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RIGHTS, LAWS, AND NORMS: RE-THINKING INTERNATIONAL ELECTORAL STANDARDS

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Coordinator: Prof. Giuseppe Giordan

Supervisor: Prof. Sara Pennicino

Ph.D. student : Svetlana Chetaikina

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Introduction

1. State of the art

Why study international electoral standards? From a theoretical perspective, one could argue that there is no such thing. Putting together the words 'international' and 'electoral' already raises attention from the point of view of state sovereignty. But the reality on the ground is that influential international actors assert the existence of such standards and fill them with particular content. International electoral standards are a phenomenon that is born out of practice of international observation and assistance. This phenomenon has entered the theoretical field only recently through the studies of the role of international actors in elections. Academic scrutiny is therefore necessary and appropriate.

'Were elections free and fair?' is a question that raises questions. In the academic sense it prompts an interdisciplinary inquiry: lawyers look at the respect of legal rules, political scientists examine turnouts, electoral systems, and patterns of support for parties, sociologists may be concerned with public moods and preferences, while economists may point to the (in)equality of resource distribution. Indeed, the inquiry requires to approach elections from the perspectives of rights, laws, and norms. Given the importance of elections, it is hardly possible to find an area that would be indifferent and directly or indirectly unaffected by this inquiry. *International electoral standards* is the subject of this research.

The interdisciplinary and multi-layered nature of the research subject facilitated the need to tap into academic literature from different disciplines, which had to be reviewed and employed in order to construct the theoretical framework for the analysis of the international electoral standards. It must be admitted, that, due to their very practical nature, international electoral standards are one of the rare phenomena that are not only under-researched, but are hardly explained from the theoretical perspectives. Indeed, a limited amount of literature dedicated to international electoral standards is available and mostly comes from those who practice international electoral observation or assistance (Bjornlund 2004, Davis-Roberts and Carroll 2010,

Lappin 2009). This is understandable, because from the solely academic perspective it is not always possible to fully grasp what is happening in the field. At the same time, the practitioners, even if sometimes operating notwithstanding considerations of theoretical frameworks, may introduce new concepts that with time become realities and, therefore, will need to be accommodated by theories (Goodwin-Gill 2006).

The fact that the international electoral standards is one of such understudied concepts is already a finding in itself. The conseptualisation of such standards into a research subject and the formulation of the research questions were based on a considerable number of reviewed theoretical frameworks and approaches from different fields. The literature review below combines a number of general and accepted theoretical approaches in the international relations and in the legal fields with more specific and more practical considerations on the research subject. The broader academic literature on international norm formation, international law or comparative constitutional law does not directly mention international electoral standards. Indeed, as it will be explained, international electoral standards are a practical tool, the conceptual ownership of which has not yet been attributed to any of these fields. However, the attempts of practitioners to position standards as an established international legal phenomenon calls for the analysis of the relevant literature. That is why it is important to also review the arguments of practitioners within the broader frameworks of theoretical disciplines.

It has been argued that 'the process of standard setting is a struggle over the meaning of language and its implications on the conduct of states' (Mutua 2007). While it has become habitual for the international electoral domain (Boda 2004, Davis-Roberts and Carroll 2010), the notion of 'standards' is not, however, the usual term used by legal scholars (Schaefer 2004). The legal theory and jurisprudence, indeed, operate with the concepts of 'norms', 'rights', 'obligations', 'duties' that primarily have to do with the respect of legal rules, while 'standards' have in its core an evaluative implication. In fact, 'standards', as well as standard-setting have been coming into play through the human rights language and often refer to international human rights instruments (e.g. Tolley 1989). The fact that such international instruments are regarded, first of all, by domestic actors as a benchmark for national legal systems explains the evaluative

subtext of ‘international standards’, including electoral standards, and opens the door for different international actors to take part in standard-setting and assessments.

While the leading practical position of these international actors on the international electoral standards is that they come from international law (i.e. international actors judging elections by international law – see *infra*), the latter never fully embraced the phenomenon. At the same time, it needs to be mentioned that a wide practical usage of ‘international electoral standards’ prompts a number of theoretical questions. For instance, why national elections become a matter of international concern and what gives legitimacy for evaluation of domestic elections by international actors? (Santa-Cruz 2005, Donno 2013, Norris 2014). Some authors link these ideas with the changing concept of state sovereignty (see literature on sovereignty *infra*), while others explain it through human rights approach, discussing the right to democratic governance (Franck 1992). An absence of theoretical foundation leads to different interpretations of what constitutes international electoral standards (Bjornlund 2004; Goodwin-Gill 2006; Carothers 2002; Massicotte 2005).

While the practice develops rapidly, theoretical findings dedicated to international electoral standards and their scope are slowly catching up with these developments. Indeed, for many years, issues related to how governments are born were not regarded as a concern of international society (Besson 2011; Cohen 2012; Sahin 2015). But this has changed. Already the mere linguistic formula ‘international electoral standards’ that puts together ‘electoral’ and ‘international’ components clearly suggests that national elections have become a matter of international concern. Research on this phenomenon remains limited and attempts to identify ‘standards’ as a newly emerging ‘law’ (Franck 1992, Donno 2013).

This research considers the main literature related to sources of international law, (Hart 2012, Kelsen 1967, Habermas 2008) and their relationship with constitutional law (Jellinek 1901, Guzman 2008) in order to see whether international electoral standards can fit into international law sources as the latter are viewed today (Kennedy 1987, García-Salmones Rovira 2013, Koskenniemi 2005, Aspremont 2011, Besson 2010). This exercise cannot be simplistic given the debates on the changing structure of international law (Paulus 2001, Friedmann 1964, Lefkowitz 2010, Besson and

Tasioulas 2010, Van Hoof 1983). What is particularly relevant for the formation of the international electoral standards is that such debates are primarily prompted by the rise of the idea of global governance (Rosenau and Czempiel 1992, Von Bogdandy et al 2008, Goldmann 2016). Critics of global governance have argued that increasing the authority of international institutions led to their politicization (e.g. Zürn et al 2012). This thesis draws attention to the idea that global law and global authority may challenge the positions of constitutional and administrative law (Walker 2015).

It follows that another legal area that plays an important role in the research is the literature on constitutional law and especially on comparative constitutional law. Both fields are very important from the theoretical perspective and from the perspective of practical constraints, including how open constitutional law should be to the influence of international actors, who operate in constitutional and electoral fields. Having said that, it should be noted that comparative constitutional law and its methodology are a running thread throughout this research. Firstly, how comparative constitutional law can be of use when it comes to exploring international electoral standards can only be explained with the background of the current state of comparative constitutional law and its potentials and approaches (Ginsburg and Dixon 2011, Grimm 2010, Kommers 1976, Tushnet 1999), as well as the boundaries of the field (Franck 1968, Tushnet 2006, Choudhry 1998, Teitel 2004, Murphy and Tannenhaus 1977, Dixon and Posner 2011). Secondly, the attention is drawn to the comparative methodology (Jackson 2012, Hirschl 2014; Scheppele 2004) and structure of constitutional and legal argument (Donnelly 2020), including appeal to emotions (Greene 2013) as well as the importance of country studies (Tushnet 1999). Considerable amount of literature is also dedicated to the interplay of constitutional and international law, on one hand and globalization of constitutional law on the other (Kumm et al 2014, Kumm 2013, Schwartz 2003, Chang and Yeh 2012, Bartole 2020, Tushnet 2008).

Works of Habermas (2001), Klabbers (2004), and Peters (2006) are illuminating sources describing how international law can be constitutionalized. At the same time, these authors offer different notions of ‘constitutionalization’. For example, Anne Peters (2006) sees constitutionalization as ‘reconstruction of the current evolution of international law’. Although such ideas that expand constitutional rules to the world order are challenged at the level of state sovereignty, Peters (2006) explains the

challenges especially when it comes to establishing international organizations, setting standards and implementing them. Other authors argue that constitutionalization understood as an achievement of world constitutionalism is hardly possible due to the lack of global governance institutions that have political decision-making power (Dunoff and Trachman 2009). Meanwhile, most authors recognize that both essential issues, one of the internationalization of constitutionalism and the other one on the constitutionalization of international law, imply determining what the standards are and who sets them. In the words of Anne Peters, 'the normative and practical power of international law does not depend on the use of the concepts of constitution and constitutionalism, but rather on concrete *institutions, principles, rules, and enforcement*' (Peters 2006, emphasis added).

Researchers tend to link the process of internationalization with the general idea of modern challenges that go beyond state borders and, therefore, demanding new solutions from international systems (Slaughter and Burke-White 2006, Binder 2011). While some authors draw attention to the fact that the same process takes place in other legal areas, such as environmental, criminal and economic law (Binder 2011), it should be taken into consideration that electoral issues are very distinct in nature. Unlike with environmental or criminal challenges, electoral ones that might even seem minor at first sight, have a potential to change a state structure guarded by constitutional law.

The interplay of national and international legal frameworks evidently calls for the analysis of sovereignty issues which are crucial when it comes to elections. A large amount of literature set the academic background for this. The content of state sovereignty is evolving. Starting from the early theoretical models (Bodin 1576) the ideas over sovereignty have been constantly changing (Kelsen 1944, Hart 2012), including under the influence of being reconciled with constitutionalism and human rights. Indeed, it should not be taken for granted that sovereign states will open themselves to 'international electoral law'. Elections are at the core of a state's sovereignty. As it was sensibly pointed out by one commentator: '[e]lections are among the most sensitive political issues facing any country. They are at the crux of who holds power and who does not' (Eicher 2009). At practical level this means that any international attempt to change rules of electoral games needs to be 'digested' by

the constitutional system of a sovereign state. Santa-Cruz traces the process by which national elections became international events or, more precisely, what the effects of this process have on state sovereignty (Santa-Cruz 2005). He finds that domestic elections nowadays are international affairs and places the emergence of international election observation in the heart of the process of internationalization of elections, thus leading him to the conclusion about the transformation of state sovereignty.

While an election is one of the cornerstones protected and regulated by public law of the states, an international standing of the right to political participation is the first and one of the most important links between national and international dimensions of elections. The major human rights instruments do not precisely define the right to political participation – they are more inclined to spell them out through such terms such as 'genuine periodic elections' or 'guaranteeing the free expression of the will of the electors'.

It is true that political rights and electoral rights in particular provide important links connecting constitutional and international orders. In fact, human rights language has become universal because, despite cultural relativism, there is nothing more universal than the idea of human rights protection (Galanos 2010; Breau 2007). The idea of universality of human rights works as a bridge between constitutional and international level. It also changes the narrative: from the debate over notions of constitutionalism, democracy and other concepts which are contested and ambiguous the debate shifts to the entitlements. There are good reasons to believe that some structural components could be better protected if spelled out through human rights (Mayerfeld 2016, Goldsmith and Levinson 2009).

Tomas Franck's (1992) idea on the right to emerging governance is perhaps the most global among human rights approaches to elections. His claim that the emerging right to governance is a global standard, detaches this right from a state and makes it international in nature. This idea is echoed more recently by, *inter alia*, Daniela Donno: '[d]emocratic electoral norms are global in scope. These standards are used by international and domestic actors in all regions of the world as the benchmark against which to evaluate electoral conduct' (Donno 2013).

While such approaches look appealing, there is room for doubt that the right to emerging governance or similar construction can ‘survive’ in reality. Exercise of political rights is still within margin of appreciation of states, which suggests that in most cases the behavior of the sovereign states towards their citizens can hardly be explained through one uniform theoretical model. While dealing with elections, most researchers apply a case study method as the main approach and, therefore, limit their findings to certain countries or regions. This is also the main rationale for choosing an actor-based perspective for this research.

While international electoral standards include norms of international law (primarily international human rights law), they are still quite distinct in nature and in scope from more established areas of international law. The notion of international electoral standards is now taken for granted by some researchers and international actors. It prompts a situation where different authors refer to different instruments in their attempts to ‘unpack’ international electoral standards and attribute their existence to different actors and institutions. This is the reason why international electoral standards should also be addressed from the perspective of norm formation in the international relations. The research touches upon constructivist theories (Finnemore 1996, March and Olsen 1989), their critics (Checkel 1998, Hopf 1998, Florini 1996), and more dynamic versions (Epstein 2008, Risse and Sikkink 1999, Bailey 2008). In this regard, the theoretical discussions are accompanied by specific strands which analyse the rise of the normativity of election observation (Hyde 2011a, Kelley 2008), which, however, is not to be equated with the normativity of international electoral standards, as this research will further show.

Some attempts to clarify the meaning of international electoral standards were made by international governmental and non-governmental organizations active in electoral assistance and observation, such as Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), International Institute for Democracy and Electoral Assistance (IDEA), International Foundation for Electoral Systems (IFES), the Carter Center, United Nations Development Programme (UNDP), Council of Europe’s Commission for Democracy through Law (Venice Commission). In many cases such actors develop handbooks that list various international instruments and documents such as conventions,

declarations, codes of practices to serve as references on electoral issues and consolidate them under the title of ‘international electoral standards’ or ‘standards for democratic elections’ (e.g. Council of Europe 2016; International IDEA 2016; EODS 2016; OSCE ODIHR 2010).

Scholars give credit to the 1990 CSCE Copenhagen Document in setting international standards for national elections (Franck 1992, Meron 1992, Buergenthal 1990). The Copenhagen Document is not a legally binding instrument. However, political commitments are regarded as politically binding for OSCE participating States. These authors argue that the OSCE human dimension process changes the human rights law shifting it away from legal positivism (Meron 1992).

Special nature of the Copenhagen Document is supplemented by special actors involved in electoral standard-setting and their implementation. Being linked with assessment of elections or their components, application of international electoral standards goes beyond the traditional machinery of human rights protection and implies international mechanisms with special international actors such as international electoral observers. International election observation missions refer to ‘international electoral standards’ as the background for making assessment of elections in different regions of the world. At the same time, international human rights bodies have also acknowledged certain international electoral standards (Binder 2007, Binder and Pippan 2018, Arceneaux 2007, Donno 2010).

With the wave of democratizations after the end of the Cold War, election observation efforts developed rapidly (Hyde 2011a). Explanations for the rapid increase in election observation in recent decades also emphasize the role played by changing notions about state sovereignty (Santa-Cruz 2005), as well as post–Cold War changes in the international distribution of power (Kelley 2008). Hyde (2011a) argues that election observation became an international norm because the rise of democracy-contingent international benefits provided an incentive for leaders to signal their commitment to democracy by inviting in election observers. Donno (2010) explored how international actors, including election observers, contributed to electoral quality, and whether they have a potential harmful effect for governability (Simpser and Donno 2012). The blurred difference between legal and political commitments serves to connect the

process of setting international standards with the activity of ‘new’ actors such as international electoral observers. The literature dedicated to the role of the OSCE posits that the status of the OSCE and its election observers changes the traditional views on international law (Meron 1992). This inquiry can also be reversed: do international election observers act within the field of public international law and, if not, what normative framework allows them to do what they do?

While election observation receives attention from scholars, the activity of other actors with regard to developing, implementing or in other ways dealing with international electoral standards is under-researched. Although the activity of human rights courts, and primarily European Court of Human Rights (ECtHR) has been studied carefully, studies of the jurisprudence dedicated to the right to free elections reveal that the Court also takes part in electoral standard setting.

The importance of the Venice Commission’s role in constitutional matters has been noted (and promoted) in the literature (De Visser 2015, Buquicchio and Garrone 1998, Fasone and Piccirilli 2017, Bartole 2020). The basis for the Venice Commission’s opinions is the ‘European electoral heritage’ set out in its Code of Good Practice on Electoral Matters. The reference to the European electoral heritage makes the Venice Commission’s opinions authoritative in the eyes of the Council of Europe member states as it is related to how the democratic institutions are built in all states.

Anne-Marie Slaughter and William Burke-White (2006) researched the external influence on the transformation of new members ‘from inside out’, illustrating how international actors can be involved in domestic affairs. They also examined the potential danger of this situation. It should be noted that the scope of the actors and their impact differs depending on the position of a particular state, as well as many other factors and characteristics of states (Giandomenico 2015).

In conclusion, it should be noted that while the academic literature reveals the themes related to constitutional and international field from different perspectives and through the role of different actors, relatively little attention has been paid to the interaction of the constitutional and international dimensions in the electoral field. At the same time, electoral domain is essential for constitutional systems and protected from external

influence by state sovereignty. As much as it is impossible to form state governments according to the same set of externally imposed rules, one would believe that there are some democratic standards according to which democratic governments are built and function. These standards, when they touch upon the sovereign structure of the states, are not automatically rejected or accepted: they need to be tried by domestic systems and thereby crystalized in order to produce the desired results. What are these standards and how they are identified and applied is the main theme of this research.

In a nutshell, the gap in the literature is that international electoral standards have not yet been placed into a theoretical framework, while being widely used in practice. This gap identified through the literature reviewed contributed to the formulation of the research questions and paved the way for establishing the methodology of the research, which combines theory with an empirical study.

2. Methodology

This research does not question the existence of international electoral standards, as they are taken to exist as a matter of fact. Neither does this research defend or condemn international electoral standards, but rather aims to put them into a theoretical framework that explains how they are made by analyzing their content. However, the thesis questions in some parts the ‘standardization’ as an international approach to elections. Elections are one of the most sensitive aspects of political organization of power, therefore, ‘international standardization’ of elections has a potential to be questioned. This research tackles how the process of setting of international electoral standards happens and explores which disciplines/theoretical fields/ can further contribute to enhancing the toolbox of international advices to electoral processes.

Such analysis needs to be interdisciplinary. International electoral standards cannot be approached with only one lens as they are a truly a multidisciplinary and multilevel phenomenon. To date, the academic research on international electoral standards from any of these perspectives has been very limited. There is hardly any information on the actual content of what is asserted as international electoral standards and how

they fit into any of the disciplines. Consequently, neither have there been analyses of these ‘standards’ from a larger theoretical and conceptual perspectives. At the same time, one can find multiple statements on the application of international instruments to national elections, especially by actors involved in international election assistance projects. These positions do not analyse where international electoral standards belong in theory but attempt to ground advice given to the states in international legal instruments.

It is fair to say that the electoral domain, both national or international, is very rapidly developing through the activity of international actors and their interaction with states. Therefore, the reliance solely on desk research does not allow to capture these developments. This consideration impacted the methodology of the present research, which is qualitative and inspired by the interpretative paradigm, as it entails the interaction between theory and practice. Due to the complexity of the research subject, the array of the methods was expanded beyond the traditional legal analysis to the use of selected social science methods, primarily participatory observation. While this research uses social science methods, the legal methods, primarily comparative studies, are also integrated.

Theorization about electoral and constitutional domains required openness to the study of the broader framework of the institutions with which national jurisdictions constantly interact. This is especially true given that the initial step was to study the phenomenon that was overlooked by theories, but has a determinative practical effect in shaping constitutional and international rules. This is why the starting point was field research, and the theoretical elaboration was further conducted in parallel with the empirical one. During the field research the activity of the OSCE/ODIHR election observation missions was explored in several countries. Further, a comprehensive study of observers’ reports, which are public documents, was conducted and used for the analysis of the application of human rights law by the election observers.

A substantial and important part of my research was conducted through the ethnographic fieldwork (Barone 2020) in a number of election observation missions, including as a member of the ‘core teams’ of experts, whose primarily tasks include meetings with national stakeholders and provision of contributions for the reports of

international electoral observation missions. I started my election observation activity in 2014, occasionally joining election observation missions; however, from 2017, following my intention to return to analyse practical findings within the academic framework, I began participatory observation on the basis of which I collected part of the empirical data for this research. This activity can be characterized as observing the observers. Participatory observation implies primarily 'speaking and listening'. Over the course of eight years, I engaged in informal conversations with approximately three hundred international experts and national stakeholders. I observed the work of international electoral observers and performed the tasks of an international electoral observer. The participation in various observation missions within the same organization in different countries and with experts-members of different states, allowed to get some unique insights, not available through the 'superficiality of the interviews' and, of course, never written in public election observation reports.

The results of these discoveries paved the way from the subject of my research – the formation of international electoral standards, to question – to which extent electoral rules can be open to standardization? The reports of election observation missions as well as the opinions of the Venice Commission that are used in this thesis as data for analysis are drafted by people. Indeed, before any election standard gets on paper, it is 'created' in the heads of experts. That is why the method of participatory observation, which included not only informal talks but also team discussions, helped to focus on developments and phenomena that are rarely being explored and questioned from the academic perspective, such as how far standard-setting can go when it comes to the electoral field and how the process of standard-setting is organized.

With respect to this method, one could argue that effective research into this subject would not be possible without participatory observation as only the intrinsic integration into the standard-setting process gives the insights that can further be confirmed or denied by the data collected thought the published reports. Participatory observation also led to my hesitancy to rely on formal interviews as a method of data collection. I refrained from going further after several interviews in which my interlocutors, primarily state officials, asked me not to use in my research their 'personal opinions'. The formal requirements of interview format appeared to constrain the people involved in

sensitive situations over either the creation of international electoral standards (international actors) or their implementation at the domestic level (domestic stakeholders).

In parallel with the participatory observation, this dissertation approached international electoral standards from the angles of different theories that explain norm formation, in order to demonstrate that the phenomenon of international electoral standards, on one hand, engages several disciplines, but, on the other hand, its specifics do not allow to fully explain it from the perspective of only one discipline. Some standards smoothly fit into the existing theories of norm formation form the perspective of international relations, while others do not.

My approach to international electoral standards is based on the analysis of information drawn from the OSCE/ODIHR election observation reports (Chapter 3) as well as opinions of the Venice Commission (Chapter 4). In order to proceed with such analysis, one needs to understand the position of 'standards' and 'international electoral standards' in two dimensions. Firstly, it is important to discover how international electoral standards fit in the realm of international norms. Secondly, and no less importantly, it is important to understand what is the position of international electoral standards in the system of international legal sources. An interdisciplinary interplay of these two fields is important because international electoral standards do not exist as a branch of international law. Furthermore, some standards are indeed legal norms, while the legal nature of others is not so evident; some standards are firmly rooted in human rights while others have little link to human rights. In order to distinguish them from one another, the legal perspective is of key importance, in particular to shed light on the question whether international electoral standards are ultimately laws.

For this reason, several methods used in legal comparative studies were deployed. The methodology of comparative law is mostly suited for this research for several reasons. First of all, among legal disciplines, comparative law is the area most suitable for research on an interdisciplinary subject. It means that the comparative legal methodology is not constrained by the 'positivist' legal method and does not separate the legal studies from the social reality. Secondly, while this research focuses on the

institutions, it draws many examples from the countries that are members of these institutions and the way these countries process and perceive 'international electoral standards'. Such approach is only possible through the comparative legal methods as it has to do with an introduction of the rules into the legal cultures of different countries.

International electoral standards are not only a multidisciplinary but also a multilevel phenomenon, as they have to do with the national and international levels in the course of their formation. Therefore, both national (as long as we deal with *electoral* standards) and international (as long as we deal with *international* standards) recognition should be ensured, in order for a standard to have both characteristics of this phenomenon. The theory offered in this dissertation explains that the influence on the formation of international electoral standards comes from both levels: international level – through the claim-making and diffusion and national (constitutional) level – through the acceptance (or non-acceptance) of international electoral standards.

3. Main research questions

This research examines the formation of international electoral standards through the studies of electoral issues that became subjects of such standards, as they are applied by international electoral actors. In order to address this, the following research questions were put forward:

(1) What are 'international electoral standards' in practice?
(2) What are the features that distinguish international electoral standards in the systems of norms?
(3) Is there a difference between the proclaimed status of 'international electoral standards' and their real nature?
(4) How does a rule become an international electoral standard? How is the standardization process happening? What are the stages of formation and how do international actors and states influence the formation of electoral rules?
(5) Which electoral issues and to which extent are and should be open to 'standardization'?

The research questions and the main concept will further be operationalised throughout chapters 1 and 2, in which I explain the different existing theoretical approaches in their applications to the practical phenomenon of international electoral standards and put forward my own theory on their formation. All questions will subsequently feature in the analysis of the empirical data collected from the activities of two international actors specific to the formation of the international electoral standards.

4. Research objectives and contributions

The results of this research provide for better understanding of what international electoral standards are and how they are formed. This understanding is important at both the national and international levels. At the international level, it helps practitioners see how the results of their activities are embodied into the rules and what bounds states in acceptance or rejection of these rules. The legal perspective insight also should help to orient international practitioners in dealing with national elections with attention to national sovereignty. At the national level, the results of the research help the states see that not all international electoral standards come from their international obligations and that by accepting or not accepting certain claims to international electoral standards, the states also contribute to their formation.

This research simultaneously contributes to the literature on international relations and legal literature as it offers an explanation of the formation of international electoral standards, which is derived from and supported by theoretical (Chapter 2) and empirical (Chapters 3 and 4) studies. Since one of the key features of elections is their national (as opposed to international) nature, and that elections touch upon sovereignty, the findings of this research are generalizable to ultimately track and explain the formation of other types of 'standards' introduced by the international actors with intentions to influence elements that traditionally belong to the constitutional core of the state.

5. The choice of actors

For this as well as for further empirical studies that I conducted within the framework of this research two international actors were chosen: the OSCE/ODIHR election

observation missions (also frequently referred in this research as 'election observers' or 'observers') and the Council of Europe's Commission for Democracy through Law (Venice Commission). The main reason for choosing these actors is that, according to them, they apply international electoral standards when they interact with states. Through reports and opinions they put forward certain rules, labeling them as international electoral standards or referring to international electoral standards. While these are not the only actors that use international electoral standards as a reference for their activity, their role is somewhat unique. International electoral observers are among the few international actors whose activity is entirely dedicated to electoral processes. Therefore, international electoral standards represent an irrenounceable element which makes their activity possible.

I use OSCE/ODIHR Election Observation Missions (EOMs) for the studies of the empirical data since they conduct election observation and assessment in a variety of countries, including established and transitional democracies, which present rich materials for analysis. I decided to choose OSCE/ODIHR among other international election observation missions for several reasons. Firstly, the OSCE is composed of 57 participating states that includes Eastern and Western European states, North America and Asia,[1] which provides a diverse background for the research: it keeps my focus on the European countries but the results may have implications also for other jurisdictions. For instance, other prominent election observation activities, such as election observation missions of the European Union or the Carter Center, do not as a rule observe elections in Europe. Nevertheless, they use 'comparable methodologies', which means that the results of the research on the formation of the international electoral standards are applicable to these election observation activities as well (EUEOM Handbook 2016: 16).[2] Therefore, the research design that I use can

[1] OSCE Participating States are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Mongolia, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan.

[2] Each EU Member State is also a participating State of the Organization for Security and Cooperation in Europe (OSCE). Election observation within OSCE participating States is undertaken by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). The EU and the OSCE/ODIHR use a comparable methodology. The EU does not usually observe elections in the OSCE region.

be applied to other election observation missions. However, in these cases the findings have to be adjusted to the region and international instruments applicable there, and take into account the prominence of the international actors involved. In this respect, the choice of OSCE/ODIHR election observation mission also permits to study the interplay of the international electoral standards and international and European human rights standards applicable within the OSCE region.

Thirdly, my experience with the OSCE/ODIHR election observation missions and subsequent participatory observation (see supra) allowed to capture important elements of election observation experience that is normally only available to insiders. This experience helped to structure the available public data relying on the intimate knowledge of the area of study. Finally, this field experience also provided me with an opportunity of interaction with the second institution chosen for this research – the Commission for Democracy through Law.

The latter is the second actor the activity of which was followed in order to track the formation of international electoral standards. The analysis of the opinions of the Venice Commission will demonstrate that international observers are not the only crucial actor when it comes to standard formation. Also, importantly, the formation of international electoral standards can be regarded not only from the international perspective, but alternatively - from the comparative constitutional one. The electoral activity of the Venice Commission started by offering good practices but gradually acquired the tendency to standardize, progressively relying less on comparative methods. In addition, member-states of the OSCE and the Council of Europe overlap significantly, which provides for an excellent opportunity to explore how issues in the same countries are approached from the perspectives of different institutions operating on the basis of different methodology and methods. The table below explains the basis for activities of the selected actors and provides information on their memberships and working methods.

Table 1. International actors selected for these research

	International Election Observers (ODIHR)	**Venice Commission**

Basis for activity	Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE	Revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies
Reason for establishment	The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place.	Strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; - promoting the rule of law and democracy ; - examining the problems raised by the working of democratic institutions and their reinforcement and development.
Year of establishment	1991	1990
Website	https://www.osce.org/odihr/elections	https://www.venice.coe.int/webforms/events/
Methodological approach	ODIHR's election monitoring methodology therefore takes account of the situation before, during, and after an election. Instead of just concentrating on election day events witnessed in polling stations, including violations such as ballot-box stuffing or voter intimidation, missions consider the pre-election environment, looking out for violations such as administrative constraints and disregard for fundamental civil and political rights	The Commission gives advices through the opinions on whether the legislative text meets the democratic standards in its field and on how to improve it on the basis of common experience. The Guidelines relating to the working method of the Venice Commission was adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010)
Modus operandi	Election observation activity	Legal Advice
Membership	57 participating states	62 participating states

6. Outline and structure of the research

In order to find answers to the research questions, the research is structured as follows.

The introductory part of this dissertation will be followed by the explanation of how the practice gave rise to international electoral standards and of the role played by different international actors in this process. In Chapter 1, it will be then demonstrated by referring to examples from the field how 'free and fair' formula was used for assessing elections developed into 'international electoral standards' and that the label 'standards' was in use even before it was filled with content.

This will be further supplemented by a review of the theoretical framework for international electoral standards in Chapter 2. There has been no fundamental theoretical discussion accompanying the transition from the free and fair assessment to a de-facto new approach that would permit to tackle nuances of elections; however, different disciplines such as international law, international relations, comparative public and constitutional law will be discussed, with the goal to provide tools for the explanation of the formation of international electoral standards.

The reviewed theories will be further discussed and operationalized in the subsequent chapters of the research (Chapter 3 and Chapter 4), which tackle the formation of international electoral standards in practice. These chapters integrate theoretical and practical approaches. Chapter 3 will examine how the different and sometimes creative ways of application of international human rights jurisprudence by the electoral observers lead to the creation of international electoral standards, including some questionable ones. It demonstrates that, even in the human rights field, international electoral standards are not human rights standards but interpretations of human rights. The latter is often given by the election observers (*'jus observatores'*).

Chapter 4 is dedicated to the constitutional perspective made by the Commission for Democracy through Law (Venice Commission). It produced a number of comparative case studies and, indeed, made a considerable step towards promotion of comparative constitutional law. However, the methods adopted by the Venice Commission at the end are yardsticks which make such methodology similar to standardization. Two different examples, one on the stability of the electoral law and one on compositions of election management bodies, show that instead of multiplying the yardsticks, comparative constitutional law can be used in order to identify a space

for good practices (proposals of multiple choices on the basis of comparative analysis) between the main principles and red lines.

Finally, the dissertation is concluded with the summarization of the research findings that altogether raise questions about the suitability and scope of the current use of ‘standardization’ as an approach adopted by the international community for the assessment of national elections.

Chapter 1. Practical background of international electoral standard-setting

1.1. International electoral standards in practice: why is it important to study standards?

The concept of international electoral standards is widely applied in practice as something that is used by international actors to review national elections, as evidenced by dozens of international election observation missions and expert reviews of electoral legislation. Yet theoretical studies on what international electoral standards are, whether and how they are different from human rights norms, and what is their place in the realm of international norms are scarce.[3]

Existing studies of election observation as an international norm explain in detail why states invite international actors to review their elections (Hyde 2011a). Moreover, they explain why states invite observers even if they plan to manipulate the electoral processes (Magaloni 2010, Svolik and Chernykh 2015). However, few attempt to tackle the reasons why states are asked to comply with the detailed advices provided by international actors and where the normative power of these advices comes from (Santa-Cruz 2005, Donno 2013, Norris and Nai 2017).

While the majority of authors agree that observers are "useful" in promoting international standards for democratic elections by observing and reporting on electoral processes, including electoral reforms and post-electoral developments, which 'standards' observers actually use and how they apply and promote them is largely overlooked. In other words, the presence of observers and its consequences have received some scholarly attention, but the content of reports that electoral observers produce and through which they apply international electoral standards remains understudied.

At the same time, such standards do pose a number of important questions. For example, when do we know that something is an international electoral standard? How

[3] See *supra* State of the Art.

are international electoral standards identified? Are there clear criteria for states as well as for international actors to check that the rules adopted in domestic legislations and practices correspond to international electoral standards? And if yes, where do these criteria come from? These are just some questions requiring further analysis.

These questions are of high importance, given a growing number of detailed advices that international community provides to domestic jurisdictions, especially in light of the fact that sometimes international actors may even send conflicting messages with regard to the same rule. For example, neither the UN Human Rights Committee nor the European Court of Human Rights found violations of treaty law in cases of imposition of residency requirement on the right to stand for elections. At the same time, international electoral observers maintain in their reports that the introduction of such requirement goes against 'international electoral standards'.[4] Furthermore, different international subjects offered different views on the restrictions of the right to vote for persons with mental disabilities: spanning from acceptance, to restrictions based on individual assessment by a court in ECtHR jurisprudence (ECtHR 2010), to the total unacceptance of any disability-based restrictions for active and passive suffrage as established by the Committee on the Rights of Persons with Disabilities (CRPD 2011).

The deeper an assessment goes, the more details would merit to be checked against the theoretical concept of international electoral standards, if one existed. For example, does failing to publish gender-disaggregated data of the intermediate level of election administration qualifies as a violation of international electoral standards?[5] Or in which cases and why the timing of introduction of legal amendments to electoral laws may be contrary to international electoral standards? Or can composition of election management bodies run contrary to international electoral standards?[6]

[4] See *infra* 1.4. Transition of the 'free and fair' formula to application of international law to national elections.

[5] According to OSCE ODIHR (2021), '[g]ender-disaggregated data on the overall membership and management positions at TEC and PEC levels needs to be extracted and is not readily available, which is at odds with international standards.'

[6] See *infra* 4.4. Multiplication of yardsticks: recommendations on election administration.

In practice, international actors, primarily international observation missions, answer these and similar questions when they assess elections in countries observed. As a consequence, the states understand the content of standards by virtue of recommendations that they receive from international actors. The latter, regardless of their statuses (international observers, international governmental organizations and NGOs dealing with democratic assistance), refer to such standards when they recommend states to comply with these standards. Would the same standards exist in the same form without international actors naming them as such? The existence of a theoretical concept and a framework for the frequently encountered term 'international electoral standards' would, thus, provide guidance for answering these questions.

In fact, once invited, election observation missions do not leave the observed states empty-handed. Conclusions and recommendations which observers produce may have far-reaching consequences as the implementation of their recommendations and their assessment of elections condition important processes for many countries. For example, in Europe, for some countries not a mere presence of international election observers but their positive assessment of elections is needed in order to meet criteria for the European Union membership (Giandomenico 2008). As one researcher of European conditionality pointed out, the European Union itself does not observe most of elections in Europe: "In fact, the ever returning key priority of free and fair elections is not dealt with by the EU at all, but fall safely under the realm of the OSCE" (Giandomenico 2008: 7). In this context, the role of the OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR) could hardly be overestimated: conclusions and recommendations emanating from their observers can literally make or break the prospects of EU membership. This additionally puts special emphasis on the importance of understanding the basis for the observers' recommendations of electoral changes.

1.2. International electoral observers as special actors in the standard-setting process

Together with the rise of international electoral monitoring and theoretical works that explained such monitoring (Kelley 2008, Hyde 2011a, among others), the theory

implicitly accepted international electoral standards as such, further encouraging international actors to give domestic advices on the basis of international norms. In other words, international electoral standards do not exist without international actors applying them. Although these actors are not international courts or human rights bodies that enforce international treaties, the power of international observers in their areas of activities should not be underestimated.

The rise of international election observation is connected to the “third wave” of democratization (Huntington 1991). Since democracy assistance became more common and accepted, international election observation has emerged as one of the oldest forms of democracy assistance (Hyde 2011a). Emerging democracies were encouraged and expected to invite international electoral observers and, as a result of monitoring of elections, observers would make a conclusion whether one of the most important democratic institutions, elections, were free and fair. As Elklit and Svensson (1997: 32) put it:

> [E]lection observers encounter great pressure— and not just from overeager journalists—to judge whether the elections in question were ‘free and fair.’ Indeed, sometimes it seems that this is all people want to know. ‘Free and fair’ has become the catchphrase of UN officials, journalists, politicians, and political scientists alike.

A number of authors name election observation as a new international norm (Hyde 2011a, Hyde 2011b, Kelley 2008). Studies on electoral integrity pioneered by Pippa Norris gained much recognition (Norris 2014, 2015 and 2017). Election observation activities contribute to the assessment of national democratic developments especially for countries that do not have long-lasting democratic traditions. Susan Hyde (2011b: 29) argues that election observation became an international norm because the availability of international benefits conditioned on democracy provided an incentive for leaders to invite election observers as a signal of democratic commitment. Recent examples, indeed, demonstrate that the act of inviting observers is still important. For instance, Belarus (in 2020) and Russia (in 2021), who were reluctant to invite international observers and intended to put restrictions on their activities (OSCE 2020; OSCE 2021), proceeded to hold problematic elections, further providing evidence in

favour of those who see the connection between the absence of observers and the intention of authoritarian consolidation.

In other words, a mere invitation of observers already has an impact on the image of the country on the international arena, which is why even those governments that do not plan to organize perfect elections tend to invite observers. Consider, for example, one of the first reports published by OSCE observers, which reflects how the attitude of the invitation of the electoral observers can be perceived:

> By inviting the Organization for Security and Cooperation in Europe (OSCE) and the United Nations (UN) to organize observation of the election, Azerbaijan's Government also sought to consolidate its legitimacy in the eyes of the international community, and to gain international recognition of its progress towards democracy. […] In the eyes of the Government, which had invited international observers, the Mission's role was, above all, to give international credibility to what it considered Azerbaijan's transition to democracy. In the eyes of the opposition, the Mission's role was to help them expose what they considered the Government's undemocratic practices. Nevertheless, the observance of *internationally accepted standards* by all parties involved was the only principle guiding the work of the Mission in Azerbaijan. (OSCE/UN 1996, emphasis added)

When it comes to the inquiry about the standards on which observers base their conclusions, researchers have noted the role of the OSCE. Scholars give credit to the 1990 CSCE Copenhagen Document in setting international standards for national elections (Buergenthal 1990, Meron 1990, Franck 1992). According to Meron (1990), the language of Copenhagen Document goes far beyond existing human rights instruments. According to Buergenthal (1990: 6), the Copenhagen Document “moves beyond the traditional catalog of human rights and embraces concerns relating to governmental structure”, while Thomas Franck, one of the main advocates of the emerging right to democratic governance, described Copenhagen Document as “detailed to an unprecedented degree, establishing a standard that the UN General Assembly might profitably emulate in a resolution” (Franck 1992: 67). It is important to mention that, despite the fact that the Copenhagen Document is not a legally binding

instrument, political commitments are regarded as obligatory for OSCE participating States. This has also contributed to the selection of the OSCE/ODIHR observers for this research.

1.3. The 'free and fair' formula as predecessor of international electoral standards

The change from the free and fair formula to the use of the international electoral standards highlights that the election observation as an activity has also been evolving. Approaches, expectations and activities performed by the election observers have been changing. The roots of international election observation can be traced to Latin and Central America already in 1970s, where international NGOs have been particularity active in election observation (Santa-Cruz 2005). In contrast, observation of elections by the intergovernmental organisations is more recent. Although the ODIHR is not the first organisation that began election observation, today, along with the OAS and EU, it is considered to be one of the most active and established (Munck 2009, Kelley 2012).

The OSCE/ODIHR observers use Paragraph 6 of the Copenhagen Document as a key reference: "[t]he will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of government" (CSCE 1990). This wording is emblematic of the period when the "free and fair" formula was widely used in the assessment of elections by international observers.[7]

The free and fair formula may be described as the early benchmark of the international community's approach to national elections. Rather than assessing elections against some sets of 'international standards', what was done for many domestic elections by the international community was their recognition as 'free and fair' (Elklit and Svensson 1997, Bjornlund 2004, Bishop and Hoeffler 2016).

[7] According to Rakner, between 1989 and 2002, international election observers were present for 86% of national elections in 95 newly democratic or semi-authoritarian countries. Election observation has been particularly widespread in Eastern and Central Europe and the former Soviet Union, Latin America and Africa (Rakner et al 2007).

Elklit and Svensson (1997: 33) noted the UN's role in referendums of independence, which began to take place in the late 1950s: '[b]efore the UN could recognize former colonies and thrust territories as independent states, it had to know whether these votes had been 'free and fair'. Bjornlund (2004) found an even earlier example of the use of the same formula, when in 1927 President Calvin Coolidge pledged the United States to fair and free elections. The free and fair formula acquired wider use as a product of the early stages of international assessment of elections, called by Lappin (2009) the 'first generation of election observation' that was primarily concerned with ensuring that the transfer of power from colonial rulers was conducted in a free and fair manner. For example, in 1978, UN Security Council Resolution 435 called for 'the early independence of Namibia through free and fair elections under the supervision and control of the United Nations' (quoted in Bjornlund 2004: 97).

The relationship between election and peacebuilding and transition of many countries to democracies were among the main factors which contributed to the need to certify elections as acceptably democratic, typically using the 'free and fair' formula. In turn, the need for the democratization process to be recognized and acknowledged, including through elections, by the international community, prompted the rise of international election observation, as a special type of activities carried out by international actors given a mandate to assess national elections. Discussing the rise of the election observation as a norm, Hyde (2011a) reflected that the necessary condition for the initiation and diffusion of this norm was uncertainty about the commitment of governments to democracy. Therefore, compared to what it is now, the initial role of the observers packed in the 'free and fair' formula was different: the main *raison d'etre* of the observers was not to give advices but rather to state how the countries were doing it terms of electoral democracy.

Initially, 'the free and fair' formula, which provides for a "thumbs up" or "down", bottom-line judgement was operational enough, as it served the purpose of recognizing progress towards democratization. While recognizing that these processes do not simply boil down to elections, the characteristics of elections in terms of their freeness and fairness were, nevertheless, viewed as the most relevant when it comes to understanding of democracy through the nature of democratic institutions and the way they function (Huntington 1993). The free and fair formula is also related to the

international promotion of elections and democracy promotion in post-conflict environments. In the words of Flores and Nooruddin (2012: 558), ‘democracy promotion implicitly claims that elections work to make peace’. Hyde (2011b) noted that in the early 1960s and overtly in the 1980s, the premium for being identified as a democratizing regime gave “true democrats” an incentive to signal their democratic credentials to international audiences. The ‘free and fair’ approach to elections became linked with democratization and transitions to democracy, as one of the key benchmarks to judge how well a country was doing in terms of its democratic development (Huntington 1993).

In this sense, the notion of “free and fair’ is rooted in the classics of democratic theory ‘where the quality of electoral processes features as one of the variables that constitute democracy. For example, Robert Dahl (1956) offered eight characteristics for the measurement of the success of an electoral process. Butler, Penniman and Ranney (1981) discussed different conditions of conducting an election as their ‘minimalistic’ definition of democracy. Understandably, such theories did not aim to provide a working definition of ‘free and fair’ for practical application.

The institutions involved in election observation were themselves developing more guidance and international election observation indeed gave a boost to the “free and fair” formula. According to Huntington (1993: 8):

> In the late 1980s, the free-and-fair-elections criterion of democracy became more useful by the increasing observation of elections by international groups. By 1990 the point had been reached where the first election in democratizing country would only be generally accepted as legitimate if it was observed by one or more reasonably competent and detached teams of international observers, and if the observers certified the election as meeting minimal standards of honesty and fairness.

In practical application of international assistance, including election observation, the formula of free and fair elections encapsulated success of democratization (Blessington 1998). As it was pointed out, ‘[t]he quality of the electoral process is the principal dividing line between so-called electoral democracies and electoral

autocracies' (Hartlyn and McCoy 2006: 42). Observation prompted an increased interest of international actors in the detailed workings of the electoral process. The increased activity in the field of election observation has intensified demand for standardized assessment criteria (Elklit and Svensson 1997, Munck 2009), to further an understanding what do the free and fair elections imply.

1.4. Transition of the 'free and fair' formula to application of international law to national elections

Although there were few academic debates, some attempts to conceptualize the meaning of the 'free and fair' formula and to identify when an election or referendum can be labeled 'free and fair', had been made not only on the practical but also on the theoretical level. For example, Elklit and Svensson (1997) tried to give specific meaning to the 'free and fair' formula through a checklist. In this analysis, they discussed the importance of the link between elections and democracy, also with reference to Dahl's 'institutional prerequisites' of democracy, one of which is free and fair elections. Indeed, Dahl's insights could be used to give a more precise meaning to 'freedom' and 'fairness' in the electoral context. Thus, the freedom is contrasted with coercion, and 'entails the right and the opportunity to choose one thing over another', while fairness is impartiality, as opposed to an "unequal treatment of equals", which leads to unreasonable disadvantages for some people or groups (Elklit and Svensson 1997: 35). The authors considered the weight of both concepts in the assessment of elections, and combined these two dimensions with three stages of election observation that they identified (pre-election developments, election day, and post-election stage) in order to offer a checklist for observation efforts. They conceded that there was still a long way to go in the development of "criteria for evaluating elections". Bosnia and Hercegovina served as one example where, despite a number of violations, elections were accepted by observers and the international community "owing to their presumed importance for the stability and peace in the region". At the same time, some practitioners expressed doubts that it was even possible to have an agreed set of international standards for elections (Rakner et al 2007).

When 'free and fair' formula served as an international benchmark for the recognition of the legitimacy of elections, at some point it faced the problem of the clear-cut

approach: ‘free and fair’ (or not) is indeed ‘a categorical assessment’ (Bjornlund 2004). However, assessing whether the elections are free and fair in newly democratizing countries led to an increased understanding that there were rather many degrees of the ‘free and fair’ scale and, as noted by one author: “[u]nfortunately, the integrity of elections varies strongly, ranging from “free and fair” elections with genuine contestation to “façade” elections marred by manipulation and fraud” (Van Ham 2015: 714).

After several cycles of elections assessed by international actors, the shortcomings of the “free and fair” formula, which allowed to say too much without saying something in particular, started to be more evident to practitioners. There was also evidence that even one cycle of elections was not conclusive for further work on democratic consolidation. Some critics challenged the reliance on the ‘free and fair’ elections concept in the context of nation-building, stating that labeling election as the ‘free and fair’ guarantees too little, if anything at all, for further transition to democracy (Flores and Nooruddin 2012). Others usefully pointed out that in addition to elections, peacebuilding required harnessing substantive values and principles, including citizenship, participation, and accountability (Lappin 2009). Critical arguments rightfully noted that while an election is a cornerstone of democracy, it is not the only requirement to complete a democratic transition, nor does it guarantee the development of other democratic processes (Hyde 2011a).

Irrenounceably, the ‘free and fair’ formula came to be viewed critically even, and sometimes especially, by those who were in charge of its application, i.e. by international election observers. Organizations performing election observation were among the first to question the ‘free and fair’ formula and attempted to find a more specific and structured concept, at the same time avoiding the rigidity and limited flexibility of the ‘free and fair’. The decrease of the appeal of ‘free and fair’ can also be explained by the weakening of the link between this formula and democratic transition, which cast a shadow on the necessity and effectiveness of election observation as such. Therefore, giving a more nuanced meaning to the ‘free and fair’ formula could also be seen as a necessity for justifying the usefulness of election observation itself. In contrast to earlier efforts, ‘the second generation of election observation’ (Lappin

2009)[8] had to find a more sophisticated toolbox and terminology. Therefore, finding alternatives to 'the free and fair' in a way became an existential question for election observers, which explains the crucial role they started to play (and continued playing) in breathing new life into 'free and fair' and further advancing an elaborated substitute for the 'free and fair'.

Susan Hyde (2011a) noted that as election observation became more widespread in the 1990s, countries that were widely considered to be consolidated democracies were not expected to invite observers. Observers of the OSCE came under criticism from some of the newly democratising states, which argued that ODIHR observers should visit all participating States. The extension of election monitoring to consolidated democracies strengthened the position of the election observation as a norm but further weakened the 'free and fair' approach. With this extension the "free and fair" benchmarks increasingly lost their attraction. Election monitoring in established democracies also contributed to the observers' understanding that all electoral processes have their flaws. At the same time, the degree to which these flaws make elections less than free and fair is not something that could be measured consistently. Different problems in democratic elections could not be easily captured by the free and fair formula. As it was 'philosophically' put in 1997 in the OSCE/ODIHR report on Montenegrin elections:

> An election process in any country may be subject to imperfections and infractions and Montenegro is no exception in this respect. Whilst of concern the culmination of such imperfections and infractions was not of a level to bring into question the final result (OSCE ODIHR 1997a: 5).

The increasing sophistication of election observation methodology also placed greater emphasis on the pre-election period. Indeed, the "free and fair" assessment was referred mostly to the election day assessment, leaving aside other important aspects surrounding elections. The evident vagueness of 'free and fair' formula could not

[8] The term 'second generation' is used by Lappin (2009) to describe the current phase of election observation that 'commenced at the end of the Cold War and is focused largely on establishing universal consensus and standards of democracy.'

accommodate all elements of complex electoral processes. “The electoral process has to be seen as a film rather than an instant photo,” said one ODIHR’s Director, Ambassador Christian Strohal. “What happens on election day is just the tip of the iceberg” (OSCE ODIHR 2005: 5).

In this respect, the nexus between “international electoral standards” and observers could be seen as somewhat reverse when compared to international human rights bodies. Unlike the international human rights bodies created for the implementation or protection of internationally agreed rules (such as the UN CCPR committee or the CEDAW committee), international observers had to search for the normative basis for their work, especially when the political commitment to conduct “free and fair” elections proved to be imprecise and, in many instances, insufficient, to move forward with an assessment.

For the OSCE/ODIHR, an interesting pattern could be detected when observers started making their reports public and asserted that there was a normative framework on the basis of which they operate. One could expect that all reports published with this assertion would follow a more sophisticated formula than a mere labeling of elections as free and fair. However, the OSCE/ODIHR election observation reports from 1995 to present have shown that the assessment of elections against international standards came before the observers actually started using and referencing international instruments in their reports.

Indeed, international electoral standards were mentioned already in the first published ODIHR report from Azerbaijan’s 1995 election. The report states: “[t]he Mission, on the basis of its direct observation and the reports of the international observers it deployed, was thus in a position to make an independent assessment of the entire electoral process, and *to judge its correspondence to international norms”* (OSCE/UN 1996, emphasis added). The ODIHR observers concluded that:

> [b]ased on the observations made during the election campaign, the polling of 12 November and the run-off voting of 26 November, the Mission considers that Azerbaijan's first parliamentary election as an independent state in many respects *did not correspond to internationally accepted standards***,** thus

depriving the electorate of the possibility to exercise fully its right to choose freely its representatives" (OSCE/UN 1996, emphasis added).

While speaking of international norms in the early stages of the election observation the ODIHR report, however, did not always provide specific references to international instruments that could be seen as the sources of these standards. However, the report does mention, for example, the right of electorate to freely choose its representatives. The examples in Table 1 present a collection of extracts from OSCE/ODIHR reports showing how the language of the observers main conclusions varied: 'acceptable' elections; listing certain provisions that were not met; or pointing out negative and positive aspects of elections. This wording, even when it invoked "international electoral standards", did not yet make it much further than the 'free and fair' formula in terms of substance. Examples in Table 2 demonstrate different wording that the election observers use to move away from 'free and fair' formula.

Table 2. *Moving away from the "free and fair" formula: examples of different summaries of observers' assessments*

Country, year	**Statement**
Albania (OSCE 1997)	Based on the findings of international observers, we are confident to say that, in our judgement, these elections can be deemed as acceptable given the prevailing circumstances.
Montenegro (OSCE ODIHR 1997a)	The OSCE has completed its observation of the Presidential election in the Republic of Montenegro and it has concluded that from an overall administrative and technical point of view the election was generally well conducted. Therefore it can be said that the final result reflects the will of the voters.
Ukraine (OSCE ODIHR 2000b)	The Ukrainian Presidential Election held on 31 October and 14 November 1999 failed to meet a significant number of the OSCE election related commitments.
Albania (OSCE ODIHR 1996)	The conclusion of the observer mission was that in many instances the implementation of the election law failed to meet its own criteria. More specifically, 32 articles out of 79 dealing with the pre-election period and election day were violated. They include articles 4, 13, 16, 19, 21, 22, 28, 29, 31, 32, 36, 37, 38, 39, 40, 44, 48, 51, 53, 56, 57, 60, 63, 64, 66, 68, 70, 71, 72, 73, 74, and 75. In reference to the OSCE election related commitments, five out of nine articles under paragraph 7 of the Copenhagen Document were not met including 7.4, 7.5, 7.6, 7.7, 7.8. Article 8 dealing with both domestic and international observers was not fully met.

Russia (OSCE ODIHR 1996b)	The statement stressed the positive aspects of the elections: that the early statements that there would be widespread falsification of voters turned out to be false; that in general the election was well managed and well run; the individual criticism of the voting process did not in total affect the result of the ballot; that the results accurately reflected the electors' wishes on the day; that the relatively high turn out of voters was commendable and that such a level of participation represents a further consolidation of the democratic process in Russia. The statements, however, also stressed Observers' concerns regarding the pre-election period, stating in their conclusions on the second round of voting that: the imbalance of media coverage and of resources available to candidates, and the role of some parts of the Presidential administration during the campaign period, marred an otherwise effective and efficient electoral process.
Bosnia and Herzegovina (OSCE ODIHR 1996c)	[T]he general climate in which the elections took place was in some cases below the minimum standards of the OSCE Copenhagen Commitments. The problems associated with registration, the media, the campaign, and freedom of movement were assessed as serious shortcomings to the overall process, though there was no pattern of recurring infractions or organisational incompetence that seriously compromised election day. the CIM emphasised that the elections, although characterised by imperfections, took place in such a way that they provide a fist and cautious step for the democratic functioning of the governing structures of Bosnia and Herzegovina.
Armenia (OSCE ODIHR 1996d)	There has been a significant improvement in the electoral legislation and its administration, particularly at the level of the Central Electoral Commission. In many cases precincts matched international standards and norms. Although access to TV has improved, further steps could and, we hope will, be taken to continue this process. Although serious breaches in the law witnessed by international observers do not in themselves constitute a systematic attempt to deny the will of the people. Furthermore, it is the opinion of the observers that, although very serious, these breaches in the law do not seem to have materially affected the outcome of the election at this stage in the process.
Lithuania (OSCE ODIHR 1996e)	It is the view of the OSCE/ODIHR International Election Observer Mission that the second round of the Lithuanian Parliamentary elections were conducted efficiently, calmly and according substantially to international standards. However the secrecy of the ballot was still not observed universally in the second round despite attempts by the Supreme Electoral Commission to rectify this breach of the law.
Romania (OSCE ODIHR 1996f)	The OSCE/ODIHR International Observer Mission concludes that the final results reflect the will of the voters.
Moldova (OSCE ODIHR 1996g)	The Moldovan Presidential Elections of 1996 were carried out in a peaceful and generally well organised way, despite the specific problems mentioned above. The results recorded reflect the will of the people, and every voter could express their will freely. The main deficiencies noted were due to the de facto situation in the Transdniestrian territory. The fact that only a few voters from the area

	controlled by Transdniestrian leaders were able to express their civic right of electing their leaders freely, is the sole responsibility of the leaders of the self-proclaimed 'republic'.
Croatia (OSCE ODIHR 1997b)	The ODIHR commends the election administration in the Republic of Croatia for administering a generally efficient election process. The voting arrangements for displaced persons constitute a complicated voting procedure, which was reportedly handled in a professional manner. However, despite the fact that the administration of the elections represented an improvement over the administration of the parliamentary elections of October 1995, some significant issues of concern remain.
Bulgaria (OSCE ODIHR 1997c)	Administratively these elections easily conformed to the OSCE standards despite the administrative errors made in the compilation of protocols by some election commissions, which, although unfortunate, did not affect the outcome of the election. Furthermore, the campaign, although robust at times, was conducted in a tolerant atmosphere […].
Croatia (OSCE ODIHR 1997d)	The Mission has concluded that the process leading up to the election was fundamentally flawed, and did not meet the minimum standards for a meaningful and democratic election in line with OSCE standards.

In more recent times, the structure of observers' reports became more complex and, therefore, the paradigm at the basis of the assessment became itself more specific. At the same time, the changed paradigm to base assessments on international standards began to take more evident shape. As a conclusion, there was no immediate change in the substantive assessment of elections: 'international electoral standards' were introduced in the reports as a visible alternative concept to 'free and fair' language, but it is evident from the content of the reports and a lack of references to international instruments, especially in the late 1990s, that observers made authoritative pronouncements largely based on their understanding of right and wrong electoral practices, rather than specific sources of norms or instruments.

The problematics of transition of the 'free and fair' formula to international electoral standards

In parallel with these developments, attempts were taken to conceptualize 'the free and fair formula'. There did not appear to be a solid theoretical debate on the way in which the free and fair formula could be modified, although by that time considerable practical experience of observation and assistance, especially in transitional democracies, could have been enriched by academic perspectives. Nevertheless,

some discussions took place. In 1994, the Inter-Parliamentary Union (IPU) adopted the Declaration on Criteria for Free and Fair Elections that was perceived by some practitioners as reflecting a degree of consensus on what constitutes free and fair elections and a model for development of similar standards by other organizations (Bjornlund 2004). The IPU itself conducted several round-tables in order to establish at least some consensus on what constitutes free and fair elections. In the words of IPU Secretary General in 2006:

> In 1994, when the IPU published its Free and Fair Elections study and adopted a Declaration on Criteria for Free and Fair Elections, few would have imagined the extent to which 'freeness' and 'fairness' would become universally recognized as the standard by which the quality of elections is to be judged (Goodwin-Gill 2006: v).

The very question "were elections free and fair?" required answers to both questions 'what is free?' and 'what is fair?' What flaws are acceptable and still allow for elections to be pronounced as free and fair? Can elections that are not free be fair? Can unfair elections still be free? Does 'free and fair' cover all positive things about elections? The answers are not obvious. Consider, for example, transparency of the electoral process. Can elections that are not transparently run still be free and fair? Theoretically, this can be answered in the positive. In practice, observers would have no means to find out, since the lack of transparency prevents them from carrying out the proper assessment.

None of these questions have been subjects of debates in which a concrete and widely-accepted definition has been found. As the OSCE conducted an exercise to consider this issue in 2002, it noted the development of election-related international standards, pointing to the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) as important markers. At the same time, it underlined the slow pace of developing actual criteria for judging democratic elections. 'The need for such criteria is clear,' their report states (OSCE, 2002: 3).

The lack of consensus of the freeness and fairness, in turn, made it more complicated for international actors to use the 'free and fair' formula in practice. This was especially true against the backdrop of transitions to democracies becoming more and more complex and some voices arguing against the usefulness of "transition paradigm" (Carothers 2002). Given the variety of democratic practices in different consolidated democracies, one could define elections as 'free and fair' despite the fact that it is different from another 'free and fair' election in a different country, thus, making agreement on their common (and necessary) features a difficult task. Similarly, while an overall labeling of elections may be useful for informing political decisions (e.g. EU membership for Western Balkans), it has limited use for outlining course towards further democratization. Reflecting on this problem, Choe and Darnolf (2000: 228) state, for example, that 'there is no common perception on what free and fair elections are and what requirements are necessary for launching [them].' This lack of consensus may not be surprising and parallels may be drawn with the definition of democracy itself, which is far from settled (Dahl 1971 and 1989, Huntington 1991b, Simon 1998, Whitehead 2002).

Some attempts at developing a definition proceeded from the idea of what should or should not be excluded from 'free and fair' formula. A number of academic and practical attempts to frame the 'free and fair' formula were based on the exclusion of certain elements from the periodical assessment. These attempts may also be grounded in the need to delineate what internationals can assess continuously. One of the issues that was discussed is whether the electoral outcome should be one of the benchmarks for free and fair elections. Some researchers were attracted to the idea to make electoral outcome determinative for the free and fair assessment. Thus, some scholars saw a link between the victory of the opposition and a fair process:

> As the opposition was not in a position to twist the regulations or the implementation of these rules to their advantage but nevertheless won, it is reasonable to infer that the election was probably free and fair. Further, the fact that the same party has proven successful in multiple elections over a period of forty years certainly invites careful analysis as to how those elections were conducted (Massicotte 2005: 44).

The appeal of this logic is, of course, in the simplicity of application: one criterion could provide a basis for an assessment and the result of the assessment would be easily explainable to the public. Despite this, such approach also produces more questions than it is capable of answering. Firstly, the simplicity of the approach does not even require special actors for the assessment: the assessment could be made automatically once the election results are out. Secondly, this logic requires an assumption that the victory of the ruling party or candidate automatically casts a shadow on the freeness and fairness of elections. Therefore, it links elections to the turnover in power rather than the will of electorate, which may be easy for international assessment but does not entirely cover freeness and fairness.

The shaping of rules as a process has made it quite clear that the 'free and fair' is a title for rather varied content, rather than a standard itself. This debate itself moved the discourse away from the 'free and fair' formula. For example, the existence of a separate election management body does not it itself say anything about freeness or fairness of the electoral process, because it may exist in one state and may not be established in another. As a result, discussing electoral management is ancillary to improving an electoral process and such discussion is rather different from that of how to make elections free and fair. It allows observers as well as some other international actors to comment on specific aspects of already free and fair elections.

As of today 'free and fair' remains as a common "lay" descriptor of elections, meaning that international experts tend not to label elections as such. Free and fair still exists but it became less of a factual and more of a political assessment. While journalists and politicians still frequently use 'free and fair', election observers insist that any deeper assessment of elections requires a more detailed approach. At the same time, the discussion over the meaning of 'free and fair' transitioned into the discussion on which standards should be used in the assessment of elections, as well as which human rights standards are relevant at particular electoral moment and point in the process.

The most successful take in making sense of the free and fair formula for international election watchers was to approach elections through the prism of international law

(Boda 2005). One way or another, the ‘free’ or ‘fair’, or their combination, are intrenched in different international documents. The ICCPR refence to ‘the free expression of the will of the electors’ and the UN Human Rights Committee General Comment 25 was reported as addressing free and fair elections (UN 1995). The Inter-American Convention on Human Rights took the same approach (Article 23), and the European Convention of Human Rights includes Article 3 on ‘free elections’ in its first protocol. The CSCE/OSCE documents, including the key 1990 Copenhagen Document, also operate with the terms free and fair with regard to elections (CSCE 1990). Although application of these provisions proved to be complicated when it came to assessing concrete cases (this will be discussed in more detail in Chapter 3), the inclusion of these words in international instruments provided a gateway for transition from ‘the free and fair’ as a labeling tool to some specific standards for the international assessment of elections. With the exception of the Inter-Parliamentary Union (Goodwin-Gill 2006), international organizations or human rights bodies did not attempt to provide a detailed explanation of what free or fair means in practical terms. International human rights instruments formed the basis for more substantial discussions and detailed assessments by international actors.

Goodwin-Gill (2006) has offered perhaps the most comprehensive argument in this regard, asserting that international legal mechanisms buttressed by international practices of election administration, should be the premier guiding principle for determining what is free and fair. He lists international documents and internationally recognized human rights and links them with what he calls ‘constituent elements’ of free and fair elections. His theory distills ten such ‘markers’ (1) Electoral law and system; (2) Constituency delimitation; (3) Election management; (4) The right to vote; (5) Voter registration; (6) Civic education and voter information; (7) Candidates, political parties and political organization, including funding; (8) Electoral campaigns, including protection and respect for fundamental human rights, political meetings, media access and coverage; (9) Balloting, monitoring and results; and (10) Complaints and dispute resolution. Goodwin-Gill’s markers closely resemble the typical structure of today’s election observation reports. As Goodwin-Gill (2006) explains, for some of these elements the roots can be quite easily attached to the international or regional human rights treaties. Thus, electoral campaign could be seen through freedoms of expression and freedom of assembly, voter registration requirements linked with

suffrage rights, etc., while the explanations of other elements such as civic education or electoral management are mainly offered based on observation activities and country experiences, thus emphasizing the role of election observation for normative significance.

Goodwin-Gill's explanation, however, does not satisfactorily answer the question of what international electoral standards are from the point of view of international law. He does not expand on the theoretical nature of international electoral standards, but rather confirms that this phenomenon can be linked to international law only to a certain level of abstraction. Therefore, if we look for a theoretical explanation in his presentation, we will face something of a vicious (or virtuous) circle, since international electoral standards are globally explained again through the will of the people expressed in periodic and genuine elections, i.e. the phrase that gives little more clarity than the 'free and fair' formula. Goodwin-Gill acknowledges that implications (markers) that come from the latter cannot be 'specifically framed as international duties'. Therefore, he calls them 'markers' for effective implementation, the indices for free and fair elections which are 'evident in the practice of established democracies and States in transition, considered in relation to the attainment or failure to attain the stated objective' (Goodwin-Gill 2006: 113).

In other words, the task of translating abstract principles to concrete international standards falls on international election observers, although Goodwin-Gill carefully noted that the international law gives no authority to observers to do so. There is no international law obligation to invite observers. As a result, once invited on the basis of the good will of the states, observers will paradoxically contribute to the formation of international electoral standards. Notwithstanding the imperfection of this explanation, international practitioners of election observation and assistance embrace this approach as a basis for standards production.

Chapter 2. Theoretical framework for international electoral standard-setting

2.1. International electoral standards in theory: what kind of norms are international electoral standards?

When it comes to applying theories of norm-formation to the international electoral standards, it is worth considering how the different terms relate to one another: norms, standards, and international electoral standards.

An important feature of theoretical concepts of norm formation is that the term “norms” is often defined through the term “standards”. In the literature on norm formation a generally accepted definition of the norm is a "standard of appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998**,** Katzenstein 1996). Norms are also presented as intersubjective constructs that provide a reference point. Norms are "collective expectations for the proper behavior of actors with a given identity" (Katzenstein 1996: 54). There are some variations in the definitions, but these differences do not usually form the basis for theoretical disagreements among the different concepts of norm formations. Norms are also defined as “ideas of varying degrees of abstraction and specification with respect to fundamental values, organizing principles and standardized procedures that resonate across many states and global actors, having gained support in multiple forum including official policies, laws, treaties and agreements” (Weiner, 2009: 183), as well as more broadly as sets of rules with a prescriptive character for a defined scope of application (Panke and Petersohn 2012).

Following any of these definitions, fully-fledged international electoral standards are supposed to be international norms. However, there are important nuances. Terminologically, the concept of ‘international electoral standards’ was not born by the theory of international relations, nor by common behavior of the states, as long as elections remain primarily within the purview of states’ sovereign action. Therefore, states cannot present a specific rule as an international norm on elections simply because states’ interaction in the international electoral field is limited: an election

remains primarily a domestic affair. The concept of international electoral standards was in a way advanced by international community as an elaborated version of the 'free and fair election' formula.[9]

Evidently, this situation is different from the concept of 'norms are what states make them' (Shannon 2000). Firstly, the understanding of what is a standard comes from international actors; secondly, it does not necessarily possess normative characteristics in all cases. For example, when international observers advanced a claim that organization of out-of-country voting was an international electoral standard, it was taken as such by some countries (see Chapter 3). On the contrary, in this case the claimed standard was not practiced by states and therefore was not satisfying the criterion of 'collective expectations for the proper behavior' (Shannon 2000), as in fact it was not practiced by many states and was not necessarily accepted by them. Later, the European Court of Human Rights ruled that out-of-country voting was not required by the ECHR, so it is not a European human rights norm (see the detailed explanation of this example in Chapter 3). Following that development, international observers largely ceased to claim and diffuse out-of-country voting as an international standard. It is probable that if international observers continued the diffusion, regardless of the decision of the ECtHR, at least some states could have introduced out-of-country voting on the basis of observers' recommendations in order to receive more positive assessment of observers. A similar case is the residency requirement for the right to stand for elections and the right to vote (also described in Chapter 3). Although decisions of human rights bodies have so far found such restrictions acceptable, international observers are diffusing a different position as an 'international electoral standard'. As longs as states accept such standard, this recommendation has more normative recognition than the jurisprudence of human rights bodies.

We may accept that different international actors interpret standards differently and what is seen as a standard for one international actor is not necessarily a standard for another. In this scenario, it is important to discern when an electoral standard identified as such by international electoral actors is perceived by states in the same way. State

[9] See *supra* 1.3. The 'free and fair' formula as predecessor of international electoral standards.

acceptance depends on a variety of factors that are explained through different existing theories, including the famous conditionality (see, among others, Bartole 2000). Unconditional acceptance could potentially expose electoral domains of states to unlimited international intervention, on one hand, and remove any filter for international actors to 'produce' standards, which may or may not always have solid legal grounds, as it will be discussed below. For the purposes of the present inquiry, however, the attention will be focused to the international actors that identify and diffuse standards; the examples of acceptance of the diffused standards by the states are given in order to demonstrate the importance of such acceptance as a stage of the standard-formation.

2.2. Special features of international electoral standards and existing theories of norm formation

The study of literature reveals a gap between the practice, where the concept of international electoral standards develops rapidly, and the theory, which either explains international character of electoral rules only partly, or explains some rules but leaves others untackled.

Academic literature offers different ways to approach and to group existing concepts of norm formation. Some norms are explained through constructivists approaches, which are also referred as 'norm as a thing' approaches (Finnemore 1996, March and Olsen 1989), as opposed to discursive approaches that pay more attention to how the norms are shaped and reshaped. There are also approaches that are considered to be 'in between' these two, attempting to explain the norm in dynamics and to catch changing meanings of the norm. In this section, a brief overview of existing theoretical frameworks will be offered and the reasons why will be analysed to explain why they may not necessarily capture the whole pallet of possible shapes and forms which international electoral standards can take. This thesis offers the explanation of standard formation that builds on and includes those elements of the existing theories that can be applied to the formation of international electoral standards, without losing

their specific electoral character, and explains new elements which capture the process of formation of electoral standards more fully.[10]

The first wave of approaches to norm formation inspired by constructivists was indeed concerned with norm creation, dynamic and socialization. The constructivists' theories led by ideas to explain dynamics in global politics, argued that states behave in accordance with a certain logic, claiming different grounds for this logic such as appropriateness, material consequences of states actions, etc. (Finnemore 1996, March and Olsen 1989). While a lot of attention in these theories is paid to the changing external environment during norm diffusions, the norm itself remains static. Therefore, this approach is criticized for 'static depiction of norm content' and 'because it limits the ability to explain how and why norms change as they diffuse, or for treating the meaning of the norm as clear and stable (Stimmer 2019).

At the same time, such research provided a theoretical platform to study the influence of international norms on the states. Many human rights norms, including some election-related norms, were put through these static frameworks. Overall, the concepts explain the stages in which the norms are established (Finnemore 1996), advocated (Keck and Sikkink 1999), and internalized (Risse et al 1999) to the extent that at times they become to be taken for granted (Finnimore and Sikkink 1998).

One of the examples that travels in the literature is the rise of women's suffrage as a norm. Taken in statics, its diffusion can be viewed through the steps of establishment, acceptance by states, and internalization to the extent that it is rarely questioned (Keck and Sikkink 1999). At the same time, this does not explain the internal dynamic with the content of the norm. Women's suffrage moved from merely meaning women's rights to vote to the temporary special measures, thus suggesting that the content of the norm is also evolving. These days it can be observed that women's suffrage is more recognized than it used to be: from granting women the right to vote the expectation moved to temporary special measures for women's representation in legislative bodies, which suggest that the evolution of the content of the norm is also

[10] See *infra,* Chapter 3. Standard-setting through the application of international human rights law.

happening. One could, of course, look at each stage of such evolution as a new norm, as these theories allow, but the internal change in the meaning of the norm as well as the role of the different actors in these processes will not be captured. Undoubtedly, the advantage of such approaches is that by sacrificing the complexity in the meaning of the norms, or, as it was put by Krook, by looking at norms as 'a thing', they help track how we know that a particular norm is a norm when we look at it.

Among the group of constructivists' theories of norm formation, there are some that may successfully be applied to the formation of certain international electoral standards. One of the most prominent foundation theories was advanced by Martha Finnemore and Kathryn Sikkink, who have been called the 'first wave' of scholars emphasizing the role of norms in international affairs (Panke and Petersohn 2012). These authors explained the life cycle of norms and suggested the following stages for the formation of a fully-fledged norm: the emergence, tipping point, and norm cascade. The latter being a situation in which an increasing number of states become proponents of the international norm and as a result the norm internalizes.

In the international election-related field, which is rarely put into any theoretical framework, this theory was applied to explain the rise of international election monitoring as a norm. For example, Judith Kelley attempted to explain election observation as a norm through the theory of life cycle of norms (Kelley 2008). Susan Hyde (2011b) also presented election observation as a norm, introducing her own theory of diffusely motivated signaling process. She suggested that through seeking international democracy-contingent benefits by inviting observers over and over, the states unintentionally created an international norm (Hyde 2011b). While these theories may explain the rise and the fast spread of election observation, the dynamic character of election standards and the specifics of their formation, as well as other features of electoral processes and related electoral standards are left outside of these theoretical frameworks.

The theories explaining the normative value of election observation perceive election observation as a consequence of the necessity and normativity to invite observers by the states (Kelley 2008, Kelley 2012). The diffusion of such invitation is driven by different factors. However, the same logic that explains why it became normative to

invite observers (even if there is no intention to have clean elections) cannot be extended to explain international electoral standards as such.

Firstly, the key issue for both theories is why the states invite observers, therefore the focus of researchers is on the compliance of the states with what is presented as a norm - the invitation of international observers. This logic is similar to constructivist theories of norm-formation: they first describe the norm and then turn to the process of its diffusion and acceptance. However, in the case of the formation of international electoral standards, one may not know whether the claim presented as a standard is a norm until we look at the diffusion and acceptance. An international electoral standard cannot be perceived as a standard until it diffused and accepted. For example, judgments of the European Court of Human Rights and decisions of the UN Human Rights Committee allowing residency requirement for the right to vote and to stand for elections have not had adequate diffusion and therefore did not obtain full normative recognition. In contrast, the judgment of the ECtHR on unconventionality of the blanket prohibition of voting rights for prisoners was diffused widely, and such restriction was removed from the legislation of a number of countries both within and outside the Council of Europe (see Chapter 3 for details), therefore, the normative recognition of this rule allows to classify it as an international electoral standard. This means that the formation of a standard as such does happen continuously, including during the stages of diffusion and acceptance. We may posit that international electoral standards continue to be formed through diffusion and acceptance, rather than being established, then diffused, and then accepted, as the theories of norm formation mentioned above would suggest.

Secondly, Hyde's theory of signalizing behavior explains that states send particular signals by inviting election observers (Hyde 2011b: 358-360). It happens because in this domain the states still interact with each other looking carefully on "true-democrats" and "pseudo-democrats", trying to be included in the first group or at least not to send a signal that would lead to be perceived as non-democratic at all (Hyde 2011b: 360).

The same logic could not be applied to examine the acceptance of specific international electoral standards, as states rarely, if ever, interact with each other while

changing their own electoral legislation. They may of course look at some electoral practices of other states, compare elements of design of electoral systems, voting methods and even adapt them, but hardly in order to send international signals. More often, such borrowings are linked with an intention to justify these choices with references to comparative experience (Jackson 2012). Introduction of new voting technologies provides good examples of such borrowings. For instance, when biometric voter registration and ballot scanners were introduced in Kyrgyzstan in 2015 (OSCE ODIHR 2016), the country looked into the experience of Mongolia, South Korea, and other countries. Subsequently, the trust in new technologies significantly increased the confidence in the technical side of the electoral process, even when the political situation did not contribute to the stabilization of the transition towards democracy. Another example is the borrowing of elements of electoral systems. For example, in 2017 Armenia 'copied' a few elements of the electoral system from Italy, although in Italy these elements were declared unconstitutional (Venice Commission and OSCE/ODIHR 2016b). However, this did not imply that Armenia attached any international signal to this choice. On the contrary, this was the result of internal consideration.

Finally, we can note that, taken together, international electoral standards have a wider scope than international election observation. As the literature review emphasized (see Introduction), not only observers 'apply' international electoral standards in their activities, but human rights bodies make references to the standards on democratic elections, and mention of certain international electoral standards sometimes features in decisions of constitutional courts.

The constructivists theories of norm formation, including the leading one, were criticized Checkel 1998; Hopf 1998). While recognizing that '[c]ommon knowledge informing actors' calculations is not static nor is it just out there' (Finnemore and Sikkink 1998: 911), critics pointed out that constructivists do not explore the contested space within and among norms and how it might result in the fluidity or evolution of norms themselves (Harrington 2003). Finnemore and Sikkink tried to adapt their approach to the changing reality and introduced and explained the role of the international organization in standard formation, but according to them international standards at the stage of the diffusion are taken as 'networks of norm entrepreneurs

and international organizations also act as agents of socialization […] by monitoring compliance with international standards.' (Finnemore and Sikkink 1998).

The adaption of the constructivists theories to the changing environment could not in the views of some authors provide 'a theoretical basis for understanding why one norm rather than another becomes institutionalized, nor has learning theory yet provided an adequate explanation' (Florini 1996). Adherents of the dynamic approach saw the answers in social interaction (Andrighetto et al 2013). According to them, the insight that norms are constantly renegotiated in social interaction has been lost in the translation of social-theoretical claims of early constructivism into empirical research agendas (Hofferberth and Weber 2015).

It is not surprising that only the international standards established by international treaties (universal or regional) or the rules which stem from them are usually featured as examples when it comes to theories of norm-formations. However, such standards do not account for all rules advanced by international actors as international electoral standards.[11] Indeed, the formation of election-related human rights norms can only partly be explained by the existing theories because they do not take under consideration the specificity of the electoral contexts for these norms. Moreover, as in the case of women' suffrage, election-related human rights norms are reviewed, revisited and reinterpreted over time.

Other theoretical approaches provide explanation of particular aspects of norm formation. For example, the literature on the so-called 'boomerang effect' seeks to understand how the diffusion of norms occurs (Keck and Sikkink 1998). In these studies the effect of the diffusion is linked to the lobby of civil society. If the state does not comply with what civil society wants, the civil society appeals to other states and the international community ('connect transnational allies') in order to achieve the results. This leads to the formation of so-called TANs – transnational advocacy networks (Keck and Sikkink 1998, Keck and Sikkink 1999). This theory was, however, criticized for under-theorization of dynamic norm creation (Hertel 2006).

[11] See *infra,* 2.1. International electoral standards in theory: what kind of norms are international electoral standards?

The spiral pattern of transnational influence (Risse and Sikkink 1999) looks at conditions under which international norms are internalized and applied domestically. This theory focuses on pre-given standards and builds its work on universality of the human rights and human rights language. The approach does not allow enough flexibility for the study of the emergence of international electoral standards, since it is not helpful to approach such standards as pre-given. This theory could be usefully employed for understanding of the constitutionalization of international electoral standards, but the first task at hand is rather to establish what international electoral standards are.

A cluster of theories referred to as dynamic approach, focuses on the processes that give birth, shape and reshape international norms (Epstein 2008). Norms are taken as they are but they can change: different agents have different roles in the creation of the norms, and they act under certain conditions. They are constrained by existing fields of norms, cognitive frames and existing systems (Snow and Benford 1988). Norms are adopted because they are vague and as such they can carry a range of meanings for a range of actors (Bailey 2008).

However, the latter idea was also critically reviewed and reassessed by researchers of norm change and contestation. These studies concentrated on a dynamic approach to norms, tracing the change in their meaning over time. Such theories are complementary to the study of the international electoral standards. Mona Lena Krook and Jacque True (2012) identified in their theory 'internal' and 'external' sources of dynamism in norm life cycle. They argued that 'internal and external components interact to shape the origins and subsequent development of individual norms' (Krook and True 2012). In this regard, the findings in chapters 3 and 4 are in line with their premise that environment and debates surrounding the norm have substantial influence and may change the norm's content.

The diffusion is one of the key aspects in the norm-formation. Diffusion as a concept is applied to a wide range of social and political phenomena and can be described as interdisciplinary. While the studies of the diffusion of policies prevail in the literature on international relations, studies of the diffusion of institutions also grow in

importance. Such studies include different organizational forms, from regulatory agencies to women's political rights (Gilardi 2005, Jordana et al 2011, Ramirez et al 1997) and democracy itself (Starr 1991, Brinks and Coppedge 2006, Gleditsch and Ward 2006).

The formation of international electoral standards is consistent with existing theories in this regard. The diffusion, as emphasized by scholars, refers to the process rather than the outcome (Elkins and Simmons 2005). Distinction has been made between diffusion and convergence, and scholars avoid making a link of direct causality between diffusion and convergence (Holzinger and Knill 2005, Heichel et al 2005). They acknowledge that convergence, which they define as a significant increase in policy similarity across countries, may or may not result from diffusion. This approach allows to study diffusion as a process. In the framework of the research presented here, this does not preclude from referring to domestic acceptance as a stage of international electoral standard-making, taking into consideration that diffusion may or may not be the reason for the acceptance.

Concluding this brief overview of norm-formation theories, it should be emphasized that the establishment of an international electoral standard should be examined in all its life stages, including diffusion and acceptance. When we look at an election-related international rule, which is claimed to be a standard, it may or may not be an international norm. On the other hand, an international norm, for example, an election-related human rights norm, also may or may not become an international electoral standard (see chapters *infra*). In sum, conclusions can be drawn regarding the claim that an international electoral standard exists only when the claim is diffused and accepted.

2.3. International electoral standards as a 'legal' phenomenon

While practitioners have actively attributed the status of international norms and even norms of international law to international electoral standards (Davis-Roberts and Carroll 2010), public international law and theories of international relations do not claim to accommodate the entire concept of international electoral standards under

their theoretical umbrellas. As explained above, international electoral standards are not born out of the interaction among states. The 'internationality' of electoral standards is obtained through the involvement of special international actors in the electoral processes, which are by and large, domestic processes.

International electoral standards are not regarded at an international stage as a branch of public international law. Unlike other areas, such as international criminal law, international humanitarian law, and even international human rights law (which has close links with elections through suffrage rights), international framework for elections, to the extent that it exists, has not acquired recognition as "law".

In practice, the approach according to which national elections are to be assessed on the basis of standards linked to international law, mainly international human rights law, became dominant now, because it paves the way for international organizations to have 'a saying' on national elections (Boda 2005, Davis-Roberts and Carroll 2010). Practical activities, such as election observation and assistance are equipped with a claim that they assess elections against international electoral standards emanating from international law. This approach is chiefly responsible for the production of the notion of 'international electoral standards', which may be regarded as an elaborated international version of the 'free and fair'. However, the practitioners claim that '[p]ublic international law provides a sound foundation for such standards' (Davis-Roberts and Carroll 2010: 418).

The primary assertion of these actors is that they apply existing international standards to national elections through such activities as assessments of elections, reviews of legal frameworks, technical assistance, and guidelines. For example, in the 2020 Guidelines on Political Party Regulations, one of the recent documents issued jointly by the Venice Commission and the OSCE/ODIHR, we find the following wording: 'The Guidelines are primarily intended to illuminate a set of hard law and soft law standards, as well as to provide examples of good practices for legislators tasked with drafting laws that regulate political parties' (Venice Commission and OSCE/ODIHR 2020). Final Reports of OSCE/ODIHR election observation missions commonly include the following sentence: '[t]he ODIHR EOM assessed compliance of the elections with

OSCE commitments, other international obligations and standards for democratic elections and national legislation'.

In other words, the idea of international electoral standards was introduced not only because out of a sudden international law became applicable to national elections, but also because for many new democracies (and those states maintaining a democratic 'facade'), the international community needed more (advanced) tools to monitor their further transition. These tools were named international electoral standards, which sounds more precise than the free and fair formula discussed earlier. But what does it mean exactly and how is it applied? Given where the notion comes from, one element is clear – it is supposed to bring international law, to the highest degree possible, into the assessment of national elections.

Two reasons are named by practitioners as being chiefly responsible for the application of public international law to domestic elections. Firstly, in their view public international law creates a framework for international standards for democratic elections based on the existing treaty obligations as well as customary international law. Secondly, the developing nature of international law or, how the authors put it, the 'living body of law', allows to expand the pull of obligations and commitments and this living body of law can be used for 'the changing needs of international community and the states themselves' (Davis-Roberts and Carroll 2010: 418). Other arguments relate to the general character of international law that helps to foster dialogue on electoral standards, and its prescriptive character that is supposed to facilitate the recognition of 'imperfectness' of most elections.

In this regard, practitioners have started positioning international electoral standards among the sources of public international law listed in Article 38 of the Statute of the International Court of Justice: namely, treaty law, custom, and general principles complemented by case law and the writings of eminent specialists. With respect to treaty obligations, it is unquestioned that states signed and ratified international treaties, and are bound by certain obligations. However, when it comes to the electoral field, the interpretation of these obligations becomes an art of balancing between the universal nature of human rights, on one hand, and the state sovereignty on the other (see the next chapter). The application of treaties as international electoral standards

in this scenario is supposed to reflect this balance. The practice, however, shows that it is not as simple as it may seem. In the next chapter, the implementation of the provisions of international human rights treaties by international electoral observers will be analysed. While the observers claim that they apply international human rights law to national elections, the practice reveals that in many cases what they apply is their own interpretations of these provisions.

In the same vein, electoral practitioners searching for ‘a window’ to go beyond the provisions of international treaties made claims that they are also applying customary international law when judging elections against international law. In the views of these authors practices of states

> […] can thus become the basis of binding customary international law when it is followed consistently over time (the period of time can be relatively short), where it is widely followed (but not necessarily universally), and where there is evidence (which may be a matter of inference), that the practice is considered obligatory as a matter of law (Davis-Roberts and Carroll 2010: 421).

Therefore, they look for practices of states, repeated provisions in electoral legislations in order to find proofs of states’ actions that would form an international custom. In this process, such sources as declarations and resolutions adopted in international fora, as well as handbooks and manuals produced under the auspices of international organizations, are being equated with such documents as the Universal Declaration of Human Rights.

However, from the perspective of the subject-matter of elections, it is hard to accept that beyond the broad principles, specific international electoral rules can emerge as customs. This is due to the fact that specific rules governing a national election are not a matter of international public law but they fall under the realm of constitutional law of each state. Therefore, compilations of practices can be regarded as some patterns from the point of view of comparative constitutional law, but hardly from the

perspective of public international law in general.[12] Exception made for cases where they directly have to do with human rights considerations (e.g. right to vote, freedom of expression), such state practices remain the matter of constitutional concerns. Moreover, states do not interact with each other when it comes to their national elections, but they act within their constitutional systems. The practices that some would like to call 'international custom' cannot be born when the state is not engaging in any international interaction.

One more important point worth mentioning here is that international customs are norms born from state behavior and then validated in international law. In the case of international electoral standards and the practice of their formation, international actors often engage in imposing certain models of behavior on states. Even if this behavior becomes accepted by many over time, especially transitional democracies, a 'customary' nature of these norms is very much questionable. Another example that will be considered in more detail later, is the establishment of independent election management bodies. It is difficult to argue that the establishment of independent election management bodies is an international customary norm, *inter alia* taking into account that these bodies are born from the advice of established democracies to transitional democracies, and it is not covered by human rights law.

The vagueness of existing explanations of what international electoral standards are from the perspective of international law does not provide clear answers. When it comes to the practical application of such standards, they are positioned as application of international law to national elections. In many jurisdictions, electoral law as a branch of law and as a legal discipline forms a part of national constitutional law. In the US, at the turn of this century election law started to be regarded as a legal discipline in its own right – attracting top constitutional lawyers, which evidences that even when election law developed a tendency to specification, it did so within the bounds of its mother-field – constitutional law.

[12] There are views with regard to possible internationalization of the constitutional law. This research does not go that far – claiming that international electoral standards is a part of the internationalized constitutional law, although it may be a good example.

Around the world, domestic jurisprudence on electoral cases falls within the domains of constitutional and administrative law. Elections always belong to national constitutional structure as they deal with the organization of power. The organization of power is hardly separable from politics (Pildes 2004), which is primarily a matter of national concern rather than international. This potentially explains why the idea of 'international electoral standards', was not taken on board as a concept by constitutional lawyers. As a result, international electoral standards were covered neither by constitutional law, nor by international lawyers for whom the electoral field is at the core of state sovereignty, which should be approached with care (see the following chapter). Although the changing concept of the international law can accommodate 'sources of international electoral standards' under the 'soft law sources', international law simply lacks the competence when it comes to the production and application of standards on rules of national political competition, which is a part of domestic organization of power.

Regarding Davis-Roberts' and Caroll's (2010) second argument referring to the developing nature of international law, one can acknowledge that theoretical discussions over sources of international law accept that the density of the law-making process has increased 'with more legal norms being adopted over more issues previously left to national law-making process' (Besson 2010: 165; Cohen 2012; Sahin 2015). In addition, the sources multiplied and the number of decision-makers increased. International law's 'normativity has also evolved drastically': the 'degree of normativity ranges from low-intensity or soft law to imperative law' (Besson 2010: 165). The changing concept of what international law is and its readiness to accommodate more international norms does not, however, mean that anything defined as norms by internationals could fall into the domain of international law.

The fact that the elections are prerequisite of democracy does not per se call for the existence of international electoral standards. According to theories explaining the sources of the international law, 'international legal process can give rise to complete legal norms (*lex lata*) but also to intermediary results such as legal project (*lex ferenda*). According to Susan Besson (2010), they can have same sources and even be part of the same law-making processes. These projects, which she calls 'intermediary legal products' are not legal norms but they 'may be vested with a certain

evidentiary value in the next stages of the law-making process' (Besson 2010). In application to my theory of formation of the international electoral standards, certain claims to international electoral standards may indeed be qualified as intermediary legal sources, which means that they are non-laws as at the moment of claim-making as the degree of normativity of freshly made claims is very low. I will demonstrate that case-law of human rights bodies can also be seen as a claim to standard but, at the same time, case-law is a legal source. What will become a standard will depend on the other stages of standard-formation (diffusion and acceptance). Paradoxically, legal sources may be left outside of the framework of standards, while intermediate legal products may acquire normative value through diffusion and thus will be accepted by national legal frameworks of states.[13]

That is why the division of legal sources into hard law and soft law does not cover all phenomena presented in practice as international electoral standards. The fact that non-legal norms may have essential regulatory power is not new and will also be confirmed by the analysis of empirical data in the next chapters. For example, interpretations of international human rights treaties that do not correspond to interpretations of the same provisions by human rights bodies may not be regarded as laws, despite the intention of interpreters to present them as such. However, such interpretations are still diffused and, most importantly, states may decide to follow them – further contributing to the development of such interpretations into standard. At the same time, the decision not to follow alternative interpretations, but at the same time staying within the provisions of the treaties as read by human rights bodies, does not lead to violation of international obligations. Different claims to standards may arise from different sources and may, in practice, deviate from each other. If we regard every statement that is presented as a standard as law, even soft-law, we risk ending up with a conflicting system of legal sources at the level of international benchmarks for elections.

[13] See practical examples *infra,* Non-linear standard setting and shortcomings in diffusion in Chapter 3.

2.4. Sources of standards. Standards and 'good practices'

The sets of 'standards' that international actors use for national elections are known by different names: 'international *standards* for democratic elections' (OSCE ODIHR 2003, CIS 2002), 'international *criteria f*or free and fair elections' (IPU 1994), and, more broadly, 'international *standards* for elections" (EU Compendium 2016). As noted earlier, in practice, attempts have also been made to distinguish between 'standards' and 'good practices'. This distinction is attempted on the basis of the mandatory character in international law, indicating the level of commitment of the states with regard to a certain rule that international actors put forward.

The elasticity of the term 'standards' supplemented by the absence of the precise legal meaning can indeed accommodate various sources. For example, a compilation of 'international standards for elections' produced for European Union election observation missions distinguishes between 'treaty standards', 'non-treaty standards', and 'other initiatives/good practices'. 'Treaty standards' are contained in legally binding international treaties. 'Non-treaty standards' are defined as the

> body of resolutions of inter-governmental organisations containing declarations, commitments, joint statements, or declarations of policy or intentions. […] Non-treaty standards are usually adopted by the highest decision-making bodies of international organisations concerning issues that reflect new concerns or developments on which the political will to conclude a legally binding treaty is insufficient, or the matter is of such a nature that the adoption of non-treaty standards is better suited for the intended purpose (EU Compendium 2016: 15-16).

In contrast to 'standards', other initiatives 'do not create norms, but provide indications on how to fulfil the norms; they provide examples of practices that can help States implement their obligations' (EU Compendium 2016: 17). The difficulty of defining 'standards' is evident already from these efforts. The same elasticity which allows holding up various 'soft law' sources as standards also leaves much room for

discretion. Reflecting these difficulties, some frustrated commentators have called on international observers to refrain from using the term ‘standards’ altogether (Meyer-Ohlendorf 2010).

The simpler alternative would be to acknowledge that some international electoral standards exist as imperative rules. These are provisions of universal and regional human rights treaties. There can also be ‘low intensity standards’ or ‘soft laws’. Such status may be attributed, for example, to non-binding resolutions of international organizations. It has also been attributed to the writings of the Venice Commission (Bartole 2020), although this may blur the line between consensus-based resolutions and individual expert opinions. The leading approach in practice seems to exclude soft law sources from the definition of standards, attaching to the notion of ‘standards’ imperative weight of an international obligation. One illustration of the definitional challenge posed by ‘standards’ is the attempts to draw a clear distinction between a ‘standard’ and ‘good’ (or ‘best’) practice:

> [I]t is important that observers distinguish between obligations and ‘best practices’. Obligations are the standards against which an election is assessed, ‘best practices’ are the means to meet those standards (Davis-Roberts and Carroll 2010: 430).

Such distinction is of course not as straightforward as it sounds. For example, ‘good practices’ may be synthesised in a reference document. One of the key sources of ‘good practice’ for election observers is the Code of Good Practice on Electoral Matters, developed by the Venice Commission (Venice Commission 2002). The Venice Commission is an expert body created under the auspices of the Council of Europe, but it is not a decision-making body of the intergovernmental organisation. The Code of Good Practice illustrates the possibility of international standard-setting through the means different from traditional consensus-building in decision-making bodies.[14] Some provisions of the Code of Good Practice have acquired wide

[14] See *infra,* Chapter 4. Standard-setting through yardsticks of Western European heritage: study of opinions of the Venice Commission.

acceptance, even exceeding the weight of conventional 'standards'. Yet the compendium of 'international standards' for EU election observers places the Code to the third tier of 'other initiatives/good practices' (EU Compendium 2016). Election observers have also tried to distinguish standards and good practices through the language of recommendations, but empirical analysis shows that they are not consistent in this distinction (Chetaikina and Vashchanka 2019).

If international actors insist that they merely apply international electoral standards, but do not produce them, it would be logical to presume that such writings do not have a legal standing separate from international treaties or other international hard law or soft law documents which they reference. Analysis of empirical data, namely election observation reports and opinions of the Venice Commission, suggests at least two trends. Firstly, the recommendations that international actors produce may, in practice, go beyond the wording and the meaning of the international legal sources they reference. Moreover, some actors claim that their writings are the basis for the generation of new standards. The Venice Commission does this regularly, and arguments have been made in favour of acceptance of its role in the creation of transnational legal order (Bartole 2020).

Secondly, and importantly, the empirical study (see *infra in chapters 3 & 4*) clearly shows that election observers engage in autonomous interpretation of international human rights instruments, which at times departs from the existing jurisprudence of human rights bodies. In the analysis presented below such interpretations are called '*jus observatores*', to emphasize the para-legal character of this phenomenon. Several examples are discussed in the following chapter, such as election observers' position on incompatibility of any residence requirement with the right to vote and equality rights, while human rights jurisprudence treats this limitation as permissible. In this regard, the competing 'standard' is produced by the observers. If international electoral standards were regarded in their purely legal dimension, the observers' interpretation would be disregarded, as it deviates from international and European case-law. While case-law is a source of international law, interpretations of observers also form 'international electoral standards'. It would thus appear that from the legal perspective, international standards are 'a separate box', created in order to use

existing sources of international law for the assessment of elections but also to produce new ones.

In this research I do not draw a line between “standards” and “good practices” on the basis of their titles. From a theoretical perspective, I refer to a particular rule as a standard when it has normative recognition, which the initial claim to a standard acquires through diffusion by international actors and acceptance by the states. In this respect, practice shows that the claims that come from accumulation of “good practices” do not have less chance to become international electoral standards, as long as they are diffused and accepted. One clear example of such claims is the introduction of election management bodies in transitional democracies. It is not something that international law requires; however, the diffusion and insistence on the necessity for the transitional democracies to establish such bodies with a certain composition, as well as the practical acceptance of this requirement, make the existence of independent election commissions more ‘standard’ than, for instance, provision of voting rights for prisoners, which is a requirement of international jurisprudence (see details *infra*). Rather, one could argue that the opposite is true for “good practices”: a reference to “good practice” conveys the idea that the rule in question already exists in the practice of many states, therefore such claims may well be prone to further diffusion and acceptance on the basis of existing examples.

The linguistic distinction between “standards” and “good practices” may also be attributed to the fact that different international actors involved in the process of assessment of national elections employ different terminology to provide the basis for their assessments and recommendations. While one stems more from the international perspective, the other (“good practice”) speaks more to comparative approach and operates with such notions as “electoral heritage”, discussed further below. At the end, the claimed, diffused and accepted electoral rules are seen as ‘standards’ of expected behavior, and therefore, have normative recognition of international electoral standards. This also adds to the multidisciplinary nature of research on international electoral standards.

From the perspective of international relations theories presented earlier, “good practices” are covered by the term “standards” since the term “international electoral

standards" is not synonymous with international treaties. Thus "good practices" may be more specific, if they refer to certain examples in state practice of how things should be, while standards could be more general – as an aspirational goal. If any consistent distinction can be made between standards and good practices, it is that good practices relate to the behavior of the states, and in this respect standards may originate from good practices. In any event, for the purposes of this research I regard "good practices" as a subset of "international electoral standards".

Chapter 3. Standard-setting through the application of international human rights law: study of OSCE/ODIHR reports

As it was explained in the previous part, the approach according to which international electoral observers apply international law to domestic elections is dominant in practice. This approach primarily relies on the human rights law instruments such ICCPR and the ECHR. Based on the acceptance of the human rights discourse with regard to elections, the diffusion of the human rights claims by the international observers it will be explored in the following paragraphs. Human rights law is being used as one of the vehicles to carry out standardization, but the observers do not always take into consideration peculiarities of the states when it comes to specifics of elections. As a consequence, the universal nature of human rights is often put forward as an argument in favour of standardizing electoral rules, even when this may be questionable.

In order to see how this happens, this chapter will unpack several issues. Firstly, it will explore the link between national sovereignty, elections and human rights, and the way in which electoral rights are reflected in the language of international human rights instruments. Secondly, practical examples will be used in order to demonstrate how international observers use international human rights law to domestic jurisdictions. Finally, it will be argued that human rights standards do not qualify automatically as international electoral standards, because in many cases they are not directly 'delivered' to the state by human rights bodies but through the activity of election observers, i.e. 'diffused' in the terminology of the previous chapter.[15] Despite the fact that observers present their recommendations to the states as international electoral standards derived from international law, in reality these are more accurately describable as observers' own understandings and interpretations of international law. The latter are then 'standardized' by the observers over time.

[15] See *supra* Chapter 2. Theoretical framework for international electoral standard-setting.

3.1. International human rights protection and national elections

Sovereignty is a necessary characteristic of the state and a basic constitutional doctrine of the law of nations (Brownlie 1990: 287). The UN Charter recognizes sovereign equality of member states (Article 2.1) and its existence underpins international relations and the international legal order.[16] The scope of state sovereignty has been debated, including from international human rights law scholars and researchers of international relations (Falk 1981, Kamminga 1992, Mills 1998, Brown 2002, among others). The content of state sovereignty is evolving (Falk 1981, Besson 2011). Despite the fact that the human rights discourse is among those responsible for the changing concepts of state sovereignty (Klein 2007, Sieghart 1986), when it comes to political rights, the sovereignty argument becomes more vocal (Steiner and Alston 2000, Marks 2000). This is inevitable especially in those cases where the political organization of power is an issue. An election may be regarded as one of the cornerstones of state sovereignty, protected and regulated by constitutional and administrative law of states. Even the more far-reaching concepts of global governance (Paolini et al 1998; Rosenau and Czempiel 1992, Von Bogdandy et al 2008) do not attempt to take away the states' prerogative in organizing of their internal power, which includes a wide range of electoral rules. International electoral standards in their entirety cannot be subject of international public law because electoral standards touch upon of the core elements of the constitutional organization of power through elections.

This does not mean that elections are not influenced by international norms. Some authors find explanations for the rapid increase in election observation in recent decades in changing ideas about state sovereignty as well as in post–Cold War changes in the international distribution of power (Santa-Cruz 2005, Donno 2013). They explore how international actors, including election observers, contribute to the quality of elections, including the potentially adverse effects of their actions for stability.

[16] According to Article 2.1 of the UN Charter, the Organization is based on the principle of the sovereign equality of all its Members.

Even the most recent evolutions of the idea of the national sovereignty would not justify international electoral law because the key concepts of national power-organization and political competition are inerrant and still remain within the purview of national public law. However, activities of international actors in the electoral domain clearly succeeded in expanding international human rights framework to this field.

The UN Charter promotes the idea of human rights that should be protected against violations including those perpetrated from one's own states. The concept of human rights, while being universal, is not homogeneous (Donnelly 2018). There are different classifications of human rights and different mechanisms of protection are required at a state level. While absolute and non-derogable rights such as prohibition of torture are at one end of the spectrum, electoral rights and political freedoms are in a different category. In fact, the way they are exercised leaves a lot of room for state discretion. For example, whether the state provides for out-of-country voting may be decisive for the outcome of elections. In Moldova's 2021 presidential election, the opposition candidate, Maia Sandu, obtained less in-country votes in the first round than the incumbent president, but took the first place thanks to out-of-country voters (OSCE ODIHR 2021b).

It has been argued that the CSCE human dimension process changed international human rights law, shifting it away from legal positivism (Meron 1990). Some indications of judging of elections by outside standards can be found in 1950-1970s. Mackenzie (1964: 147) wrote about an outside standard for judging electoral processes, which he dubbed 'law of civil liberty' and which included freedoms of expression, peaceful assembly and association. Further support for this kind of measurement can be found during the late 1970s and into the 1980s in the work of US-based International Human Rights Law Group.

While in the 1980s similar ideas appear alongside election observation, several authors, including Boda (2005), Pastor (1999), among others, remark that little progress was made in the emergence of internationally recognized norms pertaining to elections until 1990s, when state sovereignty gave more space to international concern. The evolution of international human rights law and jurisprudence of human

rights bodies shifted the boundaries of state sovereignty and placed a higher emphasis on human rights, rather than only the rights of states in international law.

The shift from strict sovereignty is also visible when it comes to political rights. The latter and the mechanisms of their implementation in one way or another reflect the constitutional organization and require imposition of positive obligations on states.[17] While human rights discourse is dominant in this respect, the establishment of such norms often involves issues related to constitutional identity and political changes (Risse and Sikkink 1999), that are hardly achievable without a comparative perspective (Rosenfeld 2010 and 2012, Tushnet 2010). This is perhaps one of the reasons why practitioners found existing universal and regional human rights instruments to offer only limited guidance on issues such as the periodicity of elections, the status of political parties, voter rights and registration of voters, and the conduct of polling (Bjornlund 2004). In fact, that elections should allow expression of the 'will of the people' may be regarded as a standard; however, the means for the achievement of this standard may vary.

International documents are cited by election observers to provide a normative basis for the international assessment of elections, and for specific stages and components of electoral processes, such as eligibility requirements for voters and candidates, freedom of assembly and association, etc. International law is linked with national elections primarily through the international human rights law. Even the term 'standards', as well as 'standard-setting' have come into play to the electoral field through the human rights language, as in this respect the observers attempt to refer to international human rights instruments.[18] On one hand, states may be sensitive to narrowing their sovereignty boundaries. On the other hand, international engagements leave open doors for the standard-setting activity of other, less 'traditional' international actors such as international election observers, who claim to apply human rights instruments and human rights language to the electoral context.

[17] See *infra* on the voting rights and their interpretations.
[18] The term standard can be traced back to the first contemporary universal human rights document (the UDHR) which states in the preamble that human rights are the "common standard of achievement for all people and all nations" and that every individual and every organ of society "shall strive […] to secure their universal and effective recognition and observance."

With regard to the language, it is noteworthy that the major human rights instruments did not precisely define the right to political participation in their provisions, encapsulating it in such terms such as ‘genuine periodic elections’ or ‘guaranteeing the free expression of the will of the electors’.[19]

The UDHR as well as the subsequent international and regional treaties negotiated by states led to carefully crafted language of provisions, reflecting the concerns of the states over important issues to be included on the international pane. For example, what is known as the right to vote under ECHR is not directly found in the text of the initially adopted Convention. In fact, the right to vote is the product of the ECtHR’s interpretation of Article 3 of Protocol 1 of the Convention which reads:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

These passages became key components in the area of interpretation of electoral rights by human rights bodies under the ECHR and the ICCPR. It is true that an infringement of “the free expression of the opinion of the people” it not easy to demonstrate when it comes to concrete cases, since Article 3 of Protocol 1 is worded as a positive obligation of states, not as a right to participate, nor to enjoy a particular outcome of the “free expression of the opinion”. The contentious character of the wording is deeply rooted and goes back to the times when the Convention and the Protocol were drafted. First drafts of the article, which included the reference to “the will of people” or to “conditions calculated to ensure that the government and the legislature represent the people”, had faced resistance, mainly from the United Kingdom, which feared that its first-past-the-post electoral system and the appointment the members of House of Lords could be found to be in breach of the Convention (Lécuyer 2014). As a result of negotiations, free elections were linked to

[19] For example, article 25 of the ICCPR states: ‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors […]’.

the expression of the opinion of the people, assigning a complicated interpretative task for the ECtHR.

The first electoral judgment was delivered by the ECtHR 35 years after adoption of the First Protocol, in 1987, in the case of *Mathieu-Mohin and Clerfayt v Belgium*. This judgment represented a shift in the Court's approach to the interpretation of Article 3 of the First Protocol from the idea of an 'institutional' right or 'positive obligation of states' to individual suffrage rights. The Court has read into the right to free and fair elections the subjective rights of participation – the right to vote and the right to stand for election to the legislature.

When international human rights instruments have long histories of negotiations and reconciliation of differences through compromise, this is especially pronounced for election-related norms. As sensibly pointed out by one commentator: '[e]lections are among the most sensitive political issues facing any country. They are at the crux of who holds power and who does not' (Eicher 2009: 264). Although the world has been changing and today international instruments are regarded as living instruments, recognition of electoral rights at the international level took many years. It does not mean, however, that human rights automatically become international electoral standards. In practice, the translation of the human rights into international electoral standards is another play that is being performed through election-related international actors.

3.2. Human rights norms as claims to international electoral standards

From the perspective of advocates of international electoral standards, it is plausible that international protection can be justified for all elements that constitute electoral processes. Thomas Franck (1992) was one of the scholars who attempted to expand the human rights approach towards elections, discussing the right to democratic governance. He argued that 'the democratic entitlement has acquired a degree of legitimacy by its association with a far broader panoply of laws pertaining to the rights of persons vis-'a-vis their governments', linking democracy, human rights and peace and claiming that democracy is emerging as a global normative entitlement (Franck

1992: 91). While this, indeed, has a theoretical appeal, Franck has also recognized the limits of practical implementation:

> Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated *by international standards and systematic monitoring of compliance.* The task is to perfect what has been so wondrously begun. (Franck 1992: 91, emphasis added)

Even if one accepts the existence of the right to democratic governance, it could not fully cover the phenomenon of international electoral standards from the perspective of international treaty law. At the same time, the search for the international legal protection of democracy prompted curious theoretical ideas linking electoral democracy with customary legal norms. Franck (1992) argued that as more states practice electoral democracy, the treaty-based legal entitlement begins to approximate the prevailing practice and, therefore, it may be said to form as a customary norm. As discussed, this argument does not pave the way for interpreting numerous (and varying) electoral practices as international customary norms.[20]

Acknowledging the developments in human rights jurisprudence related to elections, it should be noted that these developments mostly relate to eligibility requirements and the exercise of suffrage rights. However, human rights instruments operate largely through the case-law of the human rights bodies: decisions taken with regard to one country are not automatically implemented in other jurisdictions. It is also evident that even decisions of the human rights bodies, at times, face strong reluctance from the states in the course of their implementation.[21]

The theory and the practice agree with the fact that human rights, including political rights, require international protection. At the same time, when it comes to international electoral standards and human rights, there are other questions which do not have evident answers. For example, if provisions of international treaties are regarded as

[20] On democratization and constitutional design see also Ginsburg (2010) and Sartori (1994).
[21] For example, in the UK the implementation of the voting rights for prisoners was met with strong reluctance. See, for example, Adams (2019).

standards, what about the interpretations of these provisions by treaty bodies, such as the Human Rights Committee (CCPR) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW)? Furthermore, should judgments of international courts such as the European Court of Human Rights (ECtHR) be seen as setting general standards, even though they are legally binding only on the parties to the case? How to approach interpretation of the international rules by other important international actors such as election observers? While some answers can be provided through theoretical analysis, practice of election observation and assistance as well as acceptance or denial of different international instruments by states also produce answers that need to be explored within an appropriate analytical framework. All this already suggests that perhaps the most interesting part of claimed international electoral standards lies in the areas which are out of the direct reach of the international human rights bodies.

Some international electoral standards are indeed equivalents of human rights standards derived from international treaties, and this is especially true when it comes to suffrage rights. The issues covered by these standards have human rights at their core. For example, the universal nature of suffrage covers disputes over voting rights and the inclusion of more categories of electors. In these cases, the obligations of the states to follow such rules are mainly defined by the universal and regional human rights treaties that states have ratified. However, in the words of one commentator who argued that a framework for election observation 'can be derived in soliciting a norm from international legal mechanism' – 'the heavy lifting begins now' (Boda 2005). Thus the process of standards-setting led to coining of 'standards' language, in the context of which certain rules started to be *claimed as standards.*

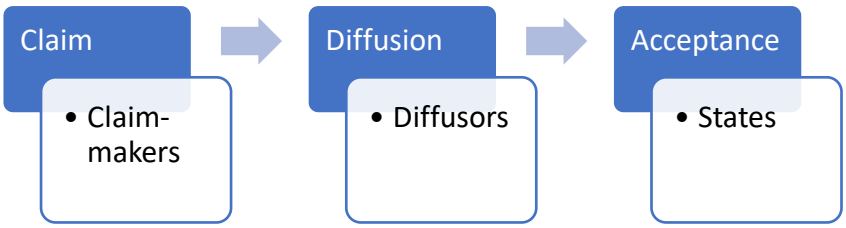
The process of formation of international standards from human rights norms should be explored while taking into account the factors specific to the electoral sphere and the practical realities such as, for example, potentially diverging rules on the same issue being presented as 'international standards' by different actors.[22] As explained

[22] See examples *infra,* section of this chapter on linear standard-setting.

earlier, these factors do not always allow for international electoral standards to be explained through the existing theories of norm formation.[23] International electoral standards cannot be neither explained, nor even described outside of the process of their formation. In fact, the process of formation is a part of the description of the international standard as it helps to answer the question why certain rules are perceived as international electoral standards by international and national actors.

That is why, in addition to the terms developed by other theories of norm formation, which seek to explain the stages or life-cycles of norms, this thesis also operates with a phrase 'claim to standard'. This phrase means that the standard can further develop from a claim, but at the same time avoids that conclusion being drawn on the basis of one-off statements by international actors, implying that other conditions should be met in order for a claim to standard to acquire normative recognition and become an international standard. These conditions are the consistent diffusion of the claim by international actors and the acceptance of the claim by states. While these conditions are similar to the terms employed by different dynamic theories of norm formation, the presence of international actors specifically tasked with the diffusion of standards (or, more accurately, claims to standards), calls for a new explanation.

Figure. Formation of international electoral standards



Claim-makers are international actors that directly or indirectly can influence elections by virtue of their mandates. While election observation activities have specific election-related mandates, human rights bodies may also be said to possess election-related mandates as they are engaged in the interpretation of different rights, such as voting

[23] See *supra,* 2.1. International electoral standards in theory: what kind of norms are international electoral standards?

rights in the cases of participation in elections, freedom of expression (when it comes to election campaign), equality rights (when it comes to participation of different groups in elections), etc. Since human-rights standards which concern elections are at the same time claims to electoral standards, human rights bodies play an important role in making such claims. Table 3 includes some human rights bodies that do make claims to election standards.

Human rights bodies are primarily claim-makers. In most cases, their claims acquire a status of standards, but this process is not automatic. For instance, the ECtHR is an international human rights body responsible for the interpretation of the European Convention of Human Rights. As Article 3 of the First Protocol of the Convention guarantees the right to free elections, with the ratification and entry into force of this protocol by the member states of the Council of Europe, the ECtHR acquired an 'electoral mandate' by virtue of its authority to interpret this article. In *Hirst v the United Kingdom* case the ECtHR declared incompatible with the ECHR the blanket restriction of the right to vote for prisoners (ECtHR 2001). The Court did its job by interpreting the provision of the Convention and issuing the judgement. Did the Court produce an international electoral standard at that stage? An intuitive answer would be 'yes'; however, there are a few other considerations before one can ascertain whether the rule has become an international electoral standard.

As it was already mentioned the judgment faced reluctance in its implementation, and in fact it was not immediately enforced. Subsequently, the ECtHR rendered similar judgments against Italy, Russia and Turkey, stating that their restrictions constituted a violation of the Convention (ECtHR 2012; ECtHR 2013; ECtHR 2014). Each of these cases has its specific details but the main message is that exclusion of a large group of people from the vote that is applied automatically, irrespective of the gravity of the offence, is not compatible with Article 3 Protocol 1 of the European Convention. In other words, in several judgements towards several countries the Court declared out a treaty-based claim to an international electoral standard, i.e. blanket restrictions of the voting rights to prisoners should not take place. It is not only the UK that imposed a blanket prohibition on voting rights for prisoners and the European Court reinforced its position towards several other jurisdictions. In other words, the ECtHR set the standard and further insisted and diffused it to several states, demonstrating that they

do not have margin of appreciation or special justifications for blanket restrictions on the right to vote for certain categories of voters.

When the judgment is issued by the Court or another international human rights body in relation to a particular state, a standard is not automatically applicable to other countries. Importantly, the claim was picked up by other international actors (diffusors). On the basis of the position of the Court and with references to its judgments, international election observers and the Venice Commission would repeatedly make the same claim in different countries where they are active. It was mentioned above that the ECtHR also plays the role of the standard-diffusor when it issues similar judgments against different countries. However, such diffusion is limited by the case-law of the Court – a complaint on the rights-violation is a necessary prerequisite for this diffusion. In this regard, special international actors, such as election observers, have more tools for diffusion than the Court has.

In this context, human rights standards do not automatically qualify for international electoral standards. This explains why human rights law does not fully cover the formation of the electoral standards even in the individual rights-related part. The human rights law, as a part of international law applicable to elections, merely provides the potential sources for electoral standard-setting, equipping international actors with tools to make a human rights claims to international electoral standards. Accordingly, it is not a given that human rights jurisprudence will fit into the framework of international electoral standards. For example, despite the fact that the both, the UN Human Rights Committee (CCPR) and the ECtHR did not find violation of their respective human rights instruments in the imposition of the residency requirements for the exercise of electoral rights, international electoral observers diffuse a different claim, stating that such residency requirements are discriminatory.[24]

The diffusion and acceptance of these claims are outside of the international human rights law reach, since the formation of international electoral standards has to do with particular norms travelling from one jurisdiction the other through the diffusion, primarily by international electoral observers, and the acceptance or rejection of these

[24] See infra on *jus observatores.*

norms by the states. Having said this, the theory of international relations can neither fully explain nor take the diffusion and acceptance on board, as discussed *infra*.

3.3. Claims to international standards and human rights law limitations

For the purposes of this research, a claim is a rule pronounced by international actors as a standard. Table 3 includes different examples of claims to international electoral standards put forward by different international actors. In fact, any (documented) rule pronounced by international actors that are directly (for example, an international election observation organization) or indirectly (for example, CRPD, CEDAW) addressed to states, can be regarded as a claim to a standard for democratic elections, but does not automatically become international electoral standard.

Table 3. *Examples of human rights claims to international electoral standards*

International Actor	**Claim**	**Reference to a document**
UN Human Rights Committee	The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant *(See CCPR, Gillot et al. v. France, Views of 15 July 2002, U.N. Doc. A/57/40 at 270 (2002).* The CCPR emphasizes that any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria, and that eligible persons should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.	Paragraph 15 of the 1996 UN Human Rights Committee General Comment No. 25 to the ICCPR states that “persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation”.
ECtHR	Blanket restrictions of voting rights of prisoners is not compatible with the European Convention of Human Rights (*Hirst v. the United Kingdom (no.1 and 2), Scoppola v. Italy (no. 3), Anchugov and Gladkov v. Russia*).	Article 3 Protocol 1 of the European Convention of Human Rights.
UN Committee on the Rights of Persons with Disabilities	The requirement to possess a legal competence in order to have suffrage rights is not compatible with the ICRPD	International Convention on the Rights on Persons with Disabilities

CEDAW Committee	While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8 […] In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.	CEDAW General Recommendation No 23: Political and Public Life (sixteenth session, 1997)
Venice Commission	A balance needs to be struck between data protection and secrecy of the vote on the one hand and stakeholders' interest in consulting the signed (or stamped) voter lists on the other".	Paragraph III of the 2016 Venice Commission's Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Publication of Lists of Voters Having Participated in Elections
OSCE/ODIHR Election Observation Mission	Consideration should be given to provide possibilities for candidates to stand individually.	Paragraph 7.5 of the 1990 OSCE Copenhagen Document that commits participating States to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination"

A claim to an international electoral standard, including claims made through human rights, often arises when a particular issue in a jurisdiction under consideration is seen as problematic by international actors. Basically, such as the voting rights of prisoners or of persons with mental disabilities, or independence of election administration, requirements for eligibility of election candidates, or transparency of campaign finance

regulations. Other examples include claim-making by human rights bodies that often rely on non-discrimination provisions of the international treaties. For instance, the claim that the limitations on the voting rights for prisoners should be proportional to the gravity of the crime came into play because there were countries where all prisoners were disenfranchised, regardless of the crimes they committed. At the same time, the ECtHR in its judgment already pointed out that there were countries where some prisoners were granted voting rights.

Very often before being claimed as a standard, the relevant rule is found in a number of jurisdictions and is successfully implemented. As the example regarding the voting rights for prisoners shows, the majority of the Council of Europe states at the moment of consideration of the UK's case allowed prisoners to vote with or without restrictions.

Elements of limitation

Regarding the limitations, given that an election process consists of many components, the direct link of some of these components with human rights is, if existent, not always obvious. Even such powerful actors as human rights bodies are limited in making claims by their human rights mandates, and they are limited in the diffusion of the claims that are already made by the procedural frameworks within which they operate.

Given that human rights bodies make their claims through the case-law and interpretations of the human rights instruments, the prerequisite of the claim in the cases of human rights bodies is the same as the prerequisites for the admissibility of complaints – appearance of the violation of the rights guaranteed by the international instrument.[25] In the situations when complaints are not admissible, no claims will be made.

It is important to note that admissibility is not set in stone and depends to a large extent on the development of the human rights jurisprudence (sometimes expressed as "Convention as a living instrument"; see e.g. ECtHR 1978). For example, the early case law of the European Court of Human Rights simply avoided electoral cases. The

[25] For different admissibility criteria see the recent practical guide on admissibility (ECtHR 2022).

first electoral cases were declared by the Commission manifestly ill-founded (ECHR 1960; ECHR 1961). These cases included complaints on restrictions of voting rights of prisoners, which nowadays would undoubtedly constitute a violation of the Convention. The Commission did not find an “appearance of a violation” and stated that the restriction does not affect the free expression of the opinion of the people in the choice of the legislature (ECHR 1967: 338). This fact did not preclude the Court from delivering electoral judgments some years after. This is another evidence that new claims can be made (and most likely will be made in the future) on the basis of the instruments that have already been in place for quite a few years.

This also means that the claim-maker can expand the subject of the claim as long as there is a reasonable link between the mandate of the claim-maker and the subject matter of the claim. Thus, since the ECtHR read Article 3 of the Protocol 1 of the European Convention as applicable to electoral rights, it started enforcing the provision in the cases of alleged violations of these rights. Once the complaint is taken to the reviews of the bodies as admissible, the claim will be made through the decision of the human rights bodies. In this sense, any decision is a claim to a standard, whether it confirms a violation of the Convention or denies it. For example, in the case of *Sitaropoulos and Giakoumopoulos v. Greece*, the ECtHR’s Grand Chamber overruled an earlier Section’s judgment and did not find a violation in the omission of the Greek Government to implement out-of-country voting, even though the Greek Constitution recognized such possibility. The Court seemed to be mindful of potential general consequences of its judgment to the point that while deciding an *individual case* it stated that the Court’s argument about out-of-country citizens losing a link with a country of citizenship did not apply *in this particular individual case* but “this is not sufficient to call into question the legal situation in Greece” (ECtHR 2012b: 79).

In addition, the scope of the claims may be narrowed by the thematic mandates of the international actors. To illustrate this with an example, the CEDAW Committee would be seen as acting within its mandate if it makes claims to standards when they are concerned with women’s participation in elections. One of the examples of such claim is related to introducing temporary special measures to achieve equality of representation of women in elected bodies. At the same time, if the CEDAW Committee made a claim to create a particular type of election management bodies,

this would not likely be seen as having the same authority. The same is true for other international actors with specific mandates, such as the CRPD Committee, which can make a claim that the blanket restriction of voting rights for people with mental disabilities runs contrary to the UN Convention, but would not be on a solid ground to claim that persons with dual citizenship should have a right to be elected. The thematic mandate of such claim-makers limits the subject-matters of the claims.

Such mandate considerations do not constrain electoral observers when they identify a certain rule as an international electoral standards. Firstly, any election-related issue in the country observed is 'admissible' to the review of the election observation activities as long as the latter were invited to observe elections. Rather, as it was explained above, such invitations are perceived by observers as opportunities to comment on any election-related issues, even if tangentially related. Further, while international electoral observers assert that they apply international human rights law, they do so through their own statements and reports. These documents, unlike court judgments and treaty monitoring body opinions, are not framed by the rules of legal reasoning and rules of procedure. Also, unlike international judges or members of human rights bodies, international election observers who apply international law to elections, do not possess comparable professional credentials and are often not lawyers. As a consequence, the way in which international electoral observers approach the translation of international human rights standards to international electoral standards is influenced by these factors. This may result in direct (linear) translation of human rights standards to international electoral standards, but it may also lead to international observers occasionally setting and diffusing 'human rights standards' that in reality diverge from international human rights jurisprudence.

3.4. From human rights to international electoral standards: *jus observatores* as a mechanism of standard-setting

All cases listed in the previous parts, be it the CEDAW interpretations or the judgments of the ECtHR on the electoral cases, are examples of claim-making. International electoral observers 'translate' these claims in international electoral standards through their periodic election observation activities. Therefore, when it comes to the setting of international electoral standards, claim-making is organically correlated with its

diffusion. In order to make a conclusion on whether this rule is a mere claim or an established standard, we need to explore how far this rule made it in terms of diffusion and acceptance.

If the initial idea of international electoral standards is that they have international instruments at their basis, it follows that the bodies responsible for application and interpretation of these instruments would set the standards, and other actors, such as international observers and international consultative bodies on elections, would play the role of standard-diffusors of these standards. The diffusors use different channels (e.g. reports of election observation missions, recommendations, legislative assistance opinions, amicus curie briefs) to transfer to states different claims, which for the purposes of diffusion are already presented by them as standards. Some of the claims are stronger, because they are not completely new, while innovative ones have less normative strength but it does not make them less relevant, albeit less diffused.

This was, however, not the case with the reports of the early stage of election observation,[26] when the claim on application of international electoral standards was often not supplemented with references to international instruments. Only in early 2000th OSCE/ODIHR election observers started making such references, including those to human rights instruments and bodies (See Table 4 below). In Table 4, there is a clear trend of using international human rights documents, including the jurisprudence of human rights bodies, with regard to voter and candidate eligibility in election observation reports.

Linear standard-setting

The examples in Table 4 below show the situation in which international electoral observers are consistently diffusing international human rights jurisprudence on prohibition of the blanket restrictions of voting rights for prisoners to the states where they carry out election observation activities. In this situation, the international human

[26] On different phases of election observation see *supra* Chapter 1. Practical background of international electoral standard-setting.

rights standards are directly 'travel' into international electoral standards. This is especially true for the states that ratified respective international instruments.

Table 4. *Diffusion of human rights provisions by international observers*

Country and year	Statement	Recommendation	References
United Kingdom (OSCE ODIHR 2010)	Restrictions to the right to vote and to stand apply, among others, to prisoners, people who have declared bankruptcy and persons found guilty of illegal or corrupt practices. The European Court of Human Rights (ECtHR) ruled in 2005 that the blanket prohibition on voting by sentenced prisoners was disproportionate and incompatible with the right to participate in elections.	The existing legislation on the suffrage rights of prisoners should be brought in line with the judgments of the ECtHR.	*Hirst v. United Kingdom*, no. 74025/01 (6 October 2005).
Turkey (OSCE ODIHR 2014)	Citizens over 18 years of age have the right to vote. However, under Article 67 of the Constitution, active conscripts, cadets, and prisoners who have committed intentional crimes, regardless of the severity of the crime, are not eligible to vote. This is not in line with paragraph 7.3 of the 1990 OSCE Copenhagen Document and other international obligations.	It is recommended that parliament fully implement the ECtHR decision on prisoners' voting rights to ensure that the loss of voting rights for convicts is proportionate to the crime committed and the imposed sentence, and that convicts' rights are automatically restored on release from prison. Furthermore, the ban on voting rights for conscripts and cadets could be repealed to bring the Constitution in line with international obligations.	In September 2013, the ECtHR ruled that Turkey's ban on convicted prisoners' voting rights is too broad and in breach of the right to free elections.
Austria (OSCE ODIHR 2013)	In a welcome development, 2011 amendments to the PEL provide for the implementation of the judgment of the European Court of Human Rights (ECtHR) on the voting rights of convicted criminals, ensuring that disenfranchisement would only be possible based on a judicial decision and in		See, *Frodl v. Austria*, ECtHR, application no 20201/04; judgement of 8 April 2010. Previously, citizens would automatically lose their voting rights if convicted of a criminal offence exceeding one year of imprisonment.

	connection to a restricted group of offences. The OSCE/ODIHR EET was informed by the Ministry of Interior (MoI) that all convicted people automatically regained their right to vote in case they met the conditions of the 2011 amendment.		
Estonia (OSCE ODIHR 2011b)	Persons who have been deprived of their legal capacity by a court decision and prisoners who have been convicted of any criminal offence are deprived of the right to vote. This, according to the Ministry of Interior, excludes 1,989 legally incapacitated people and 1,416 prisoners from the voter lists. The withdrawal of prisoners' voting rights irrespective of the gravity of their offence is also not in accordance with OSCE commitments and other international good practice.	As in 2007, the OSCE/ODIHR recommends that the Election Act is amended to end the automatic and indiscriminate ban on voting for prisoners convicted of any criminal offenses to bring it in line with OSCE commitments and other international good practice.	The European Court of Human Rights (ECtHR) has repeatedly held that an automatic and indiscriminate disenfranchisement of prisoners violates the right to free elections enshrined in Article 3 of Protocol No 1 to the European Convention on Human Rights.
Latvia (OSCE ODIHR 2010b)	Persons who belonged to the salaried staff of the former Soviet Union's state security, intelligence or counterintelligence services are barred from standing. In line with the ECHR judgment, a 2009 amendment narrowed the scope of the restriction so that it no longer applies to persons who belonged to the staff of the Planning, Finance and Maintenance Departments of the respective organizations.	Consistent with the judgment of the European Court of Human Rights, the Saeima should continue to review lustration provisions with a view to bringing them to an early end.	In March 2006, the European Court of Human Rights stated in the case of *Zhdanoka vs. Latvia*, that "the Latvian Parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end."
Poland (OSCE ODIHR 2011c)	The Criminal Code envisages deprivation of public rights and, as a part of it, deprivation of the rights to vote and to be	Consideration should be given to establishing a link between the offence committed and issues relating to elections and democratic institutions as a	

	elected, as a penalty in addition to at least three years imprisonment for “an offence committed with motives deserving particular reprobation.” However, contrary to ECtHR ruling, the Criminal Code does not require “a link between the offence committed and issues relating to elections and democratic institutions	necessary ground for disenfranchisement within the procedure of deprivation of public rights.	

At the same time, as Table 4.1 shows, in those countries which are not members of the institutions that directly prohibited the blanket restriction of voting rights for prisoners, the observers were also diffusing the same claim, referencing documents available to them, thus interpreting these documents on the basis of the existing human rights jurisprudence.

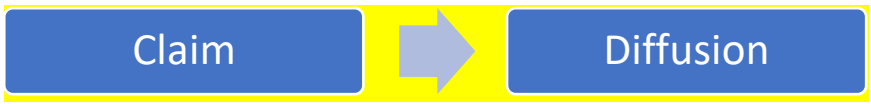
Table 4.1*. Interpretation of human rights provisions by international observers*

Belarus (OSCE ODIHR 2015)	Disenfranchisement of prisoners regardless of the gravity of the crime committed and of those in pre-trial detention is at odds with the principle of universal suffrage. On a positive note, on 24 September, the CEC passed a resolution granting voting rights to citizens under arrest for criminal convictions up to three months.	The blanket restrictions on the suffrage rights of persons declared mentally incompetent should be removed or decided on a case-by-case basis, depending on specific circumstance The blanket denial of suffrage rights of citizens in pre-trial detention or serving prison terms regardless of the severity of the crime committed should be reconsidered to ensure proportionality between the limitation imposed and the severity of the offense committed.	Paragraph 7.3 of the 1990 OSCE Copenhagen Document states that the participating States will guarantee universal and equal suffrage to adult citizens and paragraph 24 provides that restrictions on rights and freedoms must be strictly proportionate to the aim of the law. Paragraph 14 of the 1996 UNHRC General Comment No. 25 to the ICCPR states that grounds for the deprivation of voting rights should be “objective and reasonable”.
Kazakhstan (OSCE	All citizens over 18 years of age have the right to	The blanket withdrawal of suffrage rights of citizens	Paragraph 7.3 of the 1990 OSCE

ODIHR 2015b)	vote, except those declared mentally incompetent by a court or those serving prison sentences, irrespective of the gravity of the crime. The blanket denial of voting rights to all those imprisoned or declared mentally incompetent is an unreasonable restriction that is at odds with international obligations and OSCE commitments.	serving prison terms regardless of the severity of the crime committed should be reconsidered to ensure proportionality between the limitation imposed and the severity of the offense committed.	Copenhagen Document states that the participating States will "guarantee universal and equal suffrage to adult citizens", while Paragraph 24 provides that restrictions on rights and freedoms must be "strictly proportionate to the aim of the law". Paragraph 14 of the 1996 UNHRC General Comment No. 25 to the ICCPR states that grounds for deprivation of voting rights should be "objective and reasonable".
Kyrgyzstan (OSCE ODIHR 2016)	The right to vote is granted to citizens who reach 18 years of age by election day, with the exception of those who are serving a prison sentence regardless of the severity of the crime and those who are legally incapacitated. The blanket denial of voting rights to all those imprisoned, regardless of the severity of the crime, is at odds with OSCE commitments and other international obligations and standards.	The legal framework should be amended to lift the blanket restriction on the right to vote for prisoners.	Paragraph 7.3 of the 1990 OSCE Copenhagen Document provides that participating States will "guarantee universal and equal suffrage to adult citizens", while Paragraph 24 provides that restrictions on rights and freedoms must be "strictly proportionate to the aim of the law". Paragraph 14 of the 1996 UN CCPR General Comment No. 25 to Article 25 of the ICCPR states that grounds for the deprivation of voting rights should be "objective and reasonable"
Mongolia (OSCE	All citizens over 18 years of age have the right to vote, except those	The LoE should be amended to ensure that the restriction on prisoners'	Paragraph 14 of UNHRC GC No. 25 to Article 25 of the

ODIHR 2016b)	declared incompetent by a court or those serving prison sentences, irrespective of the gravity of the crime. These blanket provisions pose a disproportionate restriction, at odds with OSCE commitments and international standards.	right to vote is proportionate to the severity of the crime committed	ICCPR requires that "if a conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." See also paragraph 24 of the 1990 OSCE Copenhagen Document, which provides, in part, that "any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law."
The United States of America (OSCE ODIHR 2013b)	In addition, some 5.9 million citizens are estimated to be disenfranchised due to a criminal conviction, including 2.6 million who have served their sentence.	Federal legislation could be considered to provide consistency in restrictions to federal voting rights. Authorities should take effective and timely measures to facilitate the restoration of voting rights after a prison term has been served. Restrictions of voting rights for prisoners and ex-prisoners should be reviewed to ensure that any limitation is proportionate to the crime committed and clearly outlined in the law	The deprivation of the right to vote is a severe penalty and the current restrictions on prisoner and ex-prisoner voting rights lack proportionality and are not in line with paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document and other international standards.

When the international instrument is specific ECtHR case law the linearity is clear (direct).[27] I call this situation a **linear** claim-making and diffusion. In practical terms, it means that the ECtHR made a claim, stating that the blanket prohibition of the electoral rights for prisoners regardless the gravity of the crime is discriminatory and, therefore, not compatible with the European Convention of Human Rights. The Court repeated this statement (which for our purposes constitutes a claim to a standard) in several judgments issued with regard to different countries. Such repetition of the statement can already be regarded as diffusion as the same message was addressed to more than one country. The diffusion abilities of the Court are, however, limited. As described earlier, the Court may only start acting (claiming standards in our cases) on the basis of complaints, after the admissibility requirements are checked. By contrast, the election observers' diffusion power is much wider. As Table 4 shows, election observers successfully diffuse the claim made by the Court to the states where they conduct observation activities and they may not fall under the jurisdiction of the court. The observers rely on the interpretation of the Convention by the ECtHR and adopt it as an international electoral standard which they are consistently diffusing.



A claim to an international standard does not have high chances to become a standard without being diffused to as many countries as possible. The diffusion is related to the acceptance of the standards by the international community: it means that the claim to a standard should be perceived as strong enough by international actors in order for them to pick it up and start spreading in different jurisdictions.

In fact, when it comes to the standard-setting in the international dimension of elections, claim-making is almost inseparable from the diffusion. The reason is that most of the time each claim is made towards a country on the basis of experience of

[27] As it is evident from the examples in Table 4, the jurisprudence of the ECtHR largely contributes to observation reports by strictly examining limitations to the electoral rights introduced by the member-state of the Council of Europe. In the *Hirst v the United Kingdom* the ECtHR proclaimed contrary to the Convention the blanket restriction of the right to vote for prisoners. Subsequently, the ECtHR rendered similar judgments against Italy, Russia and Turkey, stating that the restriction constituted a violation of the Convention. The main message was that exclusion of a large group of people from the vote that is applied automatically, irrespective of the gravity of the offence, was not compatible with the Convention.

some other countries that either had the claimed rule initially (for example, claims to apply norms that come from the Western European countries) or on the basis of the fact that a similar claim was made before elsewhere. This suggests that the process of diffusion can also be seen as a systematic making of the same claim by the same or different international actors towards different countries. This is also somewhat similar to what the literature on international relations sees as diffusion. For example, Braun and Gilardi (2006: 299) referred to the diffusion mechanisms as 'systematic sets of statements that provide a plausible account of how policy choices in one country are systematically conditioned by prior policy choices made in other countries'.

The claim is made by the court in substance but the diffusion is also limited by the jurisdiction. On the contrary, observers diffuse the claim initially made by the ECtHR not only within Council of Europe but also outside. Note that the table also includes the countries that are not members of the Council of Europe, such as Belarus, Kazakhstan, Kyrgyzstan, Mongolia, and the United States. In these cases, the jurisprudence of the Court is not taken as a point of reference, and the observers directly cite other international instruments including the ICCPR and the OSCE Copenhagen Document. For example, in Belarus the observers stated that:

> disenfranchisement of prisoners regardless of the gravity of the crime committed and of those in pre-trial detention is at odds with the principle of universal suffrage' referencing Paragraph 7.3 of the 1990 OSCE Copenhagen Document that states that the participating States will guarantee universal and equal suffrage to adult citizens and paragraph 24 provides that restrictions on rights and freedoms must be strictly proportionate to the aim of the law as well as paragraph 14 of the 1996 UNHRC General Comment No. 25 to the ICCPR that states that grounds for the deprivation of voting rights should be "objective and reasonable".

Besides the prisoners, the ECtHR also overturned the blanket restriction of electoral rights for people with mental disabilities in *Alajos Kiss v Hungary* (ECtHR 2010). The reasoning was largely based on the *Hirst case:*

> The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing (Hirst v. the United Kingdom (no. 2) [GC], § 82).

In conclusion, the case of blanket restriction of prisoners is a straightforward example of the formation of the international electoral standards: claim-making is done by the body competent for the interpretation of the human rights instrument, then is diffused by diffusor, and the states either implement it or accept being criticized for its non-acceptance. For example, the 2015 Armenian Constitution granted prisoners convicted for certain offences the right to vote (OSCE ODIHR 2017). And while this represents a successful linear translation of an international standard, there can be more complex cases in which due to different factors impacting the process of diffusion, the latter is not as linear.

Non-linear standard setting and shortcomings in diffusion

One of the factors that impact the diffusion process is that different international actors may produce different claims on the same subject-matter. This situation may also illustrate the differences between standards and claims to standards. Different international organizations may diffuse different claims to standards on the same subject-matter if they rely on different international instruments which diverge one from the other, depending on the approach taken by the international body in charge of the interpretation of the international instrument.

For example, the claim made by the CRPD Committee on the subject of the electoral rights of persons with disabilities is wider than the claim on the same subject made by ECtHR. The claims are made on the basis of different international instruments by different human rights bodies. Which of these claims will become a standard will depend on the diffusion of the claims as well as their acceptance by the states. For example, some countries ratified CRPD but are not members of Council of Europe, therefore, they would not have a direct access to the claim made by the ECtHR. In fact, a normative value of the claims will depend on how each of them is perceived by

the states that ratified the international instruments and accepted jurisdictions of the human rights bodies. However, this is not the only and, in practice, not even the most important factor. The value also depends on how the claim is picked up and diffused by other international actors. While claim-makers make claims to standards, the diffusors spread the claim as a standard. Which one is diffused depends on the international actors. An interesting inference that examples in Table 5 demonstrate is that election observers may be diffusing different claims in different countries on the subject-matter of the rights of persons with mental disabilities, referencing different international sources. The example, that will be unfolded below, shows that election observers do not always use their discretion consistently. In order to see how the diffusion happens in dynamic, the table includes different legal provisions on the electoral rights of persons with disabilities from a few countries that ratified both international instruments, the European Convention of Human Rights and the UN Convention on the Rights of Persons with Disabilities.

Table 5. *Examples of diffusing standards on the voting rights of people with disabilities.*

Country and year	**Regulation**	**Assessment**	**Reference**
Czech Republic (OSCE ODIHR 2013c)	Citizens found incapable by a court of law or whose personal freedoms have been restricted due to the protection of public health are not entitled to vote. Article 10 of the Civil Code provides that the withdrawal of legal capacity is to be pronounced by a court.	This restriction was not identified at odds with the international electoral standards.	
Czech Republic (OSCE ODIHR 2018)	Citizens aged 18 years or older on the second day of the elections are eligible to vote. Those deprived of legal capacity, including persons with mental disabilities, are denied the right to vote and excluded from the voter lists.	This is at odds with the CRPD	Article 29 of the CRPD requires states to "guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others". According to

			paragraph 9.4 of the 2013 CRPD Committee's Communication No. 4/2011 (Zsolt Bujdosó and five others v. Hungary): "Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability".
Moldova (OSCE ODIHR 2015)	Citizens 18 years of age by election day have the right to vote. Those declared incapable by a final court decision, conscripted military personnel, serving a prison sentence and with an active criminal record are deprived of voting rights. These blanket restrictions are disproportionate and at odds with paragraph 7.3 of 1990 OSCE Copenhagen Document and international good practice.	The deprivation of voting rights should only be considered for mental incapacity or criminal conviction for a serious offence through an explicit court decision.	Paragraph 7.3 provides that the participating States "will guarantee universal and equal suffrage to adult citizens". Also see Code of Good Practice (1.1.d.iv and v).
Moldova (OSCE ODIHR 2019)	Moldova has a passive voter registration system. Citizens at least 18 years old by election day are eligible to vote. The right to	Contrary to international standards, a court can still deprive an	Even an individualized assessment amounts to disability-based

	vote is broadly inclusive, covering almost all citizens of voting age including prisoners. In line with previous ODIHR recommendations, in October 2018, the Constitutional Court declared unconstitutional the blanket denial of voting rights of persons declared incompetent by a court.	individual of the right to vote, including those with mental disabilities.	discrimination. See Articles 12 and 29 of the UN Convention on the Rights of Persons with Disabilities which prescribes the right to equal recognition before law and states that parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, respectively.

Thus, in 2013 the ODIHR observers did not make critical statements with regard to the provisions of the Czech Republic's legislation that permitted the disenfranchisement of the persons with mental disabilities on the basis of individual court assessments. In 2015 in Moldova, the observers stated in their report that 'the deprivation of voting rights should only be considered for mental incapacity […] through an explicit court decision'.

In both cases, the observers de-facto reinforced the claim of the ECtHR and did not endorse the position of the CRPD, nor the jurisprudence of the CRPD Committee that already existed at that point of time. In the next electoral cycles, the position of the election observers has changed and another claim was diffused. In 2017, the provisions of the Czech electoral legislation which denied the right to vote of those deprived of legal capacity, including persons with mental disabilities, was criticized as being at odds with CRPD. In Moldova, after the observers' recommendation to link the deprivation of the voting rights of people with mental disabilities to an explicit court decision, the observers stated in the 2019 report, that 'in October 2018, the Constitutional Court declared unconstitutional the blanket denial of voting rights of persons declared incompetent by a court', therefore, the recommendation of observers was implemented. However, the observers proceeded to conclude that

‘[c]ontrary to international standards, a court can still deprive an individual of the right to vote, including those with mental disabilities’ since ‘even an individualized assessment amounts to disability-based discrimination’, citing the provisions of CRPD.

While in election observation reports the claim made on the basis of the CRPD prevails now, some election observation missions continue to reference judgments of the European Court of Human Rights. Does this mean that the standard changes? If yes, when did this change happen?

According to reports of election observers in that period of time, the answer is yes. It shows, however, that the claim to a standard can be misleading from the perspective of the international electoral standard-setting when it diverges from the views of other claim-makers. Standard diffusion thus depends, among other factors, on the knowledge of the report-drafters and their awareness on the recent jurisprudence pertaining to different international instruments. As a consequence, the claim cannot be equated to an electoral standard because the diffusion of human rights standards is dependent on the awareness of election observes about these human rights standards.

This is where the role of the international electoral observers becomes critical. As it was mentioned above, the primary role of a diffusor is not to make new claims to standards but to diffuse already existing claims. What they diffuse increases the chances of being accepted by more states and, therefore, to become a standard.

The role of the observers is therefore of special importance because their mission is to impact as many countries as possible, as it is one of the ways to standardize their message. Although, as mentioned above, it does not necessarily entail the acceptance of the claim, but it ensures the delivery of the message (the claim to an international standard) to the addressee. Such power of the diffusors in setting international electoral standards is even more evident in those critical examples when observers alter the link between claims made by human rights bodies and the individual countries by either not diffusing a claim or making and diffusing a different claim instead from the one made by the human rights bodies. This situation can be referred to as divergent diffusion. The examples below will show how this process unfolds. While in

some situations the decisions of human rights bodies may put an end to such claims, in others observers may keep 'spreading' the international electoral standards that diverge from human rights ones.

Divergent standard-setting: the out-of-country voting

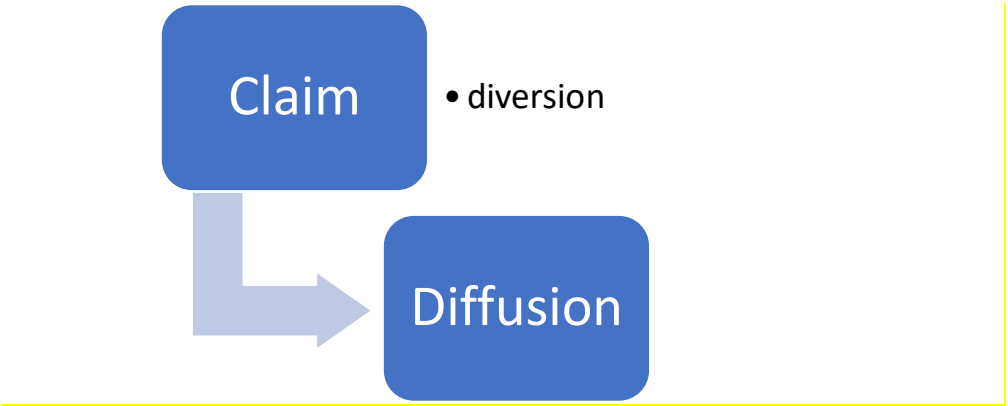
Indeed, in many cases the diffusion is performed in such a way that new standards are claimed by diffusors. This may happen through a direct interpretation of international instruments by international election observers or assistance providers, who do not always take into consideration positions of international human rights bodies. Such interpretation results in the production of new claims instead of the diffusion of the already existing once.

The claims made by actors with the authority by definition have more chances to be translated into a standard, since those who make claims can be expected to be more active in spreading them, and the diffusors have some choice over what they diffuse. For example, the Venice Commission, may directly make claims to standards on the basis of existing domestic practices of states, which they hold up as 'good practice' that should be taken up by others. Having said this, any organization that has a role in elections, can advance a claim that a certain rule is an international standard.

The expansion of the observers' activity manifested itself in at least two forms. The first form could be characterized as "filling the vacuum", i.e. commenting on something that has not been a matter of concern of international bodies.[28] The other form is expanding on the standards already set in international instruments by providing the observers' own interpretation of the human rights norms, which is herein referred to as *jus observatores*.

[28] The OSCE/ODIHR reports reveal nuanced results. An early era of election observation is particularly notable in reporting for handing to the OSCE participating states, especially to emerging democracies, a number of recommendations made without firm references to any international human rights instruments. In the majority of cases such recommendations come from the observers' understanding of universality and equality of suffrage, which make these recommendations look like human rights claims, although the reality may be more complex.

Both forms, in theoretical terms, can be explained through claim-making and diffusions. 'Filling the vacuum' activity is claiming some new rules as international electoral standards. In these cases, the process of claim-making and diffusions go hand in hand through the different election observation reports issued with regard to different jurisdictions. The expansion on the standards already set in international instruments may take a form of a divergent claim-making or a divergent diffusion.



Divergent diffusion is particularly recurrent regarding highly technical issues concerning elections. A number of observers' recommendations in the field of organizing polls that lack specific references in the reports often reflect the observers' intentions to enhance transparency in elections or the effectiveness and professionalism of election administration in particular countries. For instance, in Montenegro (OSCE ODIHR 2013d) observers advised: "In order to further increase the transparency and accountability of the election administration, the SEC could consider officially adopting and publishing the election calendar and publishing the minutes of the SEC sessions." The usefulness of such recommendations can hardly be disputed and they are good reminders for countries to continue improving election administration, despite the fact that it does not directly come from the international obligations. However, leaving more technical recommendations aside, attention should be drawn to some of the recommendations which ask countries to introduce systemic and fundamental changes to their electoral frameworks based on the divergent understanding of human rights language.

For example, starting approximately from 2000, observers became heavily critical towards a lack of possibility for out-of-country voting. Within the sample of reports

selected for this research criticism was expressed in several jurisdictions (see Table 6). The observers own interpretation of suffrage rights which has lead them to invoking a positive obligation of states to organize voting abroad, while human rights jurisprudence not only never made this claim but later explicitly excluded such positive obligation.

Table 6. *Out-of-country voting*

Country and year	**Statement/Recommendations**
Hungary (OSCE ODIHR 1998)	Only Hungarian citizens in the country on election day are provided with the facility to vote. […] This issue is somewhat sensitive in Hungary, and confused with the number of ethnic Hungarians living in neighboring countries. However, the issue pertains only to Hungarian citizens and should be considered as an administrative problem, with a provision for overseas or absent voting, as is normal practice in many countries.
Serbia (OSCE ODIHR 2001b)	The Law provides that voting only takes place in person in polling stations established in Serbia. De facto, this provision disenfranchised internally displaced persons from Kosovo temporarily resident in Montenegro, those resident abroad, incarcerated or otherwise unable to be present at a polling station, for instance due to disability. The EOM is aware that these provisions are a response to concerns regarding the potential for manipulation. However, these concerns should not impinge upon the right of all voters to express their political will.
Slovakia (OSCE ODIHR 2004b)	There is no provision for voting by citizens outside the country; the authorities should consider ways to remedy this deficiency. However, the recently adopted amendments to the parliamentary election law – which were not approved by President Schuster – would have provided for out-of-country voting, but only for parliamentary elections.

The observers maintained that countries, including those in Table 6, that do not provide for out-of-country voting disenfranchise citizens who reside abroad. It is of note that for many countries out-of-country voting is a very sensitive political matter, especially if they used to belong to one entity in the past (e.g. in Western Balkans) or where the number of citizens who reside abroad is so high that their exercise of the right to vote could potentially alter or outweigh the decision of citizen-residents of the country. In most instances citizens can exercise their voting rights only if they return to the country of their citizenship on election day. Nevertheless, observers' appeals to introduce out-of-country voting "as it is normal practice in many countries" (OSCE

ODIHR 1998) had made it to several ODIHR reports. Why would 'normal practice' of many countries be suitable for other countries? The answer would require comparative research on how the introduction of out-of-country voting affects the rules of political competition and why some countries have more tendency to allow voting from abroad than the others. While this issue has been a subject of debates of comparative public law scholars and political scientists (see, among others, Rehfeld 2006), observers effectively claimed it as a benchmark that should be respected.

The observers' tendency to standardize the rule does not always correspond to the universal search for just or good principles, as they do not engage in the comparative analysis. Using the words of Donald Kommers (1976), the standardization that observers attempt does not search for 'principles of justice and political obligation that transcends the culture bound opinions and conventions of a particular political community'. The exploration of essential characteristics of political participation in different countries would provide the observers with the necessary knowledge of how and why the out-of-country voting integrated in different countries and would enable a more tailored approach or show that this is the area in which observers should not enter with a single standard for all.

A change in the practice of recommendation of out-of-country voting can be detected after 2012, when the ECtHR issued its judgment in *Sitaropoulos and Giakoumopoulos v. Greece*. In this case Grand Chamber did not find a violation in inaction of the Greek Government to provide a regulation for out-of-country voting, even though the Greek Constitution provided for this possibility. While the Greek Constitution explicitly granted the opportunity of citizens who live abroad to take part in elections, the Government claimed that "the broadest possible consensus among the political parties was needed in order to prevent political tensions arising out of the de facto increase in the electorate (some 3,700,000 people live abroad, compared with a population of 11,000,000 living in Greece)" (ECtHR (2012b).

In the *Sitaropoulos* judgment the ECtHR examined international instruments such as the ICCPR, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights in comparative perspective and concluded that "neither the relevant international and regional treaties —– nor their interpretation by the

competent international bodies provide a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad" and that "none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote". *T*his matter was judged to be within the margin of appreciation of each state, "which had to balance the principle of universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other". What ODIHR observers thus advanced as an electoral standard was not accepted as such by the ECtHR, nor by other international human rights bodies under a different international human rights instrument.

Several conclusions can be drawn from this example for the "international standards – international observers" nexus as well as the role of the human rights law and the constitutional law in setting the international electoral standards. The out-of-country voting issue is an example of interpretation of an election-related human rights provision, dealing in particular with the universality of suffrage. Therefore, the observers made and started diffusing their own claim labeling it as a human rights claim. However, the fact that the ECtHR issued a judgment on this matter prevented a linear diffusion of the observers' claim. And this made the claim-making divergent. In fact, the Court and the observers approached the same matter differently. Unlike the observers, the Court engaged in analyzing the out-of-country voting in a particular country, but nevertheless this does not allow to call for a state obligation to organize out-of-country voting.

It is important to note that the Court did not arrive to its conclusion arbitrarily. Furthermore, the Venice Commission subsequently confirmed that based on a comparative analysis of the domestic law of 33 Council of Europe member states, a large majority (29) have implemented procedures allowing voting from abroad.

Would it be better to introduce out-of-country voting in Hungary, Armenia, North Macedonia or elsewhere? The international human rights law that the Court uses does not have to provide an answer for this question. The election observers, given their

wide access to different electoral process, could be able to answer these questions; however, for this, time-consuming comparative methodological studies should be conducted. The Venice Commission reported a comparative study of 57 countries (including some which are not members of CoE) and concluded that the practices vary widely*, '*ranging from a very open attitude to the right to vote from abroad to denial' (Venice Commission 2011).

Even if the Venice Commission and the ECtHR itself noticed a tendency in Europe to allow for out-of-country voting, election observers already had moved to label this tendency a standard, and had expressed critical assessments of democratic development in countries not guaranteeing it.

This demonstrates also how powerful the claim-making of election observers can be and how far it can go in grounding the recommendations in little more than their own claims. It should not come as a surprise that some countries have followed up on the observers' advice to introduce the changes required by international observers. In 2004 Serbia introduced out-of-country voting, allowing citizens residing abroad to cast their votes in diplomatic and consular missions. While the OSCE/ODIHR observation mission noticed this as a positive development, it also stated that:

> the low number of voters that registered for voting abroad came as a disappointment. […] Some ten thousand voters only were registered for voting abroad, but due to the legal requirement establishing a minimum of 100 eligible voters for setting up a polling station, only eight thousand were finally able to vote in 33 representations abroad. This provision for out-of-country voting met criticism for its high cost (OSCE ODIHR 2004c).

This criticism was followed by a new set of recommendations:

> The threshold of at least 100 voters to register in order to set up a polling station abroad should be decreased in order to allow more eligible voters temporarily residing abroad to cast their votes. […] The right of candidates to send representatives to the polling boards in diplomatic and consular offices should be reviewed to decrease costs (OSCE ODIHR 2004c).

The above example also illustrates the phenomenon of "perpetual electoral reform" resulting from external influence. An electoral standard invented by election observers and based solely on their understanding of universality of suffrage was taken up by a country. After the government implemented the recommendation, it faced further criticism related to the implementation of the "standard". The implementation of one observers' recommendation to introduce out-of-country voting thus led to a cascade of recommendations how to make it better. Ironically, in reality ODIHR observation missions never observe voting abroad (this is logistically difficult also because the observers' invitation comes from the host country).[29]

The out-of-country matter is an example of the observers' attempt to set a standard that did not take hold and faded away once the competent human rights body ruled that no human rights instrument goes as far as to oblige a country to provide for voting from abroad. In other words, this *jus observatores* norm, is the result of the divergent standard setting. In this case the claim disappeared as it stopped being diffused.[30]

As anticipated, in other cases the analysis of observers' reports reveals more successful *jus observatores* norms, i.e. those that the observers keep insisting on despite the divergent jurisprudence of human rights bodies. One such example is the residence requirement. This requirement for voters as well as for candidates has been very sensitive for some states for the same reason as the out-of-country voting: the reluctance to allow diaspora citizens without a strong connection with the state to have a say in the electoral competition. However, a residence requirement, no matter the time frame, did not play out well with international election observers. It has been described as discriminatory and contradictory to international standards in their reports (see Table 7). Consider, for example, the following statement and recommendation that the OSCE/ODIHR made for Georgia in 2018:

[29] It means *inter alia* that observers will never be able to independently assess how their recommendations regarding voting abroad will be addressed.
[30] After 2012, the reports of the election observers do not mention the lack of out-of-country voting as a matter that contradicts international electoral standards.

The Constitution and the Election Code grant the right to stand in the presidential election to citizens of Georgia who are over 35 years of age, have the right to vote, do not have dual citizenship, and have resided in Georgia for at least five years in total, and consecutively for the last three years. These residency requirements appear *overly restrictive, disproportionate and at odds with OSCE commitments and other international standards*; ODIHR has previously recommended to reconsider these restrictions (emphasis added).

Table 7. *Residence requirement for voters and candidates in observers' recommendations*

Country, year	**Statements**	**Recommendation**
Belarus (OSCE ODIHR 2015)	Belarus-born citizens older than 35 years with a permanent residence in the country for the last 10 years are eligible to stand as candidates, provided that they do not have an unexpunged criminal record. Restrictions on the right to stand due to residency may be considered at odds with Belarus' international obligations.	The 10-year residency requirement for persons who are otherwise eligible to stand for election should be reconsidered.
Kazakhstan (OSCE ODIHR 2015b)	A candidate must be a citizen of Kazakhstan by birth, at least 40 years old, fluent in the Kazakh language, and officially resident in the country for the last 15 years. Persons serving criminal sentences, with a criminal record that has not been expunged, or a conviction for a crime or administrative offence involving corruption cannot run for office. Limitations based on the length of residency and the blanket restriction of those convicted of a crime are contrary to OSCE commitments and other international obligations and standards. .	Candidate eligibility requirements should be amended so as not to unduly limit the right of citizens to seek public office. Consideration should be given to removing the residency requirements and ensuring that any restrictions on the right to stand for those with criminal convictions are proportionate to the severity of the offence
Netherlands (OSCE ODIHR 2007b)	There is a special restriction on the suffrage applicable to Dutch nationals residing in the Netherlands Antilles or Aruba. They are not entitled to vote in Dutch parliamentary elections unless they have resided in the Netherlands for at least 10 years, or are Dutch public servants, or a spouse, partner or child of	Although the right to vote may be subject to a residence requirement, it should be applied in an equitable and non-discriminatory manner. Consideration might be given to seeking a more inclusive approach by reviewing the length of the residency

	a Dutch public servant and form part of the same household as that person.	requirement, more closely in line with the principle of universal suffrage, a matter within the discretion of the country concerned.
Armenia (OSCE ODIHR 2013e)	To be eligible to run for president, citizens must have voting rights, be 35 years or older, not hold the citizenship of another country, and have been a citizen of and have permanently resided in Armenia for the preceding 10 years.	*No recommendations or criticism*
Montenegro (OSCE ODIHR 2013d)	All citizens who are 18 years or older on election day, have permanent residence in Montenegro for at least 24 months prior to election day, and who have not been declared mentally incapacitated by a court, have the right to vote. The residency requirement is overly restrictive, as noted previously in OSCE/ODIHR reports and joint opinions of the OSCE/ODIHR and the Venice Commission. It also continues to be at odds with international good practice, which recommends the use of residency requirements only in the context of local elections. […] The right to stand as a candidate is granted to every citizen with voting rights, who resided permanently in Montenegro for at least 10 of the previous 15 years. Although a reasonable residency requirement to be eligible to stand is acceptable, the duration of 10 years is excessive and disproportionate with the principle of equality, challenging international obligations and OSCE commitments.	In line with previous OSCE/ODIHR recommendations and international good practice, consideration could be given to eliminating the 24-month residency requirement to be eligible to vote. Consideration should be given to significantly reducing the length of residency requirement to be eligible to stand as a candidate.

As a reference for the relevant international standard the election observers indicated paragraph 7.3 of the 1990 OSCE Copenhagen Document, which states that “the participating States will guarantee universal and equal suffrage to adult citizens”, and paragraph 24 which provides that restrictions on rights and freedoms must be “strictly proportionate to the aim of the law” (CSCE 1990).

However, the position of human rights bodies is different. Under the ICCPR, the right to vote is granted to citizens. Electoral rights, as it was repeatedly mentioned by many human rights bodies, are not absolute. The CCPR emphasizes that any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria, and that eligible persons should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.[31] A residence requirement for the right to vote has been accepted as a reasonable limitation by the UN Human Rights Committee (CCPR), as long as it is not discriminatory. The Committee recognizes that differentiation does not constitute discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.[32]

The European Court of Human Rights (ECtHR) has also accepted limitations on the right to vote on the basis of citizenship and residence.[33] The Court noted a tendency in Europe to broaden the right to vote to include non-residents.[34] Candidacy rights are subject to a potentially wider range of restrictions than voting rights. Recognizing as "incontestably legitimate the interest of each State in ensuring the normal functioning of its own institutional system", the ECtHR has given states a greater margin of appreciation with restrictions on candidacy rights compared to the right to vote.[35] Even so, the Court must still be satisfied that such restrictions pursue legitimate aims and are proportionate to the aims pursued. The Court has been more cautious in its assessment of restrictions under this aspect of Article 3 of Protocol No. 1 than when it has been called upon to examine restrictions on the right to vote; the proportionality test is more limited.

[31] Paragraph 15 of the 1996 UN Human Rights Committee General Comment No. 25 to the ICCPR.
[32] See CCPR, *Gillot et al. v. France*, views of 15 July 2002, U.N. Doc. A/57/40 at 270 (2002).
[33] *Hilbe v. Liechtenstein*, Decision of 7 September 1999; *Py v. France*, Judgment of 11 January 2005; *Doyle v. UK*, Decision of 6 February 2007.
[34] Likewise, although there was a clear trend in the laws and practices of member States in this sphere in favour of allowing voting by non-residents, and a significant majority in favour of an unrestricted right, it could not be said that the stage had been reached where a common approach or consensus in favour of an unlimited right to vote for non-residents could be identified. *See ECtHR, Shindler v. UK,* Judgment of 7 May 2013, at 114.
[35] ECtHR, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, Judgment of 11 January 2007 and *Etxeberria and Others v. Spain*, paragraph 50.

While national practices differ in their application of the residence requirement for candidacy, international human rights bodies have taken a case by case approach refusing the idea that this requirement per se constitutes a ground for discrimination (see *Hilbe v. Liechtenstein*). In other words, as long as the requirement is justifiable it cannot be labeled as unreasonable or discriminatory. However, in the eyes of election observers, there is evidently no legitimate aim that might justify an imposition of the residency requirements on a candidate.

For example, in 2004 in *Melnychenko v. Ukraine*, the ECtHR found a violation of Article 3 of Protocol No 1 because of the way the residence law had been applied to the applicant. The judgment was accompanied by a dissenting opinion of Judge Loucaides who did not the violation of Article 3 of the Protocol even in this particular case. The Court also noted that while it never expressed its opinion on the cases of the residency requirement for candidates, the Court had already ruled on the similar cases concerning the right to vote. In those cases the Court established the list of grounds that can justify the residency requirements, among which are the knowledge of a country's day-to-day problems, 'correlation of one's right to vote and being directly affected by the acts adopted by the elected body (see also *Polacco and Garofalo v. Italy*, Commission decision of 15 September 1997, referring to previous Commission case-law). The Court stated that for the right to be elected even stricter requirements may be imposed, citing the Venice Commission, and concluded that the residency requirement 'may be deemed appropriate to enable such persons to acquire sufficient knowledge of the issues associated with the national parliament's tasks' and '[s]uch requirements clearly correspond to the interests of a democratic society, and States have a margin of appreciation in their application' (ECtHR 2004).

Admittedly, election observers are in a difficult spot when it comes to restrictions such as residency requirements. The reasons for introducing a long residency requirement are probably different in Kazakhstan than they are in the Netherlands. It might be that in the former case it is designed to keep election challengers away and may well be discriminatory, while in the latter there may be a more convincing explanation. The problem is that election observers (unlike, for example, courts) do not have the means to apply any test to determine discrimination as long as they claim to apply a uniform "standard". If observers conclude that 10 years is not an acceptable residence

requirement for candidates in Kazakhstan, they would not tolerate the same in the Netherlands either. Therefore, any divergence in the process of formation of electoral standards, including the divergence in acceptance, becomes risky for the success of standardization, as it modifies the initial claim, to the point of leading to its disappearance. The introduction of comparative methodology may jeopardize standardization, as it asks questions why a concrete standard is plausible in concrete contexts, but will not be satisfied with the answer 'because standards are the same for all'.

In this regard, the approach of observers, even if it may be in some cases beneficial, prioritizes consistency, i.e. consistent repetition of one standard-claim many times, at the expense of accuracy. The observers' approach may give results in some contexts. For example, after many repeated recommendations to lift residency requirement for parliamentary candidates in Armenia, the Armenian law shortened the duration of the residency requirement (OSCE ODIHR 2017). However, the observers predictably continued their criticism, since they already labeled this rule as discriminatory. Such 'template' recommendations may travel from one report to another, regardless of the historical background, political situation and the electoral system, since in the eyes of observers they apply a standard.

The methodology of election observation does not entail analysis comparable to a court judgment, nor do observers have legal qualifications comparable to international judges. While the courts developed and widely use 'the balancing test', 'doctrine of implied limitations', and other means that constitute the framework for their interpretations of international instruments, observers use standards. Once something is labelled as a standard, the chances of a different interpretation are minimal. *Jus observatores* in the form of an electoral standard produced by international observers' interpretation of human rights instruments and their diffusion may thus co-exist together with a different interpretation of human rights bodies, i.e. institutions responsible for the interpretation of the international treaties. It may, however, be "overruled", as we have seen with the example of out-of-country voting.[36]

[36] See *supra,* Table 5.

It is evident from the examples above that observers engage in their own interpretation of international instruments such as the ICCPR and other human rights treaties, and have a tendency to further diffuse their interpretations. On the basis of these instruments, through the use of provisions on non-discrimination, the observers are able to create their own claims to standards. It is also evident that the power of observers to diffuse the claims is wider than the diffusion power of the human rights bodies.[37] It is especially true when it comes to the cases in which there is no violation of the human rights treaty provisions. These are not necessarily high-profile cases (such as residence requirement cases) and the international observers may simply be unaware of the developments of the human rights jurisprudence and keep diffusing different claims.

As it was demonstrated above, the observers' direct engagement in the interpretation of the human rights provisions is especially evident when it comes to the notions of "equality", "universality" and "discrimination", where observers put forward interpretations as well as constructions of "non-discrimination", "balancing", "proportionality" that may differ from the analysis of courts and human rights bodies. At the same time, with the development of election observation reports (as they become more detailed on different aspects of the process), there are also examples of original findings of "discrimination". For instance, around 2004 ODIHR began to identify another electoral standard by insisting on the necessity to adopt the provisions for "independent candidates".

This interpretation was based on the 1990 OSCE Copenhagen Document, the relevant provisions of which read as follows:

> (7) To ensure that the will of the people serves as the basis of the authority of government, the participating states will […]
> (7.5) – respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination […] (CSCE 1990)

[37] See *supra* on the Limits of Human Rights Law.

The OSCE Copenhagen Document commits the participating States to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organisations, without discrimination". This commitment prohibits discrimination in the exercise of the right to stand for public office, both with respect for candidates who stand individually or as members of political parties. Thus, paragraph 7.5 protects the right to stand for elections without discrimination, not the right to stand individually or the right to stand as a representative of a political party. However, the election observers derived from this provision a specifically protected right of individual candidates to run for any office without being affiliated with a political party (see Table 8).

Table 8. *Individual independent candidates*

Country, year	**Statement**	**Recommendation**
Portugal (OSCE ODIHR 2009)	There is no provision for independent candidatures. Most interlocutors met by the OSCE/ODIHR EAM expressed their reservation against opening the system to independent candidates, even in the form of lists of independent candidates. Some interlocutors indicated that the law allows independent candidates to compete for parliament by means of inclusion on party lists. However, such arrangements leave full control to the parties, while the OSCE commitments provide that the rights of citizens to seek political office individually should be respected.	The legislation should be amended in order to give an opportunity to individual citizens to run as independent candidates, in accordance with paragraph 7.5 of the 1990 OSCE Copenhagen Document.
Uzbekistan (OSCE ODIHR 2010c)	The possibility for citizens to form initiative groups to nominate independent candidates was abolished by the 2008 amendments to the election law. This amendment is in contravention of paragraph 7.5 of the 1990 OSCE Copenhagen Document that provides that citizens should have the right to seek political or public office, individually or as representatives of political parties or organizations, without discrimination. OSCE/ODIHR EAM interlocutors stated that this change in legislation was prompted by the need to prevent fragmentation in the parliament and to avoid the potential of extremist groups entering parliament via initiative groups.	The legislation should be brought in line with OSCE commitments. It should provide individual citizens with the opportunity to stand as independent candidates, in accordance with paragraph 7.5 of the 1990 OSCE Copenhagen Document.

Latvia (OSCE ODIHR 2010b)	Independent candidates are not allowed to run, in contravention of paragraph 7.5 of the 1990 OSCE Copenhagen Document.	Provisions should be made for independent candidates to stand in elections.
Poland (OSCE ODIHR 2011c)	Independent candidates cannot stand alone in the Sejm elections but only in list-sharing with other candidates in a multi-member constituency. This practice is contrary to paragraph 7.5 of the 1990 OSCE Copenhagen Document.	
Russia (OSCE ODIHR 2012)	Only registered political parties can contest elections. Independent candidacies and the formation of electoral blocs are not permitted.8 Parties can, however, include individuals who are not members of any political party in their candidate lists. This is at variance with paragraph 7.5 of the 1990 OSCE Copenhagen Document, which states that […].	Election legislation should be amended to allow independent candidacy in line with paragraph 7.5 of the Copenhagen Document.
Greece (OSCE ODIHR 2012b)	Political parties, coalitions or independent candidates securing less than three per cent of votes are excluded from the allocation of seats. Several OSCE/ODIHR EAM interlocutors expressed their concern that the three per cent threshold practically prevents independent candidates from entering the parliament. As a consequence, no independent candidates were elected to the parliament since the adoption of the current electoral system in 2004. Those interested in running for office are therefore compelled to join political parties or coalitions to have a more realistic chance of being elected. It is important to create reasonable conditions for independent candidates to be elected, as noted in paragraph 7.5 of the 1990 OSCE Copenhagen Document.	Consideration should be given to lowering the threshold for independent candidates in order to effectively ensure the possibility for such candidates to be elected, in compliance with the OSCE commitments and international standards.
Serbia (OSCE ODIHR 2014b)	Candidate lists could be submitted by political parties, their coalitions or groups of citizens. Despite previous OSCE/ODIHR and Council of Europe recommendations, the LER does not expressly provide for self-nomination by an individual independent candidate, which is contrary to OSCE commitments and international good practice.	As stated in previous OSCE/ODIHR and Venice Commission recommendations, the LER should be amended to expressly provide for self-nomination by an individual independent candidate.
Kyrgyzstan (OSCE ODIHR 2016)	Independent candidates are not permitted to contest parliamentary elections, which is at	The legal framework should be amended to allow independent candidates to

	odds with OSCE commitments and other international standards.	stand in parliamentary elections.
Spain (OSCE ODIHR 2016c)	The right to nominate candidate lists is granted to political parties, party coalitions and groups of voters (contestants). Each list had to include as many nominations as the number of seats plus up to 10 substitutes. A candidate could only be on one list. Independent candidates cannot stand, contrary to OSCE commitments and other international obligations and standards.	The legislation should be amended to allow individual citizens to run as independent candidates, in accordance with OSCE commitments and other international obligations and standards.

No human rights instrument states that any difference in treatment of individual (non-partisan) and party candidates (or an absence of provision for either candidacy) would automatically constitute discrimination. In legal theory and in jurisprudence of international human rights bodies, a finding of discrimination requires assessing whether persons in relevantly similar situations are treated differently without an objective and reasonable justification. So, for example, where judicial offices are filled through election, there may be a legitimate reason to permit only non-partisan ("independent") candidates to stand. Similarly, only political parties and groups of citizens but not individual candidates may be allowed to contest legislative elections in proportional electoral systems, to avoid excessive fragmentation of the resulting legislature. A different interpretation would mean that, for example, a proportional electoral system is *per se* discriminatory. Such conclusion would, in turn, constitute a severe intrusion into the margin of appreciation of states in their choices of electoral systems.

Where both individual and party candidates compete for an elected office, the reasons for differences in their treatment need to be examined. For example, in Turkey where non-residents could only vote for political parties but not individual candidates in legislative elections, the ECtHR found that this limitation pursued legitimate aims: "[…] enhancing democratic pluralism while preventing the excessive and dysfunctional fragmentation of candidacies, thereby strengthening the expression of the opinion of the people in the choice of the legislature" (ECtHR 2014b: 65). Consequently, the Court ruled that "the treatment complained of by the applicant in his capacity as an unaffiliated independent candidate was based on an objective and reasonable

justification". In the same case, the Court did not accept that independent candidates and political parties can be put on the same footing with regard to access to the national broadcaster:

> 74. […], the Court is not convinced that the applicant, in his capacity as an unaffiliated independent candidate, on the one hand, and the political parties, on the other, can be deemed to be "placed in a comparable situation" for the purposes of Article 14 of the Convention. (ECtHR 2014b)

The Court attaches a special importance to the role of political parties (see e.g. *James and Others v. the United Kingdom*, 21 February 1986, para 46 and *Uzan and Others v. Turkey* (dec.), 29 March 2011, para 83).

It is easy to see that the same reasoning could lead to a different conclusion in election for an executive office, such as presidency. However, even when electoral systems accommodate both types of candidatures, prohibition of discrimination is not equivalent to the requirement of equal treatment of political parties and independent candidates. In some cases different treatment is justifiable and serves to protect public interests and interests of voters. For example, requirements for electoral deposits and collection of signatures are more common for independent candidates. The right to seek political or public office without discrimination, whether citizens do so individually or as representatives of political parties, does not automatically provide for an equal treatment in the allocation of state resources to individual candidates vis-à-vis political parties.

Evidently, the goal of paragraph 7.5 of the Copenhagen Document was not to absolutize the right to stand for the office individually, but rather protect the right to seek the office without discrimination (whether candidates do it individually or as representatives of political parties). A reference to some "special protection" of the rights of independent candidates to seek political offices as well as potential privileges (e.g. system of support for independent candidates) could not be inferred neither from the Copenhagen Document, nor from other international electoral and human rights standards, which emphasize the role of political parties in democratic development. Taking into account the important role of political parties in democracies recognized by scholars and international actors, it would be an evident exaggeration to prioritize

independent candidates and absolutize the right to stand individually regardless of the electoral system.

The difference between this example and those on residence requirements and out-of-country voting is that on the latter cases, the *jus observatores* related to the interpretation of international human rights instruments, which are also interpreted by competent international bodies. In the case of the right to stand individually, the Copenhagen Document is not complemented by an official interpretation of its provision, although there is considerable jurisprudence on the key concept of discrimination and other relevant positions of human rights bodies. From this document, the OSCE/ODIHR observers have for years maintained the claim that it almost embodied the 'right to stand for office individually'. Although one can refer to the interpretation of the provisions which may also be used by observers, this interpretation does not involve any international human rights law references or comparative studies and, thus, creates unleashed international electoral standards outside of legal field, with uncertain effects in terms of implementation.

Expansion of *jus observatores*

Expansion of *jus observatores* refers to the activist position of election observers. Election observers are highly creative and they do not refrain from enhancing the scope of their activity. For example, this is true with regard to electoral systems. The observers could be seen commenting on the issues that were traditionally regarded as a matter of state sovereignty, such as the choice of electoral systems. For example, the 1998 report on Moldova stated under the heading "some legal issues" criticized the current electoral system and recommended reconsideration of its certain elements in light of its minority populations.[38]

This assertiveness stands in contrast with the ECtHR's reluctance to examine electoral systems. *In Bompard v. France,* an alleged violation of Article 3 of Protocol

[38] "The Parliament decided on an electoral system with one single constituency covering the whole country, and with proportional distribution of seats. This system may be appropriate in countries with no geographically concentrated minorities. However, if there are clear regionally based minorities, a system that provides for political competition within regions is normally used. This can be done by dividing the country in a number of constituencies. […] It is recommended that this issue be addressed as a matter of priority when reviewing the election law in view of future elections" (OSCE ODIHR 1998b).

1 of the ECHR due to differences of number of voters constituencies was rejected as inadmissible. Reiterating the wide margin of appreciation given to the states in this area, the Court did not find these electoral conditions "unjustified and disproportionate" (ECtHR 2006). Furthermore, the Icelandic electoral system was contested by the applicant who claimed a violation due to a different weight of the vote in different constituencies. It became another textbook example of a case that has no real chances to succeed on the merits (Janis et al 2008: 38-41). The Court's non-acceptance that "all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory" (ECtHR 2008: 112) plays the role of an admissibility criterion for most cases concerning electoral systems. Here the limit of the jurisdiction of the court is on admissibility criteria.[39] As a result, complaints on delineation of electoral constituencies were, as a rule, declared manifestly ill-founded, regardless of the gravity of the departure from the equality of the vote, without being given a chance to be examined on the merits.

It is evident from the example above that the ground on which the human right bodies are prevented from adjudicating claims on electoral systems are not considered by international electoral observers as a limit to their activity. As a consequence, while commenting and suggesting to revise one of the most politically-sensitive features of the country, the observers cannot rely on existing international instruments. Examples of recommendations related to electoral systems are provided in Table 7.

Table 7. *Electoral systems*

Country, year	Comments
Montenegro (OSCE ODIHR 2002)	In particular, two features of the system of distribution and control of electoral mandates are not conducive to the development of democratic institutions. The election law provides that only one-half of the seats won by a party or coalition is allotted to its candidates according to the order of the candidates on the electoral list. Other candidates on the list fill the second half of the seats at the sole discretion of the party or coalition. Thus, voters do not necessarily know which candidates they are electing.

[39] See *supra,* 3.3. Claims to international standards and human rights law limitations.

Serbia (OSCE ODIHR 2001b)	The legal provisions for allocating mandates are a step back as the legislation permits parties to select which candidates will receive mandates ex post regardless of their position on the list. This lessens voters' understanding of precisely whom they electing. Furthermore, the Law allows parties to terminate mandates of representatives who lost party membership, regardless of whether the loss of membership was voluntary or followed expulsion. Effectively, these provisions make elected representatives less accountable to voters than to political parties.
Moldova (OSCE ODIHR 1998b)	The Parliament decided on an electoral system with one single constituency covering the whole country, and with proportional distribution of seats. This system may be appropriate in countries with no geographically concentrated minorities. However, if there are clear regionally based minorities, a system that provides for political competition within regions is normally used. This can be done by dividing the country in a number of constituencies. Complaints were raised by representatives from the Gagauzian authorities that the law did not give sufficient possibility for the Gagauzian population to have a political competition between parties within their Autonomous Territory. It is recommended that this issue be addressed as a matter of priority when reviewing the election law in view of future elections. Several systems combining full proportionality between parties and geographical representation are available.

Based on all the examples offered up to this point, the OSCE/ODIHR reports demonstrate an interesting trend: it might be that the need to produce assessments and recommendations that would be more specific than "free and fair" resulted in an expansion of assessments beyond the framework of existing international instruments. The observers could not be blamed for doing so. Such detailed assessment when performed at the international level always touches upon the features that the international law tries to avoid as it belongs to the constitutional frameworks of the states. However, the lack of methodology may (and does) lead to the situation that 'standardization' via diffusion of previously made claims replaces meaningful comparative analysis.

Human rights bodies are sometimes criticized for doing too little for democracy. One has to wonder whether election observers are doing the opposite, i.e. going too far in standardizing democratic developments. Are international standards regarding the electoral issues mentioned above envisionable? Can there be standards in constitutional organization of power or political competition at all? The answer that

election observation provides is unequivocally yes, however, the practice of application of such standards shows that it is not substantiated with arguments. Moreover, it should be noted that neither comparative constitutional law tackles the question of whether some rule regarding constitutional political organization of a state is better suited to one country than another, thus leaving this field open to human rights law (or to political scientists). Given that the international human rights law is limited in this regard, many questions are left without legal answers. Considering this gap, in the space left within the human rights area and around, international treaties as well as jurisprudence of the international human rights bodies serve as a point of reference for analysis. The fields uncovered by the human rights law remain fully open to 'standardization'. For this reason, this thesis argues that the approach and the methodology used should include comparative constitutional analysis.

In this respect, the expansion of *jus observatores* also manifests itself in the fact that the observers are those that label standards as such. While the claim-making power of the international human rights bodies is determined by their competence to interpret human rights instruments, the mandate of observers is directly linked to international electoral standards. In this regard, given that parallel claims can exist, there may be situations in which a provision that could be justifiable from the point of view of international human rights standards, at the same time could be discriminatory in international electoral standards in the forms in which these standards are claimed as such by international observers.

The role of the observers in the standard-setting process is critical. It is an unfolding reality that, entitled or not to their own interpretation of human rights standards, observers hold observed states to self-created standards. Effectively, observers in such cases reject or considerably reduce the margin of appreciation of states recognized by human rights bodies.

As a result, the expansion of power of observers comes together with the labeling power as the rules are to be diffused under the titles of the international electoral standards, while the examples above showed that such standards may not always be supported by the existing international jurisprudence. As shown by the qualitative analysis in this chapter, such standards are claimed and diffused by international

actors and many of them are accepted by the states, at times regardless the positions of human rights bodies or in the absence of these positions. This puts a large part of the international electoral standards-setting outside of the framework of the international legal norms. The human rights law is not always the framework within which the observers operate. At the same time, when accepted by states, the electoral rules make a part of the constitutional framework of the states and their impact on the global electoral arena may be approached from the comparative constitutional perspective.

As election observation becomes a norm itself, with the implication that observers' assessments become the embodiment of international standards in the eyes of domestic stakeholders and the international community, one could argue that the international election observation becomes inseparable from the actual international electoral standards, to the point of being synonymous with the latter.

Chapter 4. Standard-setting through yardsticks of Western European heritage: study of opinions of the Venice Commission

4.1. European electoral heritage for national elections

In the previous chapter it was explored how the idea that international electoral standards come from the application of international law to national elections is implemented in practice. Through empirical research of election reports it was highlighted how human rights law is being 'translated' into international electoral standards through the reports of election observation missions. The conclusions of the analysis above are that, first of all, human rights standards are not automatically international electoral standards. They may acquire recognition as international electoral standards through the diffusion by international actors involved in election-related activities. Secondly, a closer look at the process of such diffusion shows that human rights standards are not always diffused in their 'original versions' or what the observers present as standards does not always correspond to the interpretation of the human rights bodies. I called these phenomena *jus observatores* to show the intention of the observers to give a certain status to their interpretations of human rights provisions. While international human rights standards establish the minimum level of human rights protection, *jus observatores* may go beyond the minimum, potentially asking countries to exceed the legal obligations based on the instruments they ratified. Thirdly and importantly, the *jus observatores* as standards become the same for all countries. This raises questions about the extent to which issues within the margin of appreciation of specific countries should be open to standardization. What may seem a good suggestion to one country may be harmful for another – the implication is that 'standardization' may not be the best methodology when it comes to sensitive electoral issues as it lacks comparative sensitivity and does not acknowledge the specific context of the countries.

Is there an alternative? The Venice Commission is an example of how comparative constitutional law may be successfully employed in the practice of production of international electoral standards. The Venice Commission employs comparative tools when identifying areas regarded as problematic for electoral area in its practice, which

results in the identification of the areas that are regarded as problematic for the organization of elections, advancing the processes of setting international electoral standards. At the same time, its intention to approach each problem with yardsticks brings about multiplication of their claims to standards. Such multiplication, in turn, may lead to situations where the yardsticks lose their attachment to the red lines, and, similarly to *jus observatores*, begin to form autonomous standards, potentially replacing solutions with new problems.

Venice Commission as an actor in the standard-setting process

As it was discussed above, international electoral observers are one of the key actors that contribute to setting the scene for standardization of election rules. While the observers are very important, yet they are not alone in the field. The Council of Europe's Commission for Democracy through Law (the Venice Commission) has shown to be another important source of international impact on national electoral processes.

The study of the Venice Commission documents, such as opinions on specific legislation and broader studies, reveals that although the Venice Commission does not always label its electoral norms as international electoral standards and diffuses them as 'good practices', in reality many of these practices acquire no less normative recognition than those identified by international observers as international electoral standards. In fact, election-related opinions are part of the broader activities covered by the working methods of the Venice Commission, with regard to which it was noted that while opinions are not binding, they have been heeded quite often (Steinberger 2007).

It is noteworthy that the activity of the Venice Commission is built on the basis of the 'European constitutional heritage'.[40] Part of this heritage, what the Commission termed 'European electoral heritage', is set out in writing in the Code of Good Practice in Electoral Matters. The regularity of the "enforcement" of its provisions is ensured through impressively frequent engagement of the Venice Commission with its member

[40] See infra, 4.2. European electoral heritage as a claim to international electoral standards.

states. The Code of Good Practice has also been taken up as an important reference by other organizations, including the ECtHR (Buquicchio and Granata-Menghini 2019). In the high profile cases mentioned in the previous chapter, such as the issue of out of country voting (*Sitaropoulos and others v. Greece*) and dual citizenship (*Tanase v. Moldova*), the Court cited the Code of Good Practice as well studies and opinions of the Venice Commission.

The Venice Commission keeps track of references to its documents by different institutions and its impact,[41] and increasingly would like to be seen as a standard-maker, including in the field of electoral law. In the 2020 statement dedicated to the 30th anniversary of the establishment of the Venice Commission, its President, Gianni Buquicchio said that, among other achievements:

> '[i]n the 30 years of its experience, the Venice Commission has become a main reference with respect to the development of international standards on the rule of law, democracy and the respect for human rights and *developed standards for the holding of democratic elections and contributed to electoral reforms'*.[42] (emphasis added).

A growing number of opinions, studies and guidelines dedicated to the electoral legal frameworks and processes make elections one of the key areas of involvement for the Venice Commission.[43] Therefore, when it comes to the standard-setting role of the Venice Commission, the starting point is that, unlike election observers, the Commission *is* a claim-maker.[44] Methodologically, it means that the content-analysis of the documents produced by the Venice Commission differs from the analysis of the election observation reports. In the case of election observation reports, the primary goal is to explore the diffusion of the claims. Through this exploration it was established that observers also claim new rules. In turn, the analysis of the Venice Commission's documents *ab initio* targets both the claim-making and the diffusion.

[41] See https://www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN#ECHR, including references to the Code of Good Practice in Electoral Matters in the case-law of the ECtHR.
[42] See President Buquicchio's statement: https://www.venice.coe.int/webforms/events/?id=2928.
[43] Election-related opinions are published on the website of the Venice Commission https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN.
[44] See *supra* 4.2. European electoral heritage as a claim to international electoral standards.

Having said that, it should be noted that the Venice Commission is not a decision-making body of the relevant intergovernmental organization (Council of Europe) nor an organ of the Council of Europe, but has the status of a consultative body (Steinberger 2007). Nevertheless, its writings are sometimes presented as a source of soft-law, especially by its own experts (Buquicchio and Granata-Menghini 2019: 38), and have even been referred to as a source of 'transitional law' - on the way to internationalization of constitutional law (Bartole 2020). Some Venice Commission experts point out that in particular fields the Commission uses standards that are stricter than those of the European Court of Human Rights, and conclude that the Venice Commission consumes and, at the same time, produces European and soft law in the field of human rights and the rule of law, using as examples guidelines produced also jointly with OSCE/ODIHR (Tuori 2016). By doing this, the Venice Commission 'complements' European hard law. This contributes to the practitioners' and, importantly, member states' perception of the Venice Commission as a 'producer of the European and soft law'. Tuorli mentioned that this is especially true for the electoral domain since

> '[t]he Commission has adopted guide-lines, either on its own or together with the OSCE-ODIHR, especially in the fields of political rights, elections and referendums, and last March it adopted a comprehensive rule of law check-list. The Commission has also published summaries – so-called vademecums – of its country-specific opinions on particular issues, and in this manner, too, contributed to the growing body of European soft law' (Tuori 2016).

There may be a separate discussion into which "legal box" different Venice Commission writings may be placed. The question to which extent election-related international recommendations should be seen as law was explored earlier in this thesis.[45] Discussing above how international electoral standards fit into the legal field, it was argued that there is much space for doubt that many of the rules falling under this concept could amount to international law, even soft law, due to the special nature of the electoral field.

[45] See *supra* International electoral standards as 'legal' phenomenon.

If the legal theory becomes open to accommodating any expert opinions that come under the umbrella of international organizations as soft law, it risks the wholesale acceptance of the legal nature of a panoply of claims, without scrutiny of their substance. This thesis explores the substance of international electoral standards, including some of those made through the Venice Commission's opinions, not in order to prove (or disprove) that international electoral standards *are* international laws, but rather to show that their formation should be studied, *inter alia*, from the legal perspective.

It is not the intention of this thesis to join the discussion whether or not (and to what extent), the Venice Commission should be regarded as a producer of European law, although some of my conclusions with regard to the electoral field of the Commission's activity may be found relevant for this discussion. For the purposes of this research, it is important to establish that the Venice Commission also approaches states with electoral standards, which it asserts they need to follow. However, the reasons for the state to adhere to these standards differ from those of the election observers. Based on the idea of the European electoral heritage, they pave the way for the 'yardsticks' approach to the setting of international electoral standards.

The working method of the Venice Commission and the diversity of its member states

The Commission was established by a partial agreement of the Council of Europe's Committee of Ministers in 1990 (Council of Europe 1990), with a handful of states.[46] A key role in the creation of the Commission is attributed to Italy's Minister for European Affairs, Antonio La Pergola, who defined the goal of the Commission as follows: "Peace through democracy and democracy through law are going to be our steadfast commitment…". Since its founding, the Venice Commission presented its activity as 'a reference for the quality standards of democracy in Europe.'[47]

[46] Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey.
[47] See e.g. https://www.venice.coe.int/webforms/events/?id=1157.

Since its establishment, the Council of Europe itself operated with the principal goal to uphold human rights, democracy and the rule of law (Schmahl and Breuer 2017). In its turn, the agreement of the Venice Commission establishment included the statute, which set the following objectives for its work with regard to participating states: the knowledge of their legal systems, notably with a view to bringing these systems closer; - the understanding of their legal culture; - the examination of the problems raised by the working of democratic institutions and their reinforcement and development.[48] At that stage, the goal of the activity of the Commission was not expressly spelled out in terms of the promotion of values, but in accumulation of knowledge on these common values and understanding of the legal culture.[49] At the same time, it should also be noted that the creation of the Commission was prompted by the growing need to support new democracies within the Council of Europe. As S. Bartole put it: '[f]rom the very beginning, the role of the Venice Commission has been deeply shaped by the experience, and especially by the attention paid by the European institutions to the advent of the new democracies in the countries of Central and Eastern Europe after the fall of the Berlin Wall' (Bartole 2020). The establishment of the Venice Commission was prompted by the need to assist new democracies to bring their constitutional systems to the Western European standards.

This important role, in a way, impacted the methods that the Venice Commission used. The Commission from the beginning has been balancing between sensitive elements. On one hand, its activity per se includes reaching quite far into the constitutional law that 'was – and still is – regarded as a State's reserved domain *par excellence*', while on the other hand, if the Commission would not do this, it would become 'one of the many expert groups producing abstract assessments' (Buquicchio and Granata-Menghini 2019: 244). Referring to the potential future of the commission, Buquicchio underscores the anticipation of change and adaptation to it.

With regard to change, it is of relevance that in 2002, the statute of the Venice Commission was revised and the Commission received new tasks related to the promotion of democracy. One of the most important novelties, as noted by

[48] Resolution (2002)3 Revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 February 2002).
[49] See *infra* on the modifications of statutory goals of the Venice Commission.

commentators, was the fact that the Venice Commission was enlarged, since non-member states of the Council of Europe were allowed to join the Commission as members (Craig 2019). Moreover, in addition to developing recommendations for individual countries, the Commission was authorized to 'prepare studies and draft guidelines (Article 2 of the revised Statute). Also, one of the most important changes happened in the objectives of the Venice Commission's work, outlined in Article 2 of its Statute – from accumulating knowledge and understanding of the legal systems and cultures, the Venice Commission was tasked to also act more proactively in promoting the rule of law and democracy.

As shown in the figure, important changes of the wording occurred in the first objective of the Commission, and the second one changed significantly. One could interpret this change as a certain completion of 'the understanding of the legal culture' of the newcomers by the Venice Commission, followed by the decision to 'promote the rule of law and democracy' where these legal cultures were found to be lacking.

1990	2002
the knowledge of their legal systems, notably with a view to bringing these systems closer;	(1) strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;
- the understanding of their legal culture;	**(2) promoting the rule of law and democracy;**
the examination of the problems raised by the working of democratic institutions and their reinforcement and development.	3) examining the problems raised by the working of democratic institutions and their reinforcement and development

If the early activity of the Venice Commission was aptly called 'emergency constitutional engineering' (Van Dijk 2007), in today's practice it became rather routine constitutional engineering and maintenance. In this sense, the Venice Commission's task was to help new democracies absorb an already existing legal culture, and accept existing (but new for them) rules of the game. The democratization wave in post-Soviet

space called for additional mechanisms of assistance to emerging democracies. The main purpose of the Venice Commission was seen in shaping the constitutional legal frameworks of the freshly minted democracies more “alike” those of the established democracies. As Bartole (2011) explains, the initial choice to cooperate with the states outside Western Europe contributed to the growing popularity of the Venice Commission in countries of Central Asia, Africa and Americas.

At the same time, the Commission’s approach created a certain dichotomy between the groups of member-states, namely those

> which have a long tradition of identification with the principles and values of the European constitutional heritage and States which identify themselves in different constitutional traditions but are encouraged to accept and follow the values and the principles of that heritage in drafting their constitutions and constitutional laws (Bartole 2011).

In essence, in this vision Europe’s older democracies were not expected to take steps towards standardization, rather the newcomers were ‘conditioned’ to adopt different democratic attributes of the established democracies in order to meet the standards of older democratic sisters. The Venice Commission has implied that the European constitutional heritage is a basis for promoting the development of freedom and democracy not only in Europe. The benefits of membership in European institutions for the newcomers come with the price: the acceptance of constitutional values and traditions that are not necessarily part of their legal culture. Therefore, the comparative element of the Venice Commission’s approach is limited by this dichotomy: new democracies should accept the constitutional features of established democracies in their interpretation of the Venice Commission, the body responsible for the identification of the standards. The western European ‘yardsticks’ are devised as transplants which are supposed to penetrate the legal cultures of the transitional democracies.

While how and why such transplants occur in different areas of constitutional law, especially constitutional justice and judicial independence, has been studied (Uitz 2005, Rosenfeld et al 2015, Halmai 2018), the electoral domain, where the Venice

Commission becomes increasingly active, is often (again) overlooked by constitutional lawyers and comparativists, as discussed above.[50] The Venice Commission now regularly offers its assistance to the electoral frameworks of the member states, using methods similar to 'constitutional engineering' – approaching the states with 'yardsticks', i.e. standards detected in the Western democratic countries.[51]

4.2. European electoral heritage as a claim to international electoral standards

The Venice Commission contributes to the development of international electoral standards through tools which differ from the 'free and fair' formula. The Venice Commission does not itself engage in the assessment of elections as free and fair, nor does it put in the centre of its work the claim that it applies international law to elections. It arrives to electoral standards from a different starting point – namely, 'yardsticks', i.e. standards that stem from the interpretation of European constitutional heritage by the Venice Commission.

> As a matter of fact this heritage is the yardstick that the Commission adopts in expressing its opinions on the drafts which are submitted to it. […] The interpretation of the European constitutional heritage is allowed to move with scientific and operational discretion: it implies distinguishing the relevant principles and the extension of the space of discretion which they leave to the States. The point is very delicate and requires specific attention. The Commission has to deal with sovereign States and, obviously, even the interpretation of the heritage can be seen as an exercise of sovereignty. Therefore the Commission should leave to the State a margin of appreciation in dealing with their own constitutional problems. But this is not always possible because some principles and values must be interpreted in a mandatory way, that is in a way which does not have alternative of choice (Bartole 2011).

It is important to highlight the distinction between these approaches to standard-setting. From the Venice Commission perspective, the electoral domains of member-

[50] See *supra* Setting the theoretical framework for international electoral standards.
[51] On constitutional engineering, see Sartori (1994).

states are regarded more through comparative perspective (the dichotomy between the groups of states) rather than through international law. An electoral domain is an important part of the constitutional frameworks of the states where they, at least in theory, preserve a certain margin of appreciation. S. Bartole noted:

> 'The Venice Commission did not substitute itself for the interested electors, but gave its advice on the steps to be taken in view of implementing the transition to liberal democracy. Its mandate was helping the governing authorities of the European Institutions in the evaluation of the constitutional reforms adopted by the states *in the light of agreed values and principles*.' (Bartole, 2020) (emphasis added)

These agreed values and principles are the core in the standard-setting activity. They are often referred as European or Europe's constitutional heritage. The European Electoral Heritage that stems from the European constitutional heritage is a source of electoral standards emanating from the Venice Commission.

Neither the 1990 partial agreement on the establishment of the Venice Commission, nor its 2002 revised version mentioned European constitutional heritage. An accumulation of the common points of constitutional experiences of the European democracies was covered by the objective of the work of the Venice Commission in its statute. In this sense, the Venice Commission did not merely share the European constitutional heritage with new democracies, but it also collected this heritage by studying constitutional systems, selecting from the large body of norms those that belong to the constitutional heritage, in order to make valuable points of reference for new democracies.

The Code of Good Practice and election-related activity of the Venice Commission

Since the establishment, the activity of the Venice Commission has expanded. Until 2002, before the revision of its Statute, the electoral activity of the Venice Commission was not the forefront. It became more visible when the same year the Venice Commission adopted a Code of Good Practice in Electoral Matters (Venice Commission 2002). Subsequently, this document was also recognized by the

Committee of Ministers of the Council of Europe with a declaration in 2004, in which, among other things, it was defined as the ‘‘basis for possible further development of the legal framework for democratic elections in European countries.”

The Code of Good Practice in Electoral Matters spelled out the concept of the European electoral heritage. Similarly to the European Constitutional heritage, the European Electoral Heritage could be described as an amalgam of existing principles collected and synthesized on the basis of national and international praxis. Following the constitutional heritage as a first yardstick and as a starting point for the Commission’s work, the yardsticks multiplied. Based on the Western European constitutional values, more specific rules are generated: from the constitutional heritage to electoral heritage, to good practices, and from these good practices to very specific norms.

This relatively new, electoral dimension of the Commission’s activity and the rapid recognition of its authority in this field may be linked with the accumulation of knowledge of best European practices in elections, as a part of knowledge of the constitutional frameworks of Western European democracies. In this regard, the Code of Good Practice was not intended to impose new rules. The reference to the European electoral heritage makes the Venice Commission’s opinions authoritative in the eyes of the member states when it comes to institutional realization of the features common to Western European democracies.

This factor of institutional realization is important for the norm formation. Ann Florini (1996) calls it ‘prominence’ and argues that it is ‘an important characteristic of norms that are likely to spread through the system’, illustrating it with the natural selection theory. Norms that exist and flourish are easier to diffuse. Finnemore and Sikkink posit that

> [n]orms held by states widely viewed as successful and desirable models are thus likely to become prominent and diffused. This fits the pattern of adoption of women's suffrage norms, since almost all the norm leaders were Western states (though the United States and Britain were latecomer norm leaders, not early ones) (Finnermore and Sikkink 1998: 906).

‘Paradoxically, it is exactly its non-innovative nature that appears to constitute a ‘‘strong’’ point in favor of its authoritativeness and prestige’ (Fasone and Piccirilli 2017). The reference aims at adding normative value to the vest of international electoral standards made by the Venice Commission. These are not supposed to be made as new rules but the promotion of already existing, accepted and valuable democratic ones. What the Venice Commission set out to do is not claim new standards but to reclaim and diffuse the existing ones among the newcomers.

There is another possible explanation why the European electoral heritage is relevant for the formation of electoral standards. ‘A common heritage of political traditions” is explicitly mentioned in the Preamble of the ECHR. However, there is a difference between the European electoral heritage, from which the new transitional democracies are excluded insofar as they are not perceived as constituent elements of this heritage, and the heritage of political traditions, which has been used by the ECtHR for a contrasting purpose: to allow states a margin of appreciation in political cases.

In addition, the Statute of the Council of Europe, that was invoked by the ECtHR to introduce, for example, the notion of the rule of law to its jurisprudence,[52] also spells out “common heritage of peoples”.[53] At the same time, the European electoral heritage, unlike the Europe constitutional heritage and political traditions, is more precisely defined by the Venice Commission. According to the Code of Good Practice in Electoral Matters:

> “This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second, the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met” (Venice Commission 2002).

[52] See, for instance, *Golder v. the United Kingdom,* Application no.4451/70, Judgment 21.02.1975.
[53] Statute of the Council of Europe, ETS No. 1, Preamble.

The Code spells out five principles that constitute “European electoral heritage”: universal, equal, free, secret, and direct suffrage, to which is also added the principle of holding elections at regular intervals. These are, in fact, basic principles of suffrage rights underlined in international human rights documents, including the UDHR, ICCPR and the European Convention of Human Rights, as interpreted by the ECtHR.[54]

Reference to the same human rights documents means that the principles of European electoral heritage are similar to the principles advanced by international observers as the foundation of the ‘free and fair’ formula’.[55] Either free and fair formula or the electoral heritage are still implied as a background when specific recommendations are made by international actors who reference international electoral standards and good practices. All these notions are operationalized in practice and used by international actors to influence the electoral areas of the states through claims to international standards for democratic elections.

It could be said that the Code of Good Practice in Electoral Matters as a document can be considered a meta-claim to international electoral standards. As anticipated, international electoral standards are created, the provisions of the Code of Good Practice can therefore be identified as potential claims to standards. As it will be discussed further on, these provisions become operationalized through regular diffusion. For instance, with regard to the composition of election administration, the Code of Good Practice recommends that the election management body should include a judge or law officer (Venice Commission 2002: 75). However, this provision has not been actively diffused and in some cases the Commission advised against the

[54] Article 21.3 of UDHR states that ‘ [t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Article 25.b of ICCPR states that ‘[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors’. Article 3 of Protocol 1 of ECHR states that ‘[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’.

[55] See *supra* The problematics of transition of the ‘free and fair’ formula to international electoral standards.

inclusion of judges in the election management bodies.[56] On the other hand, the neighboring claim, that the composition of the election administration should include representatives of the political parties, has become one of the most diffused provisions of the Code, including by international observers.

The reliance on the diffusion by other international actors is secondary for the Venice Commission, since it has its own instruments for regular spreading of the norms. Some of the main documents that the Venice Commission produces with regard to individual countries are named 'opinions'.[57] Given that initially the Venice Commission relied on the fame of its members,[58] one could detect a hint to *opinio juris* in international law.

The key tool for the implementation of opinions has been referred to as 'machinery of the conditionality' (Bartole 2020): adherence to the Council of Europe, and, for some countries, further potential for the membership in the European Union.[59] Conditionality of building democratic institutions is for many countries linked to the financial help provided by international donors who heed the Venice Commission's advice.

This adds emphasis to the fact that new democracies seek to rely on the existing expert advice and good practice in order to build stronger democratic institutions, including elections, at home. While election-related expertise may be provided for all member-states of the Commission, requests for such expertise rarely come from Western European countries. Some states request such expertise more often than others.[60]

Unlike election observers, the Venice Commission as an institution does not assess electoral processes but works mostly during the process of legal reforms through

[56] See i*nfra,* on election administration in Turkey.
[57] According to its Statute, the Commission shall supply opinions upon request submitted through the Committee of Ministers in its composition limited to the member States of the partial agreement (hereafter referred to as the Committee of Ministers) by the Parliamentary Assembly, by the Secretary General, or by any member state of the Council of Europe.
[58] The commission shall be composed of independent experts who have achieved international fame through their experience in democratic institutions or by their contribution to the enhancement of law and political science.
[59] See *supra* on the relevance of conditionality for the formation of the international electoral standards.
[60] Opinions of the Venice Commission by country are available at: https://www.venice.coe.int/WebForms/documents/by_opinion.aspx.

commenting on electoral legislations, which adds a legal standing and methodology to their writings and implies legal analysis. These writings may be consolidated into studies dedicated to specific electoral issues.[61] In other words, the Commission does not comment on events, it comments on documents, most often on legislative drafts. Its suggestions offer the states an opportunity to revise their legislation in order to make electoral processes closer to Western European standards.

In that respect, the Venice Commission's approach offers an opportunity for external advice with no binding effect and, at the same time, without automatically standardizing the approaches. This makes the Commission's approach more individual and tailor-made, to the extent that it recognizes that in some cases the European electoral heritage could not be applicable – as discussed below.[62]

Whereas the reluctance to invite electoral observers may already be perceived as something that runs against international standards and an intention to cheat in elections, there is no commitment of the states to invite the Venice Commission. As discussed in the previous chapter, in the case of election observation a mere invitation already plays a certain political role in the image of the country, which prompts governments to invite observers even when they do not plan to heed their conclusions. The Venice Commission is not invited automatically for each and every revision of election laws and it can be said that when invited, the Commission's expertise and conclusions are awaited and provide desirable input into electoral reforms.

In order to ensure consistency of research and to explore how the standards are made at the level of the Venice Commission, for this thesis the study focused on the analysis of the content of documents (opinions) of the Venice Commission. For nearly 20 years of its existence, the Code of Good Practice in Electoral Matters of the Venice Commission is supplemented with its opinions related to elections. These opinions offer 'jurisprudence' based on of Code of Good Practice and the Venice Commission expertise.

[61] See, for example, studies on the individual right to re-election available at: https://www.venice.coe.int/webforms/documents/?opinion=908&year=all.
[62] See *infra* Section on election administration.

Unlike reports of election observers that have a pre-defined structure, the structure of Venice Commissions' opinions is determined by the issues that it was explicitly requested or took upon itself to review, therefore in order to guarantee the necessary condition of homogeneity, following a general overview of the opinions, I selected two specific electoral issues (claims to international electoral standards) that are frequently featured in the opinions and present a degree of complexity. These issues are (1) stability of the electoral legislation and (2) organization of elections by impartial election management bodies. The value of selecting these issues is more than just the frequency of their mentioning, despite the fact it already highlights the importance attributed to these issues. In fact, the principal value in selecting these issues is that they are unique in a sense that their interpretation and implications come from the Code of Good Practice in Electoral Matters, and recommendations are based on this document. It should be underlined that both issues are listed in the Code as conditions for realization of the principles of the European Electoral heritage which makes them good claims to electoral standards.

With regard to conditions of implementation of the main principles, it is important to note that when it comes to international electoral standards, their level of detail varies from the most general, such as universal suffrage, to very specific ones, such as the precise timing when the revisions of certain legislative provisions are not desirable. The conditions for implementation of the principles of electoral heritage include a number of procedural guaranties, such as stability of the electoral law, requirements for election administration, transparency, procedural terms for electoral dispute resolution, and other rules that may be regarded as technical and common to the electoral frameworks of European states, but in different circumstances may play out as politically sensitive. For example, the famous requirement to establish election commissions was not supposed to be seen as a principle in itself but a condition for an effective realisation of suffrage rights. However, with time and through a number of opinions by the Venice Commission, this condition became a standard in itself, and acquired an autonomous standing that is independent of the impact that it may produce, as discussed below.

The study of opinions shed light on how the status of different claims changes, depending on the effect that they have over member states. Being an advisory body, the Venice Commission is also in the position to make claims to electoral standards and further diffuse them among member states. In addition, building its claims on the European electoral heritage, including to the formation of electoral standards, provides an additional incentive (and at times conditions) for the acceptance of claims by member states as based on the background that previously existed, and therefore should be shared by all European democracies if they would like to be granted membership in the club. This manner of setting electoral standards can be rather effective since it prompts acceptance of Western European rules even when the latter may not be genuinely shared by the new democracies. However, this manner also denies the constituent character of new democracies in the European space – the new democracies joined but did not become a core part of it. The examples will show that the yardstick approach has its strong sides and weaknesses.

Both examples below reveal that the yardsticks (standards) that come from the Western democracies do not always frame the space within which the countries can decide how to organize their systems. The reason for this could be that for the countries producing yardsticks (Western Democracies), the yardsticks are not the reason but rather the consequence of being an established democracy. Standards that come as consequences of democratic maturity cannot always be transferred to democracies in transition regarding electoral issues. For example, stability of electoral law may be the consequence of maturity of Western democracies, which do not need to change legal electoral framework frequently. Stability of electoral law is also expected from transitional democracies as a requirement, but they need stability for other reasons than maturity. In other words, Bulgaria can stop amending the legal framework, but it will not be an indicator of its democratic maturity, since there may be a need for electoral reform. Achievement of the stability of electoral legislation would not, in this case, be an indicator of the maturity of democracy. One probably should not expect the electoral legislation of Armenia to be as stable as the electoral legislation of Luxembourg but we can draw a line where the legislation is changed with a sole purpose to keep in power the incumbent party. In cases where these yardsticks in the electoral field become more and more specific, such detalisation may further depart from the initial intention of the yardsticks.

The following questions will be addressed below: where does the stability of electoral law as a yardstick come from? What does it mean for established democracies and whether the same meaning can be attached to this principle in transitional democracies? Does it change over time as a consequence of reception of more and more opinions. This example shows that the meaning of a particular yardstick in Western democratic states may not necessarily be the same in different electoral contexts and, therefore, it should be applied with care. Positively, there are examples when the Venice Commission takes into consideration specifics of the transitional democracies, drawing conclusions that certain elements of Western electoral traditions would not have the same effect there. However, in both cases the multiplication of the yardsticks leads to departure from the initial principles.

4.3. From good practices to European yardsticks: stability of the electoral law

Stability of the electoral law is indicated by the Venice Commission as a guarantee that plays an important role in the European electoral heritage. Stability of electoral law became a claim to international standards since it has characteristics of a rule put forward by the Venice Commission as an international standard. The rule is documented in the Code of Good Practice in Electoral Matters and diffused among the member states, mostly transitional ones due to the fact that in this context electoral laws are more often amended.

Stability of electoral law is one of the frequently referenced provisions of the Code of Good Practice. Similarly to the principle of the impartiality of the election administration, stability is widely diffused not only by the Venice Commission itself but also by the OSCE/ODIHR international observers.[63] What such stability should include is explained already in the Code of the Good Practice in Electoral Matters, which lists it as a condition for implementing the principles of the European electoral heritage, giving it place right after the first important condition – the respect of fundamental rights:

[63] For example, recently the OSCE/ODIHR observers critically commented on the amendments of the electoral law of Armenia as the changes were introduced too close to elections. The observers referenced the Code of Good Practice (OSCE ODIHR 2021).

Regulatory levels and stability of electoral law

a. Apart from rules on technical matters and detail – which may be included in regulations of the executive –, rules of electoral law must have at least the rank of a statute.
b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law (Venice Commission 2002).

Thus, the Code of Good Practice suggests, stability of electoral law includes several elements. One of them is the status of election rules in the system of legal sources. The requirement that election rules must have at least the rank of a statute is intended to preserve them from being amended easily. The same idea is true for the second requirement, which is, in turn, more specific, namely, the prohibition for the change of certain fundamental elements of election law before an election. A very specific timeframe for this requirement is enshrined in the Code of Good Practice: the fundamental elements of the election law should not be touched less than one year before an election.[64]

Such prescriptive and detailed requirements do not come from international law, and, as acknowledged by the Commission itself, from constitutional law as such. In its opinion the Venice Commission acknowledged that the stability of the law in general, and the electoral law in particular is not an international rule. [opinion on Switzerland that "[s]tability of electoral law is not demanded by constitutional or international law" (Venice Commission 2001). Indeed, the choice that certain elements of the law are more protected from changes is usually left to the national jurisdictions to decide. For example, in some countries elements of electoral systems are inserted in constitutions, while other countries prefer to keep them in statutes. Has one of these

[64] At a first approximation, it looks that the Commission offers a choice between a year deadline for the fundamental electoral amendments and the status of the fundamental rules. However, in practice, as it will be demonstrated with examples below, it can be a combination of both requirements, as long as it guards the sense of the provision: such "standards" are guided by the idea of the preservation of the electoral rules from rapid changes.

two solutions more reasons for being? It would depend on the specifics of the country, the level of political stability it achieved, and, therefore, may be a matter of individual choice. For example, in Armenia, the constitution envisaged the proportional system with a so-called “stable majority” in order to form the government. While this provision was inserted in the constitution to ensure stability of the electoral system as well as stability of the incumbent government (i.e. the double-goal of stability), the change of one element would require opening the process of constitutional amendments.

Despite being an example of a claim to international standards which originates outside of international law, this claim does have a solid normative recognition among Western European democracies. This is what characterises various claims to standards made by the Venice Commission, in contrast to claims made by election observers. In fact, observers are supposed to diffuse existing standards, while the Venice Commission may not only identify standards tracing them back to European electoral heritage, but also apply them as yardsticks to the new democracies.

The Commission explains why the stability of the electoral law is important and, most significantly, identifies that stability is an attribute of established democracies:

> Stability of electoral law is not demanded by constitutional or international law. However, in the established democracies, major changes in this respect are few, guarding against any *risk of the system being manipulated for purposes of electoral gain, and bearing witness to the maturity of democracy* (Venice Commission 2001, emphasis added).

Although stability of electoral law contributes to overall legal certainty and ensures more predictability of the process, the initial value of stability is placed more on the guarantee of fair competition – to guarantee that those who have the power to change legal rules would not use it to gain an advantage in next round of elections.[65] The absence of such manipulations signals democratic maturity, contrary to cases in which

[65] The Venice Commission (2001) noted in the opinion on the constitution of Ticino that ‘[r]etention of the fundamental rules of the electoral system in the constitution of Ticino should ensure that the innovation is perpetuated even if the system changes, and prevent it from being challenged on grounds of party interests.’

electoral rules are crafted in order to give an advantage to a particular political force. In the same opinion drawn before the Code of Good Practice in Electoral Matters was introduced, the Venice Commission (2001) explained that '[i]n Western Europe, only Italy has recently effected a major change for the national elections by switching from a virtually universal proportional system to a mixed but predominantly majority system', referencing the 1993 referendum in Italy that, according to some commentators, 'marked the beginning of a series of significant changes in electoral systems all over the world'.[66] Changes were frequently made in the electoral systems of newly established democracies that tried different models with different features. While there are no limits on the number of changes of electoral systems, the frequency of the changes was regarded by the Venice Commission as a sign of the lack of stability and may indicate an unstable transition. For example, in 2015, some commentators referred to Bulgaria and Kyrgyzstan as examples of frequent changes in electoral systems.[67]

The Venice Commission's 2001 opinion suggested that the purpose of stability of the electoral law and, in particular, of the electoral system, is to safeguard, first of all, electoral systems from being revised on the basis of narrow partisan interests. It also confirmed that the occasions of changing electoral systems are rare for the established democracies, which is one of the signs of maturity of their democratic traditions. Making claim that it should work the same way for democracies in transition in this case is an attempt to set as a standard something that is a product ('an attribute') of democratic maturity.

At the same time, it is hard to assume that electoral rules should not be changed especially in transitional democracies, many of which are searching for electoral systems that would suit them. In this sense, the principle of stability of electoral law permits the Venice Commission to approach elements of electoral law that are usually left within the states' margin of appreciation. It is important to note that the Code of Good Practice in Electoral Matters named three main elements as fundamental when

[66] See ACE Electoral Knowledge Network: https://aceproject.org/ace-en/topics/es/esb/esb06
[67] Ibid.

it comes to stability of electoral law. Along with rules on electoral systems (1), these elements are composition of election administration (2) and constituency boundaries and the distribution of seats (3). Importantly, exactly these kinds of rules are, as a rule, considered to be “immune” from international advice because they constitute a part of political system and, therefore, are usually internal matters of the states.

Juxtaposition between the Venice Commission and the ECtHR

Different perceptions of such immunity are especially evident in the light of juxtaposition between the Venice Commission and the Court. Whereas the Court does not touch electoral systems at all, considering them to be within the margin of appreciation of the states, the Commission finds ways to impact the electoral systems, not through the human rights perspective but through the yardsticks coming from the European electoral heritage (at a more general level). The ‘prohibition’ on amending electoral systems a year prior the elections as well as changing constituencies is one way for such impact. Therefore, through the yardsticks approach, the Venice Commission expands the area of the influence of international actors on the national electoral frameworks. On the contrary, the influence on the outcome of elections limited the Court’s approach to electoral systems and did not allow the Court to overcome the margin of appreciation played exactly the opposite role in the Venice Commission’s approach to provide for safeguards of these rules. For example, in 2017 in its the Opinion on Bulgaria, the Venice Commission suggested that “[t]he stability of the electoral law is a prerequisite for implementing the principles underlying Europe’s electoral heritage and is vital to the credibility of an electoral process” (Venice Commission and OSCE/ODIHR 2017). It explained that “[s]tability is particularly important regarding the fundamental elements of the electoral law since *these aspects are more likely to influence the outcome of an election”* (Venice Commission and OSCE/ODIHR 2017: 5, emphasis added). In this respect, through this claim-making the Venice Commission supplements the activity of the Court. It does so by applying yardsticks that can further become standards, rather than ordering or striking down rules.

Different factors, including those related to the institutional set up of these two Council of Europe institutions may explain the likelihood of stricter scrutiny of electoral system design by the Venice Commission in comparison to the ECtHR. Firstly, in this regard,

the Venice Commission might be better positioned as its opinions do not risk to enter the realm of 'high profile' cases and do not imply that elections which already took place contradict democratic standards. In addition, the implementation of its opinions is not aimed to remedy rights violations but to prevent them. Secondly, such practice of standard-setting also indicated the possibility of the Venice Commission opinions to be used in order to enrich the ECtHR jurisprudence. The Venice Commission emphasized that "the principle of stability of electoral law was affirmed by the European Court of Human Rights on 18th November 2008 in the case *Tănase and Chirtoacă v. Moldova* (paragraph 114 with reference to the Code of Good Practice in Electoral Matters)" (Venice Commission 2008). It is clear that most human rights institutions could not play this argument, since they do not have a preventive function.

The Venice Commission does what the ECtHR does not dare to do, precisely it analyses results-related electoral features, applying the standard of stability of the law. This makes the Venice Commission well-positioned in the Council of Europe to overcome the margin of appreciation through soft, preventive mechanisms. As Bartole (2020) highlighted, the Venice Commission goes beyond the basic task as its aim is to identify best practices and 'to develop standards through benchmarking' (Bartole 2020). He also mentions that the Commission may elaborate on standards through its opinions. This important feature of the Commission's approach characterises the standard-setting by the Commission, including on election-related matters.

Therefore, the Venice Commission's way of setting electoral standards is different from the *'jus observatores'* one, as is its relationship with the human rights jurisprudence. The Commission may identify electoral standards outside of the international and regional human rights jurisprudence. However, unlike election observers, the basis of the claims to standards for the Venice Commission is the European electoral heritage possessed by Western democracies. In turn, this enriches the claims with normative value not only for the member states but also for the development of human rights law. The fact that the ECtHR confirms the existence of electoral principles affirms the fact that the Venice Commission plays a role in setting electoral standards. At the same time, application of such standards poses its own risks.

Detalisation of stability: problems in applying the yardstick to new democracies

When it comes to the stability of electoral law, one of the differences between the established democracies and transitional ones is that the latter are prone to more electoral changes than mature ones. Transition to democracy itself is a continuous change, which presumes that legal frameworks may also be changing. Moreover, critical statements of the international actors including human rights bodies, international election observation missions, and the Venice Commission itself often encourage the states to engage in electoral reform and introduce legal changes. From this perspective, it can be seen as a contradiction: on one hand, international actors push for electoral reforms, while on the other hand they expect stability. Both of these possibilities, external push for reform or the requirement of stability, rarely happen in mature democracies, which suggests that the initial standard of stability applied to the transitional democratic reality may not work without adjustments.

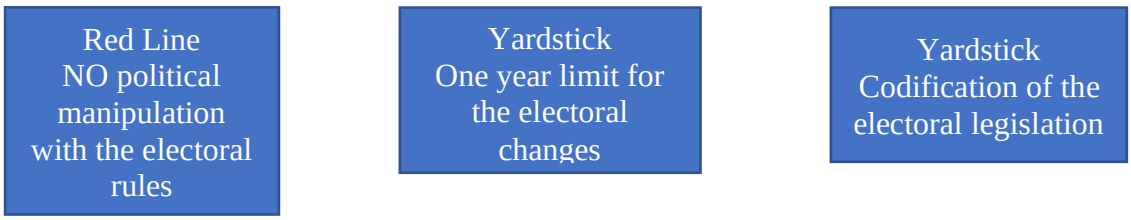
This raises a number of questions with regard to stability of electoral law. Firstly, how should it be assessed in consolidated rather than transitional settings? If the stability of the electoral framework corresponds to the maturity of the democracy, how should transitional democracies be judged in terms of such stability? It appears to be the Venice Commission's position that while frequent changes of electoral laws do not constitute grounds for violations of this standard, and in most cases it is also not against the constitutional rules of the states, the frequency and scale of such changes suggest that the country may struggle to establish an electoral framework for the long term. For example, the Venice Commission expressed dissatisfaction with massive amendments of the electoral framework shortly before the elections even when they do not touch upon the most important elements of elections. In 2017 opinion on Bulgaria the Commission opined that not only the substance but the number of amendments matters. If the changes are not critical in substance but high in number, this may also constitute a problem from the perspective of stability (Venice Commission and OSCE/ODIHR 2017: 6).

Further, while stability is indeed an attribute of the maturity, it does not always necessarily correspond to *democratic* maturity. In authoritarian countries the legal framework may remain unchanged and thus be very stable, however, not very

democratic. In this respect the changes should be considered in a comparative perspective. Stability of the electoral framework can therefore also be an attribute of entrenched authoritarian regimes that resist reforming existing legislation and opening their systems to democratic change.

The second question is, how detailed should the recommendation of international actors be regarding this issue? Stability is probably not the goal in itself, but rather a mean to ensure that electoral rules are not manipulated, which makes its application as a yardstick more challenging. The examples below show how the idea of stability can be applied differently. It can be applied as a red line – when stability is used to identify 'no-go' areas and this 'no-go' area for transitional democracies is an attempt at manipulation of the electoral framework to obtain a narrow partisan advantage. The same principle could be applied as a rigid requirement, demanding that electoral frameworks should be untouchable for one year before the election. Furthermore, stability could also be used to substantiate a claim that electoral legislation should be codified.

Figure: Multiplication of the yardsticks on stability of the electoral law



Once a yardstick is identified, consumers of the Venice Commission's advice should be made aware of its existence. Such awareness happens through the diffusion of the standards. It was already mentioned that the Venice Commission has its own machinery for the diffusion of electoral standards – it diffuses them *inter alia* through issuing opinions.

Multiplication of yardsticks

There is a clear margin between different claims addressed to different countries on the basis of the stability yardstick. Interestingly, each opinion elaborates on the existing claim to a standard, putting forward new arguments (*de facto* new claims) on

why the stability of the electoral law is of great importance. Looking at the three examples below, one can identify which claim defines a ‘red line’, and which goes into multiplication that risks losing the link with the initial meaning of stability of electoral law for transitional democracies.

The first example of the application of the stability requirement has to do with invoking of this principle in the situations in which the change of the electoral legislation is supposed to be introduced in order to secure certain elements from frequent changes. In this respect, either the electoral system or compositions of election management bodies are usually primarily targets. For example, in the 2002 Opinion on Georgia, the Venice Commission stated with regard to changes in the composition of the Central Election Commission that “the decision of the Parliament to change once again the composition of the CEC is a negative signal. The stability of the most sensitive features of electoral law, including the electoral system and the composition of the election Commissions, is essential to the legitimacy of the democratic process” (Venice Commission 2002b). The Commission did not provide a detailed explanation of the changes, however, it drew attention to the fact of their frequency ('to change once again the composition of the Central Election Commission’) in order to make a reference to the stability argument. In fact, this argument identifies a red line for the principle of stability of the electoral legislation, condemning the frequent changes of the fundamental elements of the elections (e.g. composition of election administration).

However, the stability argument is not always applied in its pure expression, which leads to multiplication of different claims that depart from the stability standard and acquire a life of their own. In the example of Moldova, the Venice Commission criticised the 180-day time limit provided for delineation of constituencies, instead of the recommended one year. In the 2017 opinion on Moldova it was pointed out that the draft law submitted to the review of the Commission allocated a minimum of 180 days before the ordinary elections for redrawing the boundaries of electoral constituencies (Venice Commission and OSCE/ODIHR 2017b). This timing was not found sufficient by the Venice Commission, which recommended undertaking the delimitation of constituencies at least one year in advance of an election. When it comes to delineation of constituencies, the Commission could be very strict, including

on the timing of the procedure. However, it did not explain why exactly one year is enough while 180 days is insufficient.

The difference between the first and the second example is that in the first case the change of the fundamental element, i.e. composition of the election commission, was criticised from the perspective of its frequency that has a direct impact on the legitimacy of elections. In its turn, in the second case, the legitimacy of the change was not questioned from the perspective of stability of the electoral law. In this context, the critical remarks that more time is needed in order to meet a standard of stability does not serve the initial goal of prevention of manipulations and preserving the legitimacy of elections. It is, of course, understandable that as much time as possible should be provided for voters and parties in order to get familiar with the amendments and with their new constituencies. But why exactly this timing was not found sufficient while one year time was is not based on anything other than the Venice Commission's own adopted template that became a separate yardstick, weakening its link with the initial claim.

> Constituency borders are fundamental elements of electoral law, and redrawing them may have significant political consequences. To promote stability in the fundamental elements of electoral law, the Code of Good Practice recommends that such parts of an electoral law should not be open to amendment less than one year before an election. Given the importance of constituency boundaries, the proposed deadline of at least 180 days may not be sufficient to ensure impartial and comprehensive delimitation procedures before an election (Venice Commission and OSCE/ODIHR 2017b).

The third example is related to the codification of the electoral legislation and is even more detailed and distanced from the initial claim. In the 2006 opinion on Ukraine, the Venice Commission was more than encouraging in making a connection between frequent changes in electoral legislation and the absence of an electoral code: "[t]he adoption of an Election Code could contribute to the stability of the electoral legislation in line with the recommendations of the Code of Good Practice in Electoral Matters" (Venice Commission and OSCE/ODIHR 2006). This recommendation was subsequently reiterated (Venice Commission 2010). In 2011, the Commission

reinforced its argument, stating that the draft law concerns only the elections for parliament and, therefore, does not meet the Resolution of the Parliamentary Assembly of the Council of Europe 1755 (Paragraph 7.1.1) of 10 October 2010 and the OSCE/ODIHR and Venice Commission long-standing recommendation that all electoral rules should be codified in a single Election Code, to ensure that uniform procedures are applied to all elections (Venice Commission and OSCE/ODIHR 2011).

Could the claim and the insistence on codified legislation be based on the stability which is a part of European constitutional heritage? There are countries in Europe which do not have codified constitutions (Grimm 2012). While it is clear that numerous amendments often do not contribute to the stability of electoral legislation and may create a perception of manipulation with election rules, especially if passed shortly before elections, it is not evident how and why the adoption of an electoral code would be helpful in that regard. The codification claim based on the stability of electoral law has only a remote link with the latter. A mere existence of an electoral code does not make electoral legislation more or less stable. It makes it codified, which is a different matter.

A related problem revealed by this analysis is that the standard of stability, as it appears in the Venice Commission's writings, may also be challenging in terms of application. On one hand, it is easily applicable because a mere suspicion of manipulations with electoral rules is already an argument in favour of questioning a rule to be introduced in advance of elections. Yet countries may play the stability card in order to deliberately delay electoral reforms or even elections. The strict application of the one-year requirement with regard to the stability of electoral law may thus shield the reluctance of states to conduct reforms.

The one-year requirement may become a subject of controversies in politically sensitive environments, including raising a question whether the stability of electoral law as such could be demanded in the times of political instability. For instance, in April 2021, less than three months before the early parliamentary elections, and in anticipation of them, the electoral code was amended in Armenia. The amendments directly tackled the electoral system, abolishing the territorial electoral lists and moving towards a more proportional electoral system. The Venice Commission did not appear

to be very critical of this amendment, despite the fact that many elements of these amendments could earn a place in the textbook of bad practices with regard to stability of electoral legislation. Firstly, these changes were made very close to the elections, leaving a very short time for electoral stakeholders to prepare. Secondly, the changes affected a fundamental element – the electoral system and, as a result, the allocation of mandates. Additionally, the opposition voiced concerns that the changes were made against them, and some parties are even boycotted the voting on these amendments. The latter became the subject of political controversies, including the president's refusal to sign the bill (Venice Commission and OSCE/ODIHR 2021).

In fact, the opinion of the Venice Commission reads rather as if the Commission was looking for a way to justify the changes, with arguments which appear to go more in the political than the legal dimension. The Commission wrote that 'in purely technical terms the new system does not seem to have a major impact either on the capacity of the electoral administration to organise such elections, or on the understanding of the procedures by the voters' (Venice Commission and OSCE/ODIHR 2021). Striking a different note after the elections, the OSCE/ODIHR election observers' report pointed out that election administration had difficulties with changed procedures and political parties had to adapt their strategies to the changed rules. The observers emphasized the public trust in the elections; however, made a note on the stability of the electoral legislation (OSCE ODIHR 2021).

This example suggests that the more detailed the yardsticks are, the more risks their application encounters, especially in politically sensitive environments. This may lead the legal argumentation of international actors to be adjusted to political considerations. The Venice Commission was trying to find arguments that the change that did not correspond to its standard is in line with this yardstick. However, the problem may be not be as much in the amendments, as in the yardstick itself. One year requirement for the electoral law to be stable does not take into account a possibility of early elections, nor does it take into account to which extent the previous electoral system was suitable for the country and acceptable to the political actors, as well as many other different factors. And arguably all these factors should not be accounted for in the yardstick, as it is up to the country to deal with these factors at

home. Prescriptive and detailed yardsticks simply cannot take these factors into consideration in advance, resulting in unnecessary politization of legal arguments.

If we compare this example with the one above, in which the Venice Commission critically viewed the fact that only six months were provided by the legislation for the delineation of constituencies, it is clear that one year as a yardstick may put the Commission in a vulnerable and defensive position, and its application may give rise to controversial results. In one case the Venice Commission tries to justify the change of the electoral system less than three month before the elections, while in the other argues that six months is not enough for the delineation of constituencies, as its Code of Good Practice suggests one year. In both cases, one year as a yardstick was not justifiable from the perspective of the stability of electoral law, but the two cases unfolded differently.

These examples raise questions whether the principle of stability can exist autonomously, or whether it should be balanced with other important elements that occur in the electoral areas. The Venice Commission itself balances the considerations of stability and the need for the electoral legal changes to be made through an inclusive procedure pointing out that there are other considerations that should be respected during the electoral reform (Venice Commission 2020: 5).

On this note one could argue that in complex political situations and less mature democracies, the stability standard can backfire. Both arguments, the stability of the electoral law and the need of time for electoral reform, can be used in order to take steps away from democracy. For example, after the November 2020 revolution in Kyrgyzstan, parliamentary elections were postponed several times, resulting in the extension of the mandate of the expired parliament.[68] The new leaders justified postponements by the necessity to conduct constitutional reform, which was then followed by electoral reform and the change of the electoral system. The need for electoral reform, including the time for consultations, was used as an argument to further and further postpone parliamentary elections, while the expired parliament was

[68] See https://eurasianet.org/kyrgyzstan-lawmakers-approve-election-delay-and-constitutional-overhaul.

conducting major revisions of the entire legislation of the country (see also Venice Commission 2020b).

Concluding with the example of stability, it is relevant to point out that this unquestionably important principle is also a product of democratic maturity. This speaks in favour of its application with due regard to the context of transition towards democracy. The Venice Commission possesses a wide discretion and flexibility in application of the standards and, as a result, its advices can be narrowly tailored to the specific context of the country. As a flipside, the same flexibility and discretion could be misguiding and serve to demand from the states something that they are not bound to demonstrate to international actor. One such example is the use of the principle of stability of electoral law in order to push for codification of electoral legislation, or a strict attachment of stability to the one-year requirement.

Table 8. *Venice Commission: extracts from opinions of the stability of the electoral law*

Armenia (Venice Commission 2016)	The timeframe for reform is regrettably very short, as the Constitution provides that the new code has to enter into force by 1 June 2016. While the stability of the electoral system is a key principle, it is equally important to have sufficient time for a thorough, inclusive, and public discussion in order to build consensus and confidence around major changes in electoral legislation […] The Code of Good Practice in Electoral Matters stipulates that fundamental elements of the electoral system should not be changed a year before an election so as to guarantee the stability of the law. However, it is equally important to have sufficient time for a thorough, inclusive, and public discussion in order to build consensus around major changes in electoral legislation.
Bulgaria (Venice Commission and OSCE/ODIHR 2017)	It must be added that the Venice Commission does not consider the one-year restriction as preventing a state from bringing its electoral law in accordance with the standards of Europe's electoral heritage or the implementation of recommendations by international organisations. Indeed, some of the late amendments to the Electoral Code address concerns previously raised by the Venice Commission and the OSCE/ODIHR. If new provisions affecting fundamental elements of electoral law are adopted within one year before an election, such amendments should only take effect after the forthcoming election. Frequent or numerous late amendments to electoral laws may cast doubt on the legitimacy of the democratic process. With the May 2016 revision, roughly 1/4 of the Electoral Code's 498 articles were amended. In addition, several amendments were made to the Electoral Code's supplementary, transitional and final provisions, including its annexes. The amendments of July and October 2016 were less numerous, but

	nonetheless added to the number of amendments introduced in May 2016. Even if many amendments are considered minor and not all relevant to presidential elections, the number of amendments is high and may complicate election preparations for stakeholders. This relates, among others, to candidates and their supporters, as well as the authorities involved in preparing the election and the role of the media. A large number of amendments close to the election may also confuse voters and undermine the credibility of the legal changes and subsequent electoral process in the eyes of the public.
Georgia (Venice Commission 2002b)	Furthermore, the decision of the Parliament to change once again the composition of the CEC is a negative signal. The stability of the most sensitive features of electoral law, including the electoral system and the composition of the election Commissions, is essential to the legitimacy of the democratic process.
Georgia (Venice Commission and OSCE/ODIHR 2016)	While it is recommended to undertake any redistricting well in advance of an election, the delimitation process would only be completed a few months before the expected elections in October 2016. The adoption of the assessed amendments less than a year before the expected elections, along with the short timeframe envisaged for the CEC to carry out delimitation in the remaining constituencies is a matter of concern. These late changes might disadvantage some political parties and candidates and thus may be perceived as politically biased. Moreover, the late finalisation of boundaries may pose a challenge to ensure that voters are sufficiently informed as to the changes to their electoral constituencies.
Georgia (Venice Commission 2005)	On a more general aspect, the Venice Commission invites the Parliament of Georgia to avoid many successive electoral reforms, which cannot be in accordance with the general principle of the stability of electoral law.
Hungary (Venice Commission and OSCE/ODIHR 2012)	It is welcomed that the fundamental elements of the electoral legislation are regulated by a cardinal law, therefore providing for its stability and broader consensus. While it is advisable that the rules governing the constituencies' delimitation are included in a cardinal law, particularly the distribution formula, the inclusion of a detailed list of constituencies in the cardinal law undermines an efficient method of updating the constituencies in respect of the principle of equality of voting rights, as it requires a qualified majority.
North Macedonia (Venice Commission and OSCE/ODIHR 2006b)	Enactment of the Electoral Code will help avoid redundancies and possible discrepancies in legislative provisions. Even so, some provisions could nonetheless be improved upon even more in terms of legal drafting and methodology. The Code has some articles which would more appropriately be placed in the Constitution; while other provisions (such as those concerning the detailed responsibilities electoral commissions) might be better left to rule-making. 8. While the Code will help safeguard the rule of law and democratic governance of elections, the adoption of electoral legislation should be watched closely to prevent political parties amending it in their favour before elections. The stability of electoral law is of great importance, particularly in a pre-election period.

North Macedonia (Venice Commission 2008)	The stability of fundamental elements in electoral law is, as underlined in the Explanatory Report of the Code of Good Practice in Electoral Matters, regarded as one of the factors in the credibility of the electoral process, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests. The principles stated in the Code of Good Practice were further clarified in the Interpretative Declaration on the stability of the Electoral Law adopted by the Venice Commission in December 2005 (CDL-AD(2005)043), where the stability of composition of electoral bodies was emphasised. The principle of stability of electoral law was affirmed by the European Court of Human Rights on 18th November 2008 in the case Tănase and Chirtoacă v. Moldova (paragraph 114 with reference to the Code of Good Practice in Electoral Matters).
Moldova (Venice Commission and OSCE/ODIHR 2014)	The proposed reform that focuses on changing the electoral system, if adopted, will have to be implemented and put into force in less than one year before the next parliamentary elections. This not only raises serious concerns in terms of feasibility, but also in terms of building confidence of voters and other stakeholders, including political parties (in particular from the opposition) and civil society. Such a fundamental reform should not be perceived as manipulation of the electoral legislation in an electoral year. Thus, a sufficient and clear timeframe for implementation of such a significant change is essential.
Switzerland (Venice Commission 2001)	Concerning the stability of electoral law Stability of electoral law is not demanded by constitutional or international law. However, in the established democracies, major changes in this respect are few, guarding against any risk of the system being manipulated for purposes of electoral gain, and bearing witness to the maturity of democracy. In Western Europe, only Italy has recently effected a major change for the national elections by switching from a virtually universal proportional system to a mixed but predominantly majority system. France, which has frequently revised its balloting method in the past, has upheld the system of two-round majority election to a single seat since the creation of the Fifth Republic, apart from the 1986 elections which were held according to the proportional system. Stability is still more pronounced in Switzerland, and by and large both federal and cantonal electoral law have only been amended in secondary areas since the proportional system was introduced for the election of the legislative assembly in the recent or remote past. On the other hand, introduction of the proportional system for electing the executive has not succeeded in taking hold elsewhere than in Ticino and Zug. Swiss electoral law is thus typified by considerable stability. Retention of the fundamental rules of the electoral system in the constitution of Ticino should ensure that the innovation is perpetuated even if the system changes, and prevent it from being challenged on grounds of party interests.

Ukraine (Venice Commission 2010)	In the past, electoral legislation in Ukraine was too often changed, sometimes just a few months before elections. Very often such changes created a situation when provisions of different laws regulating the electoral process were contradictory (for example, during the 2006 parliamentary and local elections). This was seriously undermining the stability of the electoral law and as a consequence, the trust of voters in elections. The adoption of an Election Code could contribute to the stability of the electoral legislation in line with the recommendations of the Code of Good Practice in Electoral Matters.
Ukraine (Venice Commission and OSCE/ODIHR 2011)	The draft law concerns only the elections for parliament in Ukraine. It, therefore, does not meet the Resolution of the Parliamentary Assembly of the Council of Europe 1755 (Paragraph 7.1.1) of 10 October 2010 and the OSCE/ODIHR and Venice Commission long-standing recommendation that all electoral rules should be codified in a single Election Code to ensure that uniform procedures are applied to all elections.
Uzbekistan (Venice Commission and OSCE/ODIHR 2018b)	In absence of detailed regulations on the envisaged functioning of SEVR, a comprehensive assessment is not possible at this point. It remains to be seen in practice and upon the development of additional regulations on how the SEVR serves to improve the quality and accuracy of voter registration. Without prejudices to the content of the future Cabinet of Ministers regulation, consideration could be given to including more detailed provisions into the draft Election Code. This step would be in line with the overall objectives of codification, contributing to the conciseness and integrity, as well as stability of legislation.

4.4. Multiplication of yardsticks: recommendations on election administration

As this study shows, the Western European electoral heritage and traditions are the yardsticks that play an important role in shaping the Venice Commission's ideas of model elections: it has become the key in the methodology of the Venice Commission to rely on standards of established democracies to show the way how to build democracy though law.

At the same time, the study of the principle of stability of electoral law demonstrated that the standard of stability of the fundamental elements of electoral law comes from the established democracies, but what is expected to be achieved by means of such stability in new democracies is different. It also showed that stability of the regime is not always the product of democratic maturity, therefore, the same level of stability that exists in established European democracies can hardly be expected from the transitional democracies, electoral frameworks of which are more often subjects of

reforms. That is why the yardstick could not be applied without a necessary adjustment and considerations of specifics of the countries under review. However, the more adjustments are made, the more detailed these yardsticks become, and then travel to other countries as rules that have already been claimed as standards. The more detailed yardsticks become, the more problematic is their application as universal rules.

Nonetheless, not all electoral phenomena have roots in democratic traditions of Western European countries and can be regarded as Western European yardsticks in the electoral field. Some elements are, in fact, 'new' discoveries that do not necessarily form part of the current Western democratic traditions, but may be offered to transitional democracies as solutions. One of such important elements regards special bodies that are established to administer electoral processes.

The Venice Commission's Code of Good Practice (2002) stated that '[i]n most established Western European democracies where the administrative authorities have a long-standing tradition of impartiality, elections are organised by a special branch of the executive government, the function often vested in the Ministry of the Interior' (see also 2020 Venice Commission report on the election administration). However, such setup is not recommended for the new democracies, as many of they do not have the same long-standing traditions of civil service performing sensitive function related to administration of electoral processes. Whereas in the case of stability of electoral law, the claim relied on the maturity of old democracies as a benchmark, in the case of administration of elections by electoral commissions the logic is in some ways the opposite: commissions do not exist in most of the established democracies because these democracies are mature and their 'administrative authorities have a long-standing tradition of impartiality' to administer their elections, without creating a special institution.

The origin of this claim is comparative: due to the differences identified between Western European democracies and new democracies, the same model of election administration is not applicable everywhere. It is important to note that the claims of such nature are rare: the Venice Commission suggests that the Western European model in this respect should *not* be the yardstick for transitional democracies. Such

claim based on the comparative characteristics of states is in fact an identification of a 'red line' for transitional democracies. The red line in the present case is that elections in new democracies should not be administered by the executive branch of power since such administration of elections has not yet achieved sufficient public confidence. Therefore, this identification is based on the premise that in transitional democracies administrative bodies are not perceived as impartial, while the Code of Good Practice in Electoral Matters, in turn, contains a provision that advises an organization of elections by an impartial body.

The idea that an impartial body should be in charge of applying electoral law is not new. Importantly, it is based on the notion that implementation of legislation must not be favorable to a specific party because those who implement it share this party's views. The Code of Good Practice explains the way elections are usually administered in the Western democracies and recommends *not* to borrow this model.[69]

This is an example of how international standard-making in the electoral area may benefit from comparative analysis. The initial claim as well as diffusion of 'independent election management body models', being somewhat paradoxical and interesting examples of advancing something different from what exists in the Western democratic heritage, reveals that there might be some unique and underexplored ways for electoral standard-setting based on differences of countries and their respective democratic developments.

The creation of independent election administration bodies, fenced by the 'no-go' Western European model, was evidently taken up as a standard. In fact, new democracies today follow the model of election administration by independent election commissions. However, they also try to do so through accommodating different recommendations coming from the Venice Commission and from election observation missions to ensure their independence through adjustments in their compositions. The claim of what should not be done has evolved into *what kind of election administration*

[69] The explanatory part of the Code of Good Practice states that '[h]owever, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government - even when the latter is controlled by the national opposition' (Venice Commission 2002).

body should be established in the transitional democracies. Although the initial idea identified a 'no-go' method for a certain category of countries to administer elections, this claim became prescriptive and detailed with regard to each country where it was diffused.

The table below demonstrates that in many countries of transitional democracies the comments and recommendations revolve around how different political forces should be represented in compositions of election administration, with references to the inclusiveness and balance in representation in commissions.

Table 9. *Comments and recommendations on election administration*

Country, year	**Comments/recommendations on election administration**
Armenia (Venice Commission and OSCE/ODIHR 2016b)	In line with Article 195.2 of the Constitution, Article 42 of the draft code provides that the CEC is composed of seven members elected by the National Assembly with at least three fifths of votes of the total number of deputies, for a term of six years. This election procedure differs from the current code, by which CEC members were appointed by the President upon recommendation of specified bodies. This qualified majority does not of itself ensure representation of the opposition. It is recommended that the process to appoint members of the CEC in the parliament be inclusive, so all parties may have trust in the CEC.
Azerbaijan (Venice Commission and OSCE/ODIHR 2003)	There is no ideal model that could force members to work in a consensual manner if both the majority and the minority are determined to use their voting power to pursue purely partisan interests. The two organisations had proposed to solve the described dilemma by composing the CEC in a way which would have given the opposition parties a significant position in the decision making process. […] The Parliament decided not to follow this suggestion and instead opted for a model which combines an almost assured majority with a mechanism to lower the majority threshold if decisions are urgent. […] The Venice Commission and the OSCE-ODIHR regrets that all attempts of political dialogue on the electoral code failed to yield results and that the composition of election commissions does not enjoy broad political support. A large consensus on this issue would have increased confidence in the electoral process.
Belarus (Venice Commission and OSCE/ODIHR 2010)	Election commissions could be constituted on the basis of nominations by political parties to ensure an inclusive and diverse balance of interests, and in such a manner as to provide a functional separation from state bodies. Simultaneous service within the state administration should be proscribed. […] Whilst the rules on how political parties and others may nominate commission members have been somewhat

	simplified, this leaves open the question of whether nominees will be appointed. This is a major flaw in the legislation, particularly given the lack of representation of opposition political parties in election commissions in the most recent parliamentary elections.
Bulgaria (Venice Commission and OSCE/ODIHR 2017)	The 2014 Joint Opinion's most serious concern about the election administration was the lack of guarantees of pluralism, inclusiveness and balance in the appointment of members of the CEC. This concern appears to be addressed by the amendment to Article 46 (3) of the Electoral Code […] The amendments thus establish a system of equal representation of the parties in the Parliament on a proportional basis as well as guaranteed representation for parties represented in the European Parliament, but not in the National Assembly. These procedural safeguards allow for a balanced composition of the CEC in line with the recommendations of the Code of Good Practice in Electoral Matters. Beyond the balanced composition, the Venice Commission and the OSCE/ODIHR emphasize the importance of constructive dialogue and non-partisan conduct among members of the entire election administration, in particular, during the decision-making process. Members of the election administration at all levels – CEC, regional and precinct (section) election commissions – should debate and vote based on objective elements and not through partisan considerations or affiliations.
Croatia (Venice Commission and OSCE/ODIHR 2006c)	Under the Draft Law, the President and other members of the SEC would be selected by Parliament. Under the Constitution, the Croatian Parliament has very broad powers. Among these is the power to "carry out elections, appointments and relief of office, in conformity with the Constitution and law". No other branch of the State, including the President or the Government, has explicit authority to appoint officials; except that these other branches can engage in activities which are not explicitly authorized by the Constitution if they are otherwise specified by it (e.g., with respect to the powers of the Presidency) or determined by it or through law (e.g., the Government). It should be assumed that the governing group in Parliament would engage in broad consultations with political parties and others, including civil society, with respect to appointments to the new SEC. The Draft Law does not explicitly require such consultations, however – either because that could be viewed as an unconstitutional limitation on parliamentary authority, or since such consultations would be carried out informally or as part of the work of the Parliamentary Committee on the Constitution, Standing Rules and Political System. Nonetheless, in the final analysis, selection of the members of the SEC under the Draft Law would be controlled by the majority in Parliament. While the Parliament would be ill-advised to choose poorly-qualified or partisan appointees, nevertheless the method of appointment could tend to diminish the perceived legitimacy of the new SEC.

Georgia (Venice Commission and OSCE/ODIHR 2006d)	Through their central role in selecting CEC members, the President and parliamentary majority can exercise, in effect, an extensive influence and potential control of the election administration. It is again recommended that the Election Code be amended so that the nomination and appointment process for CEC members is inclusive and ensures their independence and impartiality. Further, it is recommended that safeguards be included in the Election Code to ensure that no party or bloc has a preponderance of managerial positions in election commissions. The Code of Good Practice in Electoral Matters touches upon the question of election commissions' composition and can provide some guidance in this regard.
Slovakia (Venice Commission 2001b)	Electoral commissions at all levels are constituted from the political parties with one or more candidates for election in the area for which the commission is responsible. The importance attached to the need for commissions to be composed of party representatives is underscored by the fact that parties can withdraw any one of their members from a commission (Section 8.3). Members are therefore bound to comply with party instructions, which could raise questions concerning the independence of electoral commissions.
Turkey (Venice Commission and OSCE/ODIHR 2018b)	The March amendments to the Law on the Basic Provisions on Elections and Voter Registers changed the composition and leadership of the BBCs. Under the previous legislation, presidents of BBCs were drawn by lot among candidates proposed by the political parties. Article 22 of the amended law abolished the appointment of political party nominees, and the president of the BBC is instead a civil servant in the district chosen by the president of the relevant District Electoral Board (DEB). Moreover, the amendments abolished the appointment of one member from the aldermen council of the village or the district, and replaced this member with a civil servant chosen by the president of the DEB (Article 23). As per the previous legislation, the remaining five members of the BBCs are appointed by the five parties with the greatest number of votes in the last general parliamentary elections in the district. As a result of the amendments, the president and a total of two out of seven members of the BBCs are civil servants, who are fundamentally subject to the authority of the executive branch of power and are thereby, on the basis of the amended Article 104 of the Constitution, under the authority of the President of Turkey. With this background and due to the perceived lack of independence of Turkey's civil service from the political powers, it is hard to see how the civil servants in the BBCs can be considered impartial, as required by the Code of Good Practice in Electoral Matters. While political parties are not impartial when taken individually, objective impartiality can nonetheless be achieved by a broad and balanced composition of electoral administration bodies. Concerns with the competence of party-appointed BBC presidents, as noted by the authorities as a justification for the new composition, can be addressed by establishing minimum professional requirements. […] Introducing civil servants to BBCs while reducing pluralism represented by the political parties, appears

	problematic vis-à-vis the above-mentioned impartiality requirement and the country's particular political reality. The Venice Commission and ODIHR recommend reconsidering the amendments regarding the composition and leadership of BBCs.

Such level of detail raises a question to what extent it is desirable for international actors to move forward and become prescriptive in giving advices and shaping them further as standards, and what should be not be standardized but approached from the comparative perspective. Another related issue is whether the detailed prescriptions risk departing from the initial ideas on which they are based. Significant detalisation during the diffusion of the initial claim, as well as different effects that the acceptance of the advice brought to the countries, reveal that detailed suggestions on how to compose election commissions may produce results which fall far short of independence of election administration bodies. While the achievement of the independence of election administration as an institution is an art, the general advice given by the Commission is to maintain 'a balanced' composition of election commissions.

Opinions of the Venice Commission show that the diffusion of claims regarding composition of election administration is far from straightforward, in light of the countries' own considerations with regard to the independence of institutions and personnel who can serve as commissioners. This is why the Venice Commission report calls the composition of the electoral administration 'one of the most controversial aspects of electoral legislation in many emerging or new democracies throughout the world' (Venice Commission 2020: 6). Although the new democratic "tradition" was set "in opposition" to the established one, the detailed explanation that accompanied the model composition of the election administration is not something that resulted in independent and impartial organization of the electoral processes as it is not necessary that the combination of the listed component would work for all states in a similar way.

The practical examples found in the opinions that the Venice Commission issued for different countries prove this point. The most interesting trend is the insistence of international actors on the inclusion of political parties in the composition of the

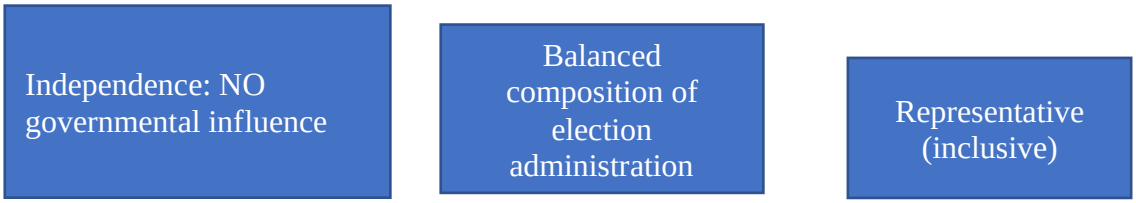
election administration (see Table 9 above). The idea is detailed and prescriptive: key political actors should be included in election administration bodies as the way to ensure political confidence in the electoral process through ‘a balanced composition’. In this composition, political stakeholders pursuing competing political interests are put together.

One example of the practical crystallization of this idea by the Venice Commission can be drawn from Turkey. Amendments to the Turkish election law in 2018 abolished the appointment of commissioners by political parties and introduced the ‘old-fashioned’ model where members of election administration are civil servants (Venice Commission and OSCE/ODIHR 2018b). Although party-nomination system was partly retained and the law still preserved that some members are to be appointed by parties “with the great number of votes in the last general parliamentary election in the district”, the shift form the ‘fully-fledged’ party nomination system was not appreciated by the Venice Commission, which pointed out the perceived lack of independence of Turkey’s civil service from the political power and, therefore, questioned impartiality of the election administration composed this way (Venice Commission and OSCE/ODIHR 2018b).

It is evident that in this case the Venice Commission was advocating for the re-introduction of the party-based election administration system. The inclusion of political parties was supposed to resolve a problem of domination of government (incumbent political force) in the administration of elections and the potential disregard of the opposition interests, so as to avoid election management bodies looking like ‘electoral ministries’. However, the prescriptiveness of the way it should done through the inclusion of political actors in election administration bodies has led to the gradual substitution of the initial concern over the independence of election administration to the concern about the balance in the composition of election administration bodies.

A substantial number of opinions of the Venice Commission regarding election administration in new democracies advise for election administration to be composed on the basis of representation of political parties. This was taken on board as a claim also by international election observers and diffused as the best-case scenario for transitional democracies. This advice is underpinned by the idea that political

representation will, in the long run, help build public trust in election administration which, in turn, will improve overall credibility of the process. The figure below shows the transformation of the claim: from the claim of independence to the representativeness in election administration.



Confidence in the electoral process (or lack of such confidence) is among the features which distinguish electoral processes in the new democracies from those in the old ones. Indeed, the representation of political parties in election administration may enhance the confidence in the electoral process as it gives political parties more access to the different stages of elections. A higher level of trust, according to this advice, can be achieved in the new democracies, through a political balance in election administration. For example, with respect to Belarus, the Venice Commission pointed out the deficit of public confidence in the electoral process and made a conclusion that the inclusion of the key political stakeholders in the composition of the central election administration could boost public confidence (Venice Commission and OSCE/ODIHR 2010). The same message with regard to confidence was reiterated in other opinions, in which the Venice Commission underscored the importance of public confidence in the work of election administration and linked it with the openness of the appointment and the transparency of the work of the commissions (e.g. Venice Commission and OSCE/ODIHR 2003). However, there are also arguments that political models of election administration do not always lead to the independence of the election administration.

Firstly, the public confidence, while being important, is distinct from independence of election administration. Moreover, although initially the political balance in election administration was not seen as goal in itself, but rather as an instrument to achieve public confidence, the diffusion of this idea and its acceptance in transitional democracies gave it prominence. Over time, the claim to the standard of political balance in election administration acquired autonomous standing as a value in itself. Yet there was no clear explanation why the proposed ‘balanced’ model would

necessarily build confidence in elections, especially for the contexts where there is little trust in political parties or the party system is not well developed.

Secondly, if representation in election administration was meant to be a “trust booster”, it is not evident that this goal was achieved. This idea looks vulnerable also because balance is not equal to independence or impartiality. The advice to staff commissions with nominees of political parties offers, in a way, to fight fire with fire: in order to ensure that the commissions are independent from political influence, representatives of all main political forces should be present in the commissions. This solution has given rise to a new problem – politization of election administration, where political parties use their representation to achieve their partisan aims.[70]

One example of the ‘side effects’ of partisan models of election administration is Albania. Researches point out a crucial role of the international actors in the process of electoral reform in Albania which, in its turn, is connected with the process of Europeanization (Hoffman 2011). Extreme politicization is seen as an important factor undermining trust in democratic institutions. With regard to elections, this manifests itself in the electoral framework which includes numerous checks between parties that do not trust each other. The political polarization and deadlocks which characterize the work of the parliament and other institutions are reflected also in the election administration.

To illustrate this with practical examples, Table 9 is composed of extracts of OSCE/ODIHR observation reports on election administration in Albania, including recommendations on how to improve it. Given that he reports of the election observers are periodic, they are used in this chapter to illustrate the continuous nature of the problems with politization of election administration in Albania. Although the Venice Commission’s reports also point out the same issue, the persistence of the problem is better seen through the reports of the election observers. One of the latest reports states that ‘the election administration is being used for the political maneuvering rather than for administration of elections, although the law provide for the equitable

[70] It is noteworthy that at times some cases in different regions speak against election management bodies made of representatives of political parties. See, for example, Election Management Bodies in East Africa (Makulilo et al 2016).

opportunities for parliamentary political parties to participate in administration of elections' (OSCE ODIHR 2019b). An extended look at the evolution of the election administration in time dynamic clearly shows that problem with politization of the election administration has roots in the competing interests of the main political parties.

Table 9. *Albania: Election Administration*

Report	**Findings**	**Recommendations**
1997 parliamentary elections (OSCE 1997)	[T]he Albanian authorities responsible for the administration of the election, particularly the Central Election Commission, displayed a high degree of commitment and responsibility in seeking to overcome the very real problems facing them.	-
2000 local elections (OSCE ODIHR 2000)	Despite the constitutional stipulation that the CEC should be an independent and non-partisan body, five of its members are close to the Government coalition. In this context, the election of Fotaq Nano, a family relative of the SP Chairman, to the position of CEC Chairman only reinforced the perception of political and personal ties linking the CEC to the ruling coalition. Also the appearance of the Deputy Chairperson at a SP rally during the election campaign prompted new accusations of bias.	The relationship between the CEC and other State bodies, such as Ministries, local Government administrations and Prefectures, should be clearly regulated.
2001 parliamentary elections (OSCE ODIHR 2001)	In contrast with previous elections, overall the CEC displayed greater independence and transparency in its decision-making. Although the majority of ZECs functioned well, the professionalism of many was questionable and decisions were marked by intense political rivalries in what ought to have been politically neutral institutions. In some zones, the behavior of party appointed ZEC members was unacceptably partisan, at times obstructing the process to	Political parties should continue to have representation on election commissions in order to create confidence in the process.

	such an extent that elections did not take place as scheduled.	
2004 local elections (OSCE ODIHR 2004)	The new Electoral Code introduced a new formula for the appointment of members of election commissions. Based on the protocol agreement between the SP and DP in May 2003, the formula attempts to ensure that there is no single, dominant force in control of election administration by creating a numerical "balance" on every commission. In previous elections, there were numerous instances where election commissions acted in a highly politicized manner, particularly in the favour of incumbents.	[T]he legal framework for the appointment of members should be clearly defined and in compliance with the Constitution; […] •political representation on all election commissions should be wider to ensure that more parties are represented on election commissions; […] • the system of appointment should be sustainable and provide safeguards both against political advantage and deliberate obstructionism; […] • political parties should recognize that election commissions must operate impartially, and professionally without any external interference, and that grievances are to be raised through the appropriate complaints procedures; and • election commission members should recognize that they are administrators rather than politicians.
2005 parliamentary elections (OSCE ODIHR 2005b)	The CEC is a permanent body composed of seven members. CEC members have a seven-year mandate. Political parties exert considerable influence over the composition of the CEC as they nominate members for appointment. Under an agreement reached in October 2004 between the SP and the DP, the 'political balance' of the CEC was altered, with the SP 'surrendering' one of its five seats to the opposition.	If the current system for nomination and appointment of the election administration is retained, the Electoral Code should be amended to: Ensure that the nomination and appointment of the CEC is fully compatible with the Constitution; Provide for a more pluralistic and inclusive election administration i.e. one that is not controlled and dominated by the two main political parties.
2007 local elections (OSCE ODIHR 2007)	The January 2007 amendments increased the membership of LGECs from 7 to 13, with the six largest parties from the parliamentary majority and minority entitled to nominate members. As the opposition camp currently comprises five parties, the SP, as the main party of that group, was granted an additional member in each LGEC. The two biggest parties from both groups, the DP and the SP, retain the right	While preserving the transparency and inclusiveness of the election administration formation and functioning, the Electoral Code needs amending with a purpose of eliminating any space for abuse and blocking the process by political parties. In particular, there should be effective mechanisms for filling vacancies in the election administration in case parties do not exercise their right to make nominations within the established deadlines.

	to nominate the LGEC chairpersons and the thirteenth member of each LGEC on a parity basis, determined by “random selection” and “equal territorial distribution”.	
2009 parliamentary elections (OSCE ODIHR 2009b)	The CEC is a permanent body whose seven members are elected by Parliament for a four-year term and can be re-elected. The chairperson and two members were nominated by the DP, the largest party of the parliamentary majority, and one member by the Republican Party (RP), also part of the parliamentary majority. The deputy chairperson and one member were nominated by the SP, the main opposition party, and one member by the Social Democratic Party (SDP), also opposition. In addition, parliamentary political parties as well as parties who are running for elections are entitled to nominate representatives to the CEC. These representatives may take part in discussions and put forward proposals but do not have the right to vote.	While preserving the transparency and inclusiveness of the election administration formation and functioning, the Electoral Code should be amended in order to eliminate any opportunity for abuse and blocking the process by political parties. In particular, there should be effective mechanisms for filling vacancies in the election administration in case parties do not exercise their right to make nominations within the established deadlines. Such mechanisms should be applied without delay when appropriate.
2011 local elections (OSCE ODIHR 2011)	The formula for the composition of the CEC reflects parliamentary representation, with four members nominated by the majority parties (majority-proposed members) and three by the opposition (minority-proposed members). The current CEC was elected in February 2009. In addition, all parties running in the local elections were entitled to nominate representatives to the CEC. These representatives could take part in discussions and put forward proposals but did not have the right to vote.	The formula for the composition of the Central Election Commission could be reconsidered so as to increase confidence in its independence and in its impartial application of the Electoral Code.
2015 local elections (OSCE ODIHR 2015d)	Although the legally required political balance was achieved in all CEAZs, political polarization led to a lack of collegiality and, at times, functional deadlocks.	Consideration should be given to enhancing the independence, impartiality, and professional capacity of the election commissions. The law could be amended to allow for non-

		partisan election commissioners at all levels to depoliticize the election administration. The CEC should impartially implement the letter and spirit of the law.
2017 parliamentary elections (OSCE/ODIHR 2017b)	The law does not provide the CEAZs with an alternative mechanism to fill the vacant positions in the VCCs and counting teams in case their members are not nominated in a timely manner by the parties. This leaves the formation of VCCs and counting teams largely dependant on political considerations. Two days prior to election day, some 720 VCCs had yet to be formed. The OSCE/ODIHR EOM was informed that all parties delayed nomination due to concerns about potential bribery of commissioners by their opponents, reflecting deep mistrust among political parties. The delayed nominations were also used to circumvent the legal prohibition on replacing VCC members. This is indicative of systemic weaknesses of a highly politicised election administration	The law could be amended to allow for non-partisan appointment of election commissioners and counting team members. The Electoral Code should be amended to prohibit discretionary replacement of CEAZ members by nominating parties. Consideration should also be given to introducing alternative mechanisms to appoint VCC and counting team members, when political parties fail to nominate their candidates.
2019 local elections (OSCE ODIHR 2019b)	The law provides equitable opportunities for parliamentary parties to be represented at all levels of the election administration. Previously, ODIHR recommended to allow for non-partisan appointment of election commissioners with the aim of depoliticization of the election administration. In this electoral process, these entitlements were used by the parties for political manoeuvring at the expense of the impartiality of the election administration.	In line with previous ODIHR recommendations, in order to enhance public confidence in the electoral process, consideration should be given to alternative formulas for nominating members of election administration, supported by procedural safeguards for their independence.

In fact, when the composition of the election administration is open to more political players also prompted the political maneuvering of commissioners and actions in the

interests of political parties that they represent. In this regard, already in 2004 the recommendations given by the Venice Commission that states '[w]hile permitting political party representation on commissions before elections, the Code should establish impartial, independent, and professional election commissions that operate in a non-partisan and efficient manner',[71] may even seem contradictory as neither a 'balanced composition' of election administration, nor a composition that include representatives of more political party could in practice guarantee the independence of the election administration.

It should be noted that one of the issues is that the link between independence and representation of political parties in election administration is not the same in different political environments and may depend, among other factors, on democratic development of a particular state. Addressing insufficient independence of election commissions through opening their composition to more political participants could work in a setting such as Belarus, where opposition parties have little access to election administration and granting such access has been a long-standing recommendation. However, in a more competitive political environment such as, for example, Albania, the political composition itself may become problematic. Indeed, is it surprising that political parties pursue political goals? Is it surprising that in Albania, given the constitutional context of the country, political parties used their membership in election administration for their political purposes, including to block the electoral process? Is it natural to expect from political parties to act impartially when they are involved in election administration? Evidently, in Albania the answer is no, and the inclusion of political representatives in election management is perceived by parties as a platform to influence the decision-making in election administration and enhance political interests.

One important lesson that the standard-making on election administration reinforces is that the diffusion, even when made by the same body that made a claim, can diverge from it to the extent that it goes far beyond the initial message. Indeed, such claim is no longer about a 'no-go' area or an appeal to the general principles, but about the

[71] 'A fundamental problem with the Electoral Code is that some of its provisions encourage a politicized election administration dominated by the two major political parties at every level' (Venice Commission and OSCE/ODIHR 2004).

shaping of the composition of election management bodies. At the level of further diffusion and acceptance, the adoption of political representation did not always produce the desired effect, i.e. to strengthen public confidence in the administration of elections. Those standards that can't be measured, such as independence, may give birth to new claims to new standards, which in the course of time may lose the link with the initial idea or produce side effects. Accordingly, the partisan model that was supposed to ensure independence of electoral bodies becomes a vehicle to accommodate as many political forces as possible. Thus, the idea of balanced composition of election administration has been substituted by *the claim of political representativeness* in the election administration.

Representative models are those where as many pollical actors as possible are represented. The minimum of representation in election administration is evidently achieved when the government and the opposition are represented. But this claim evidently departs from the other two as it does not always guarantee independence or the political equilibrium, and, on the contrary, may even fail on both fronts. In fact, whether it works or not largely depends on the context of the countries.

The main way in which the claim is currently diffused appears to be that the composition of election administration should reflect the composition of the parliament. Overall, the requirement to include parliamentary parties into administration of elections became this minimum, the falling below it would be regarded as a breach of electoral standards which would be regarded as contrary to electoral standards.

Thus, the Venice Commission adopts and claims as a standard the idea that the representative political composition of election administration should also be based on some criteria that would prevent the dominance of one political group. It should be noted that in terms of ensuring balance the 'parliament-mirroring' model may not necessarily be easy to apply, especially when it comes to decision-making - the clear cut between the majority and the opposition typical for parliaments may not be that helpful in the administration of elections. It is clear that if the proportional representation in the composition of the election administration is based on the result of the previous elections, if ruling parties won an overwhelming majority of

parliamentary seats, the achievement of balance in composition of election commissions becomes impossible.

At the same, if something is not functioning in the partisan model of election administration, international actors attribute this to insufficient representation, and may advise for more and more elements to be introduced into the systems. For example, in Kyrgyzstan, the Venice Commission criticized the composition of the Central Election Commission "as the CEC is appointed by a limited group of political party interests holding political power in the executive and legislative branches. Political parties participating in elections, unless they already have mandates in parliament, are excluded from the appointment process" (Venice Commission and OSCE/ODIHR 2011b). As a result, it was recommended to open the appointment process also to political parties not represented in the parliament.

In the previous chapter, where the application of human rights by international observers was discussed, it was already mentioned that such cascading recommendations risk encouraging perpetual reforms based on the advice of international actors. Here, the approach to election administration, with the continuously expanding toolkit that becomes more and more detailed provides examples how perpetual reforms are encouraged through setting standards in the field of the election administration. For example, the 2001 Venice Commission's opinion on Ukraine states that a balanced composition of the election administration 'is often the best means to ensure its independence' (Venice Commission 2001c). Interestingly, after Ukraine implemented the suggestion to change the composition, it received new comments, suggesting the new procedure may be too burdensome to apply in practice. The June 2013 joint opinion 'recommended increased pluralism in election commission membership, noting that the guaranteed positions on election commissions of sub-national level of remain with parties already holding parliamentary mandates and that non-parliamentary parties can only participate for the remaining vacant positions through a lottery (Venice Commission and OSCE/ODIHR 2013). Clearly, at some point such advice loses links with independence of election administration, and treats the inclusion of political parties as a goal in itself.

Furthermore, in practice there is no direct link between the political composition of the election administration and its independence, and, there are cases in which the departure from the political composition of election administration may in the long run produce a positive effect. In Turkey, the Venice Commission advised against judicial composition of election administration, stating that "as the full members of the SBE [the election commission of the central level] are exclusively judicial officials, its independence is contingent on the independence of its judges as such". Indeed, in this case independence of the judiciary was put into question by the Commission. While the Commission gave credit to an attempt "to place particular emphasis on its independence from the executive as well as from any political party in Parliament" by the creation of election administration out of judges, it also noted concerns as to the independence of judges in Turkey after the constitutional revisions of 2017:

> In this new constitutional context, the current composition of the SBE is problematic. Insofar as the independence of the Council of Judges and Prosecutors can be questioned, so can the independence of the SBE. Indirectly, the Council of Judges and Prosecutors controls the appointments of the SBE's members (Venice Commission and OSCE/ODIHR 2018b).

Despite the advice of the Venice Commission, Turkey opted for the election administration composed of the judiciary. In 2014, international election observers reported the lack of trust in election administration that followed the lack of independence of the judiciary (OSCE ODIHR 2014). Over time, election observers' reports stopped raising the lack of independence of election administration and the lack of trust in its work as an issue, with reports mentioning that some interlocutors, including political actors raising issues over transparency of work of election administration which is not connected with its compositions. (OSCE ODIHR 2018b). While the Venice Commission advocated for a different model for Turkey, the adopted model appears to have proved to be a working option that does not cross the line of the undesirability of administration of elections by executive bodies.

Some of the patterns emerging from the examples in this chapter show that new claims may travel from one country to another, or even from one electoral stage to another. In this process also standards of questionable value, the impact of which on the state

is not sufficiently studied, may give rise to more and more detailed prescriptions for countries. This may contribute to the impression of perpetual electoral reforms that can never be completed as when it comes to the issues such as impartiality, independence, transparency, and representativeness, such elastic concepts can accommodate many new claims. The same tendency of the production of new claims from the elastic human rights concepts such as 'non-discrimination' and equality characterises the activity of international election observers.

It is evident that the electoral standards that the Venice Commission claims are not only coming from the experiences of old democracies, but also from the behavior and features of transitional democracies. Indeed, accumulated experience of transitions may help understand what better lends itself to "standardization" and where it is more plausible to rely on good practices, in order to approach particular issues in a more nuanced way. For example, while independence of election administration should be advocated as a standard, the ways to achieve such independence may be different, and the task of international actors here can be not to impose or disregard certain models, further multiplying yardsticks, but to offer a range of possible solutions relying on existing practices.

This speaks to the importance of the contexts, and more valuable recommendations could be produced if the use of different practices in different contexts is taken into consideration. Plus, there can be no accusations of "double standards" if we accept that not everything should be approached with standards. If there are no standards, it should not mean that international actors cannot do anything, as they are able to offer good practices, possible solutions, etc. But such approach should leave a choice and provide context-tailored options, instead of being a step to standard-formation.

Conclusions

This research started with a question - what are international electoral standards? International electoral standards are a relatively recent practical phenomenon arising from the activities of international actors. In practice, international electoral standards are products, and, at the same time, a framework of activities for international actors involved in international observation and assistance.

The approach to the assessment of elections by international actors is in continuous evolution. Democratization and the increasing holding of competitive elections presented international actors involved in assessing and assisting these processes with the need to transition from the ‘free and fair’ formula to a more detailed approach. It has shifted from the general political assessment, i.e. based on the ‘free and fair’ formula, to the assessment of elections against international electoral standards.

There are several driving factors of this shift. Firstly, the concept of international electoral standard provides grounds for a more detailed assessment compared to the ‘free and fair’ formula. Secondly, such assessment avoids labeling elections as a whole and takes into account different stages of the electoral process. Thirdly, it contributes to guaranteeing the longevity of electoral observation as an activity of international relevance. This thesis, therefore, tackled the assessment of elections as an evolving phenomenon, which evolution is strongly influenced by the vector taken by the international electoral actors.

With regard to the theoretical framework for international electoral standards, this research revealed a gap between the rapid practical development of international electoral standards and the relevant theory. The lack of studies provided practitioners with an opportunity to fill this gap. In fact, the concept of ‘international electoral standards’, i.e. the idea that elections can be judged on the basis of international norms and international law appeared before its content could be created. As a result, the latter was constantly expanded by the international actors.

The examination of international electoral standards as they appear in the reports of election observation missions clearly demonstrated that they cannot be sufficiently explained by the existing theories of international relations. International actors, for their part, have attempted to put electoral standards under the legal sources, but international law cannot fully accommodate international electoral standards. In other words, international law simply lacks the necessary framework for producing and enforcing the rules on competition for and organization of power inside the states.

As to theoretical inquiry, international electoral standards are an interdisciplinary phenomenon, and, therefore, should be approached from the perspective of different disciplines combined together and taking into account social reality of the phenomenon. The formation and the application of international electoral standards can be explored on the basis of some elements of existing international relations theories, however, taking into consideration the specific features of the phenomenon:

1. The involvement of international actors that set the standards
2. Lack of interaction between/among states, with the result that the 'international norms' do not originate from such interaction, but rather from that between the state and international actors, primarily international observers

International electoral standards are diffused and accepted or rejected by the states, similarly to the norms in international relations. However, they are initially made by specific international actors, rather than through states interaction. In order to not accept one-time statements as standards, this thesis introduced a concept of 'claims' to standards that can become an international standard if diffused by international actors and accepted by states.

Examination of how the human rights law is applied by the international electoral observers revealed that the norms of international human rights law can be diffused according to divergent and non-divergent schemes. International electoral standards are made through the process of linear diffusion (e.g. blanket restriction for the right to vote for prisoners) or their meanings can be changed during diffusion, making such diffusion divergent. In the latter case, when observers provide their own interpretation of human rights standards, they create international electoral standards themselves

(jus observatores), while maintaining that such standards come from human rights jurisprudence.

This thesis identified multiple examples of this and, in some other cases, human rights jurisprudence is even employed by the observers for the purposes of standardization. These and other examples strengthen the case for not treating international electoral standards as a 'legal' phenomenon.

It should be noted that in many cases, the observers' recommendations are benign and make a lot of practical sense considering one country under scrutiny, but they may not work as well in others. However, as long as the activity of observers is presented as form of application of international law, observers will continue efforts to 'standardize' rules that are not necessarily meant to be standardized. The conclusion of this practical analysis is that the issues within the margin of appreciation of specific countries should be handled with care vis-a-vis standardization, as when it comes to sensitive electoral issues the standardization approach lacks comparative sensitivity.

Jus observatores as explained before is not the only instrument of standardization. The Venice Commission represents an alternative approach, operating with good practices. However, with time, it also engaged in standardization through 'yardsticks'. The Commission's recommendations are becoming increasingly detailed and are being standardized and applied as yardsticks, potentially producing problems in addition to solutions. Thus proving also that 'standardization' is not necessarily always helpful. Two different examples, one on the stability of the electoral law and the second one on the composition of election management bodies, show the shortcomings of the approach based on the yardsticks. Comparative constitutional law can be used to identify yardsticks, but with specific regard to electoral matters it should be used in order to identify to the benefit of countries areas limited by red lines (no-go areas). Within this area the states should exercise their discretion in running their own electoral processes and international advice should be available but based on the collections of good electoral practices framed by comparative perspectives.

The fact that the international approach to elections started from the free and fair formula and today turned to international electoral standards means that the latter

could be a temporary phenomenon. Moreover, due to the fact that the election law is very political in nature, therefore, unique for each state, it can hardly be open to wholesale standardization. In fact, within the framework of debates on internationalization of constitutional law, elections is one of the elements that internationalize rather reluctantly. For all these reasons, paying more attention to comparative studies, collecting and explaining good practices suitable in different contexts could be a good solution.

This is not to say that the election observation and assistance should be turned into an academic activity. Statements of the election observers have always been and continue to be sensitive political documents, and whatever approach is adopted – i.e. 'free and fair formula', 'international electoral standards', 'good practices' etc. – the public will expect a political assessment of the organization of electoral competition. The importance of this consideration notwithstanding, its further exploration could not be accommodated within the framework of the present analysis.

In conclusion, by examining the formation of international electoral standards, the studies of the electoral issues that become subject of such standards and their application by international actors, this research proved that if the legal argument is used in the assessment of elections and the production of recommendations, it should be employed in its full potential, which is hardly possible through standardization.

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