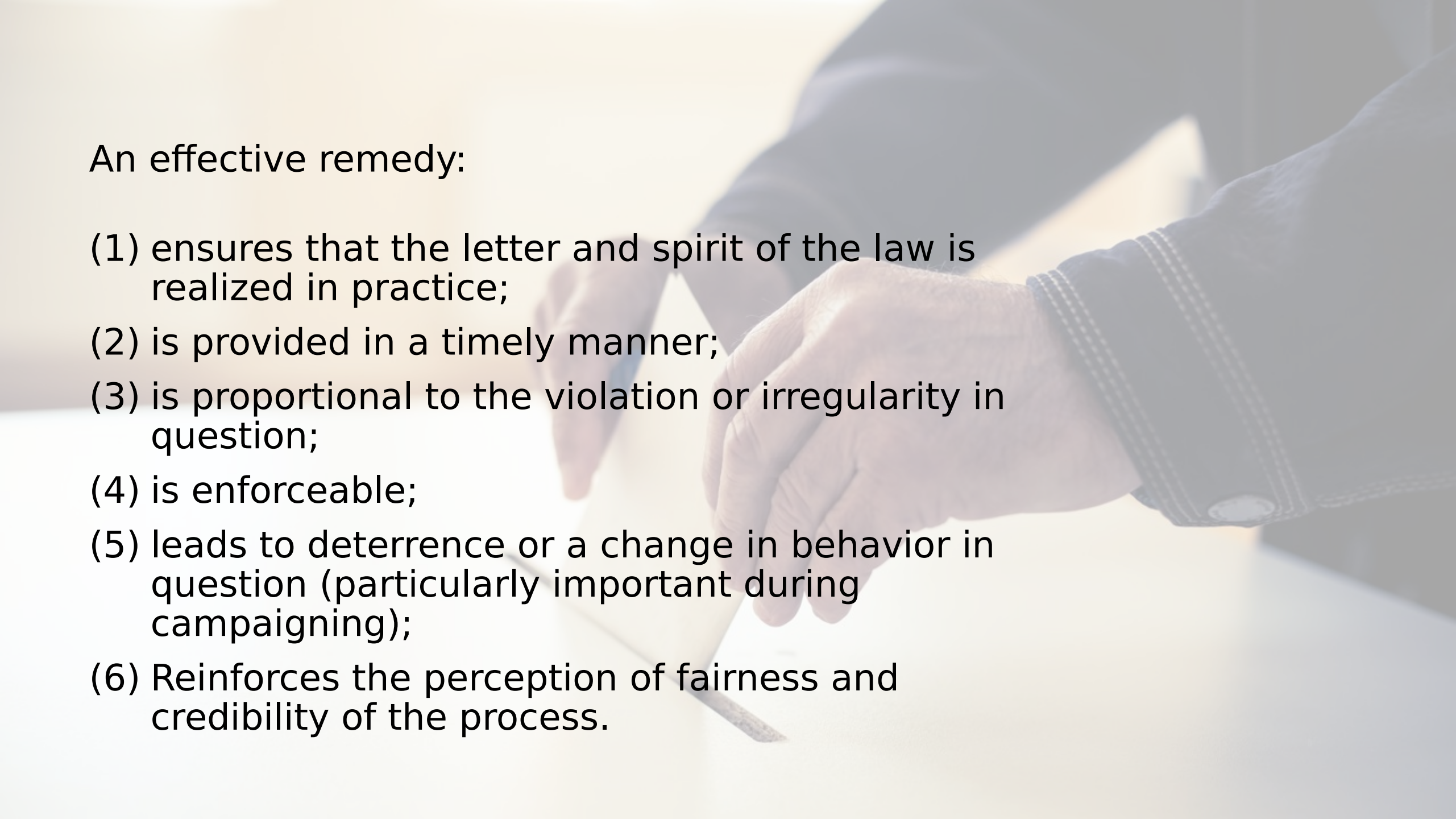
Lewanika and Others v. Fredrick Chiluba (Zambia 1999) *Clear and convincing evidence*

INTERNATIONAL PRINCIPLE 6: EFFECTIVE REMEDIES

CCPR General Comment 31, para 15: “Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States, Parties must ensure that individuals also have **accessible and effective remedies to vindicate those rights**.”

Electoral Justice processes exist to ensure every step is in line with the law and protects fundamental electoral rights. Hence, where there is a right, there must be a remedy





An effective remedy:

(1) ensures that the letter and spirit of the law is realized in practice;

(2) is provided in a timely manner;

(3) is proportional to the violation or irregularity in question;

(4) is enforceable;

(5) leads to deterrence or a change in behavior in question (particularly important during campaigning);

(6) Reinforces the perception of fairness and credibility of the process.

INTERNATIONAL PRINCIPLE 7: EFFECTIVE EDUCATION AND TRAINING

- ✓General public
- ✓Political parties
- ✓Actors with a technical role
  - Electoral officials
  - Lawyers
  - Arbiters
- ✓Media
- ✓Election observers







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Overview of Categories of Complaints and Disputes

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Types of Complaints and Disputes

- **Electoral Disputes**: (either between election contestants or between election contestants and election implementers).
- **Administrative Disputes**: (violations or mistakes that include arrangements, procedures and mechanisms related to election implementation)
- **Ethical violations**: (violations against a code of ethics or code of conduct)
- **Results disputes or petitions**: A dispute between the NEBE and election contestants concerning the determination of results.
- **Election offences or crimes**: (breach of the law punishable by sanction or criminal sanction).

Note: Complaints can be a mix of the above

Categories of Complaints and Disputes

- Complaints regarding political party registration
- Complaints regarding voter registration
- Complaints regarding candidate registration
- Complaints regarding candidate symbols
- Complaints of ethical violations
- Complaints related to voting
- Complaints related to vote counting and results
- Breaches of the code of conduct, election offences
- Other

Jurisdiction is determined by category of complaint or dispute

Key Distinctions

Fraud / Illegality

Deliberate wrong-doing by election officials or other electoral stakeholders, which distorts the individual or collective will of the voters

Malpractice / Irregularity

A breach by a professional of his or her relevant duty of care, resulting from carelessness or neglect

Key Considerations for Courts in Election Cases

Legitimate complaint vs. unsubstantiated claim: complaints should be officially filed to avoid rumor-based allegations that can undermine the election

Distinction between crimes and ethical violations: There can be overlapping jurisdiction; clarity and cooperation between institutions is important

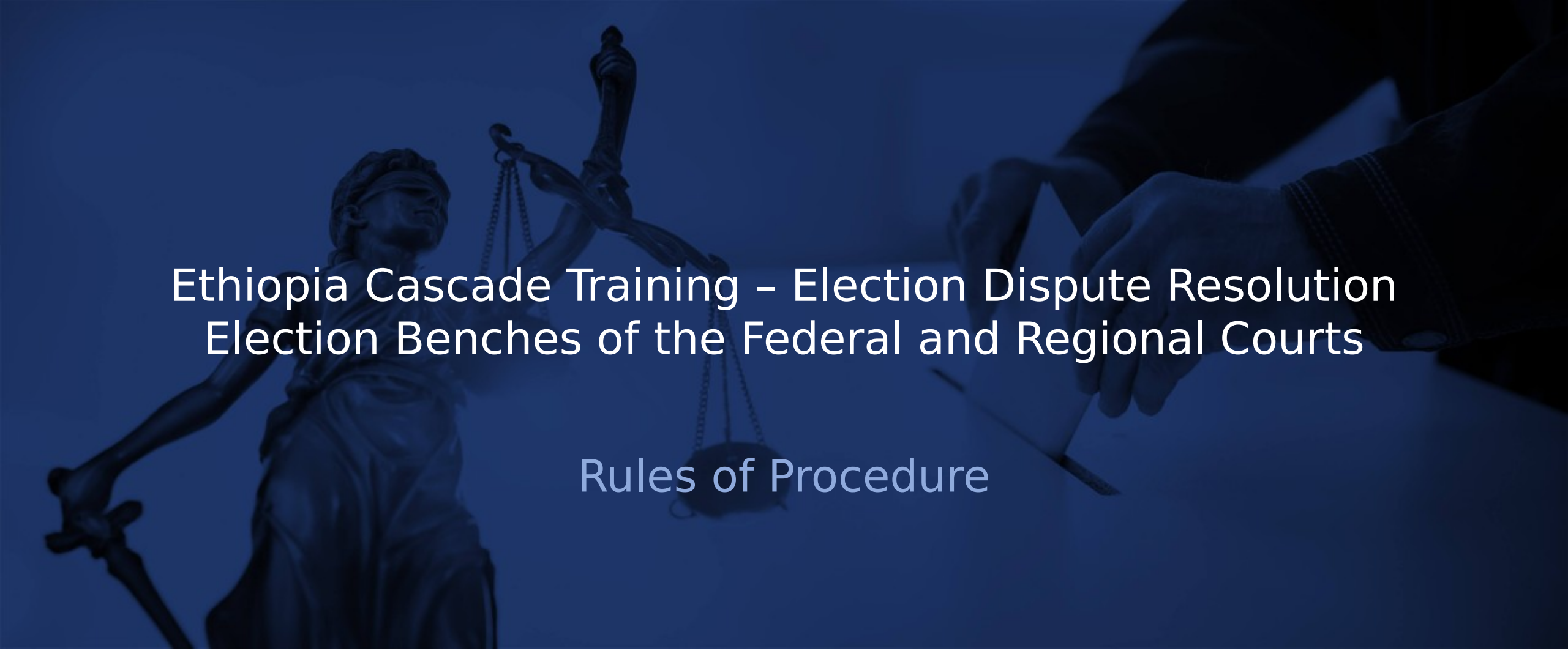
Distinction between malpractice (negligence) and fraud (intentional): both are legitimate complaints that should be addressed

Key Considerations for Courts in Election Cases

EDR processes for each stage of the election may differ, but should apply the same principles:

- Careful distinction between categories of complaints, disputes, or violations to determine what processes and remedies might apply (especially where multiple grounds for a complaint are alleged);

- An application of principles of due process.



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Rules of Procedure

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Add slides on rules of procedure



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Categories of Complaints and Disputes

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Candidate Registration

LEGAL BASIS FOR COMPLAINTS REGARDING CANDIDATE REGISTRATION	
International standards	ICCPR, Art. 25, “every citizen shall have the right and the opportunity to take part in the conduct of public affairs, to vote and to be elected. Any restrictions on these rights should be based on objective and reasonable criteria” African Charter on Human and Peoples’ Rights, Art. 13(1), “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives”
Constitution	Art. 38(1), every Ethiopian national, without any discrimination, has the right to take part in the conduct of public affairs, to vote and to be elected
Legislation	Proclamation 1162/2019 Arts. 30-42 set out the requirements and procedures for candidate registration, Art. 153 provides for complaints relating to candidate registration
Directives	Directive on Registration of Candidates, Collection of Endorsement Signatures and Symbols of Candidates Directive on Organization and Procedure of Electoral Grievance Hearing Committees

Candidate Registration



- Legal standing
- Grounds for complaint
- Jurisdiction
- Burden of proof
- Evidentiary considerations
- Timeline
- Procedure
- Remedies
- Referral of violations to relevant authority

Voter Registration

LEGAL BASIS FOR COMPLAINTS REGARDING VOTER REGISTRATION	
International standards	ICCPR, Art. 25, every citizen shall have the right and the opportunity to vote. Any restrictions on the right to vote should be based on objective and reasonable criteria African Charter on Democracy, Elections and Governance, Art. 4(2), State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people
Constitution	Art. 38(1), every Ethiopian national, without any discrimination, has the right to vote on attainment of 18 years of age.
Legislation	Proclamation 1162/2019, Arts. 17-28 set out the details and procedures for voter registration, Art. 152 provides for complaints related to voter registration
Directives	Directive on Voter Registration Directive on Special Polling Stations Directive on Mobile Polling Stations Directive on Organization and Procedure of Electoral Grievance Hearing Committees

Voter Registration



- Legal standing
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Voting

LEGAL BASIS FOR COMPLAINTS REGARDING VOTING	
International standards	ICCPR, Art. 25, every citizen shall have the right and the opportunity to vote at genuine and periodic elections…held by secret ballot, guaranteeing the free expression of the will of the voters. Any restrictions on the right to vote should be based on objective and reasonable criteria. African Charter on Human and Peoples' Rights, Art. 13(1): every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives.
Constitution	Art. 38(1): Every Ethiopian national, without any discrimination based on color, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights: (a) To take part in the conduct of public affairs, directly and through freely chosen representatives; (b) On the attainment of-18 years of age, to vote in accordance with law; c) To vote and to be elected at periodic elections(…)
Legislation	Proclamation 1162/2019, Art. 18 provides eligibility requirements to vote, Arts. 47-56 set out voting procedures and Art. 154 deals with complaints related to voting.
Directives	Directive on Establishment of Grievance Hearing Committees: Art. 18 Directive on Voting, Vote Counting, and Announcement of Results: Arts. 23-34 Directive on Special Polling Stations

Voting



- Legal standing
- Grounds for complaint
- Jurisdiction
- Burden of proof
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- Timeline
- Procedure
- Remedies
- Referral of violations to relevant authority

Vote Counting and Results

LEGAL BASIS FOR COMPLAINTS REGARDING VOTE COUNTING AND RESULTS	
International standards	CCPR General Comment 25, para 20, “there should be independent scrutiny of the voting and counting process and access to judicial review …. so that electors have confidence in the …. counting of the votes” African Charter on Democracy, Elections and Governance, Art. 17, “ensure that there is a binding code of conduct …. [that] includes a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels”
Constitution	Art. 38(1), every Ethiopian national, without any discrimination, has the right to take part in public affairs, to vote and to be elected
Legislation	Proclamation 1162/2019, Arts. 57-60 set out the procedures for vote counting, Arts. 61-62 set out procedures for results announcement, and Art. 155 provides for complaints related to counting and results
Directives	Directive on Voting, Vote Counting and Announcement of Results Directive on Special Polling Stations for people living outside their constituencies, such as students, members of the military and internally displaced people Directive on Re-election Directive on Organization and Procedure of Electoral Grievance Hearing Committees

Vote Counting and Results



- Legal standing
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Ethical violations, breaches of code of conduct, election offences