



Office for Democratic Institutions and Human Rights

FEDERAL REPUBLIC OF GERMANY

RE-RUN OF ELECTIONS TO THE BERLIN HOUSE OF REPRESENTATIVES AND DISTRICT ASSEMBLIES

12 February 2023

ODIHR NEEDS ASSESSMENT MISSION REPORT

9-12 January 2023



Warsaw
23 January 2023

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I. INTRODUCTION

Following an invitation from the Permanent Mission of the Federal Republic of Germany to observe the 12 February 2023 re-run of elections to the Berlin House of Representatives and District Assemblies, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) conducted a Needs Assessment Mission (NAM) from 9 to 12 January 2023. The NAM was composed of Ulvi Akhundlu, Deputy Head of the ODIHR Election Department, and Hamadziripi Munyikwa, ODIHR Election Adviser.

The purpose of the mission was to assess the pre-election environment and the preparations for the elections. Based on this assessment, the NAM recommends whether to deploy an ODIHR election-related activity for the forthcoming elections, and if so, what type of activity best meets the identified needs. Meetings were held with officials from state institutions, including Berlin *Land* (LEC) and District (DEC) election commissioners, members of the expert commission established to enquire into the events of the September 2021 elections in Berlin, representatives of political parties, and civil society. A full list of meetings is annexed to this report.

ODIHR would like to thank the Federal Foreign Office, and the Office of the Berlin *Land* Returning Officer for their assistance and co-operation in organizing the NAM. ODIHR would also like to thank all of its interlocutors for taking the time to meet with the NAM.

II. EXECUTIVE SUMMARY

On 16 November 2022, the Berlin Constitutional Court invalidated the results of the September 2021 elections for all the seats to the Berlin House of Representatives as well as all Berlin district assemblies, requiring a complete re-run of these elections within 90 days of the decision. The 26 September 2021 *Bundestag* elections were held along with elections for the Berlin House of Representatives, and all 12 District Assemblies, as well as a referendum. Procedural errors, including insufficient numbers of ballot papers or voters receiving and casting incorrect ballot papers, were exacerbated by the long queues caused by Covid-19 social distancing measures and the running of the Berlin marathon on the same day. ODIHR deployed an Election Expert Team (EET) to the 2021 *Bundestag* election, which focused on postal voting, the campaign environment, the regulation of campaigns and the regulation and oversight of campaign finance. The EET noted instances of procedural issues though it visited a limited number of polling stations in Berlin in keeping with ODIHRs election observation methodology for EETs.

Elections for the Berlin House of Representatives and district assemblies are governed by the 1987 Berlin Law on Elections to the Chamber of Deputies and District Assemblies, and the 2006 Berlin Election Regulations, only the latter were amended since the September 2021 elections, including increases in the number of staff in polling stations and increased stipends for election workers. Most ODIHR NAM interlocutors assessed these laws as providing a generally robust framework for the management of elections, acknowledging, however, there was a space for further improvements and

harmonization, particularly in relation to powers and responsibilities of the State and District Returning Officers.

Members of the Berlin House of Representatives are elected through a mixed electoral system combining 78 majoritarian seats in single member constituencies and a closed list proportional representation system in a single constituency, with the outcome of the latter determining the overall distribution of seats. District assembly elections are based on proportional representation through closed lists for parties or voters' associations. Following the September 2021 elections 147 representatives were elected to the House.

The elections will be administered by the Berlin *Land* Election Committee (LEC), 12 District Election Committees (DECs) and Election Boards 2,257 (EBs). The *Land* Election Officer (LRO) is appointed by the Senate of Berlin, the District Election Officers (DRO) are appointed by the District Offices, and the members of the EBs are appointed by the District Election Offices. The members of the LECs are appointed by the State Election Commissioner and are composed of judges, and electors proposed by the parties represented in the Land House of Representatives. The members of the DECs are appointed by the district electoral officers. . All voters can request postal ballots and postal ballot request forms had already been distributed to voters at the time of the NAM meetings. Notwithstanding the procedural errors which necessitated the re-run of these elections, all ODIHR NAM interlocutors expressed confidence in the independence of the election administration and of their capacities to effectively manage the upcoming elections, including postal voting.

Following the September 2021 elections, the Berlin Senator for the Interior established a commission to enquire into the irregularities as they related to the House of Representatives and District Assembly elections. The commission published a report in July 2022 providing recommendations for improving the conduct of elections in Berlin in the short, medium and long term. Among the immediate changes introduced following the recommendations of the expert commission on elections after the 2021 elections were, increasing the permanent staff at the LEC from four to 12, significant increases in the number of polling staff and their daily remuneration, increased numbers of ballot boxes and polling stations, ensuring extra ballot papers, and the introduction of control mechanisms to verify that the correct ballot papers are delivered and received in the correct polling stations.

German citizens who are 18 years of age with a registered residence in Berlin are eligible to vote in the elections for the House of Representatives. European Union citizens, aged 16 years or older, who are registered in Berlin can vote in the district assembly elections. All ODIHR NAM interlocutors expressed confidence in the voter registration process and accuracy of the voter lists.

As these are re-run elections, all the candidates and candidate lists remained the same as those for the September 2021 elections with the exception of those candidates who were deceased, no longer resident in Berlin or their respective district or who had withdrawn their candidacies. All ODIHR NAM interlocutors expressed general confidence in the candidate registration process. Most political parties that the ODIHR NAM met with indicated that they apply internal gender quotas.

Federal regulation of campaigns is limited, with the conduct of the election campaign mostly governed through the Berlin Road Act which stipulates campaign-related ordinances. All ODIHR NAM interlocutors considered the campaign environment open and free.

The Federal Political Party Act provides the main legal framework for party and campaign finance, including at the state level, setting no limits on the amounts that political parties may raise or spend during the campaign. Other than the provisions of the Federal Political Party Act, which also apply at the state level, there are no specific state level requirements for the disclosure of funding sources. There

are no state level requirements for disclosure of sources of funding. Parties are mostly financed through membership fees, private contributions and public funding, which cannot be higher than the funds the party collects from private sources. While most ODIHR NAM interlocutors were satisfied with the existing regulation of party and campaign financing, previous ODIHR reports have noted that campaign funding could benefit from a lowering of the threshold for immediate disclosure of donations, requiring financial reporting during campaign periods.

The media landscape is pluralistic and characterized by a strong tradition of public service broadcasting and a vibrant print media market. *Land* laws regulate broadcast media with no media-related regulations at the federal level. Media are required to provide plurality of opinion, balanced coverage for all important political, ideological and social forces and parties and are legally obliged to provide an ‘appropriate amount’ of broadcasting time. No ODIHR NAM interlocutors noted concerns relating to equitable access to media.

Voters can submit complaints to various levels of election administration on issues related to voter registration, polling cards and the nomination of candidates and party lists. All other election related complaints including on the validity of elections are handled by the Berlin Constitutional Court which has no specific measures in place for the expedited hearing of election related cases. All ODIHR NAM interlocutors expressed confidence with the election dispute resolution system.

The election legislation does not contain specific provisions regarding international election observation, though it does stipulate that polling should be public.

ODIHR NAM interlocutors generally welcomed an external assessment of the re-run elections, but almost all were of the view that the observation activity formats which ODIHR would be in a position to deploy for these elections would not be necessary or beneficial. The ODIHR NAM noted a high level of confidence in the capacity of the Berlin LEC and DEC to implement these re-run elections effectively as well as a number of practical changes introduced following the recommendations of the expert commission on elections. Based on the findings of this report, ODIHR does not recommend the deployment of an election observation activity for these elections. However, ODIHR encourages the Berlin authorities to continue to work with Federal authorities to address previous ODIHR electoral recommendations and stands ready to assist the authorities in implementing these recommendations.

III. FINDINGS

A. BACKGROUND

Berlin *Land* is one of the Federal Republic of Germany’s 16 states. While federal legislative power rests in the Federal Parliament (*Bundestag*), extensive legislative authority is vested in the *Land* Houses of Representatives and corresponding district assemblies of which there are 12 in Berlin. The Senate, selected by the House of Representatives, serves as the state executive responsible for state policy and administration and is headed by the mayor and no more than ten senators.

Elections to the *Bundestag* were held on 26 September 2021. In Berlin, *Bundestag* elections were held along with elections for the Berlin House of Representatives, and all 12 District Assemblies, as well as a referendum. Procedural errors, most consequentially insufficient numbers of ballot papers or voters receiving and casting incorrect ballot papers, were exacerbated by the fact that the elections were held at the height of the Covid-19 pandemic with corresponding social distancing measures in place, as well as the Berlin marathon having been held on the same day, hampering efforts to rectify these issues effectively. Complaints were filed with the Bundestag Committee for the Scrutiny of Elections,

Immunity and the Rules of Procedure as the body responsible for the resolution of complaints for federal elections, and the Berlin Constitutional Court with respect to state and district elections.¹ On 16 November 2022, the Berlin Constitutional Court invalidated the results for all the seats to the Berlin House of Representatives as well as all Berlin district assemblies, requiring a complete re-run of these elections within 90 days of the decision.² The Berlin Senator for the Interior, appointed in December 2021, established a commission to enquire into the irregularities as they related to the House of Representatives and District Assembly elections. The 18-member commission was composed of election workers, academics and prominent lawyers who met in plenary sessions between December 2021 and June 2022. The commission published a report in July 2022 providing recommendations for improving the conduct of elections in Berlin in the short, medium and long term.³

ODIHR deployed an Election Expert Team (EET) to the 2021 Bundestag elections.⁴ The 2021 EET assessed preparations for, and the process of, postal voting, the campaign environment, the regulation of campaigns and the regulation and oversight of campaign finance. Correspondingly, the report was limited in scope and did not offer a comprehensive assessment of the electoral process, rather considering specific areas under review for their compliance with OSCE commitments and other international obligations and standards for democratic elections, as well as with national legislation. In line with ODIHR's methodology, the EET did not undertake a systematic observation of the election-day procedures, but visited a limited number of polling stations in Berlin, and noted instances of procedural issues on election day. The final report of the EET, published in March 2022, made ten recommendations which included establishing an independent body to monitor political finance, elaborating upon the regulation of loans, sponsorship, and third-party campaigning, tracking the receipt of postal ballots, and better defining municipal regulations for campaigning.

B. LEGAL FRAMEWORK AND ELECTORAL SYSTEM

The German Federal Constitution is binding on all states and establishes fundamental rights and freedoms, while relevant provisions of federal laws including the 1994 Political Parties Act, the 1999 Law on Election Statistics, and the 2002 Civil and 1998 Criminal Codes apply to the conduct of state elections. Elections for the Berlin House of Representatives and district assemblies are governed by the 1987 Berlin Law on Elections to the Chamber of Deputies and District Assemblies, and the 2006 Berlin Election Regulations. Only the latter were amended since the September 2021 elections, including increases in the number of staff in polling stations and increased stipends for election workers.

Members of the Berlin House of Representatives are elected through a mixed electoral system combining majoritarian and proportional representation systems. First-past-the-post contests in single seat districts elect 78 members, and all additional members are elected through closed party lists in a single multi-seat constituency with a five per cent threshold for the allocation of seats. Votes cast through the proportional votes determine the overall distribution of seats. Compensatory seats are added to the House where parties have won more direct mandate seats than proportional seats (known as an overhang) until the representation reflects the proportional votes. Following the September 2021 elections 147 representatives were elected to the House. District assembly elections are based on

¹ On 19 November 2021, the Federal Returning Officer (FRO) filed an [objection](#) contesting the validity of the election in six Berlin constituencies, citing temporary closures of some polling stations due to wrong ballot papers and other organizational reasons that resulted in long queuing times denying many voters the chance to cast their ballot. Several complaints, including those filed by DIE PARTEI and Alternative für Deutschland (AfD), were filed with the Berlin Constitutional Court.

² Appeals to the decisions of the Bundestag Committee and the Berlin Constitutional Court were made to the Federal Constitutional Court and decisions were pending as the ODIHR NAM conducted its meetings.

³ See the [Report of the Expert Commission on Elections in Berlin](#).

⁴ See previous ODIHR [election-related reports on Germany](#).

proportional representation through closed lists for parties or voters' associations with a three per cent threshold for the allocation of seats.

C. ELECTION ADMINISTRATION

Elections are administered by the LEC, 12 DEC's and 2,257 Election Boards (EBs). The Berlin LEC is chaired by the Berlin Returning Officer (LRO) with six commissioners representing the parties in the House of Representatives, and two judges of the Berlin Higher Administrative Court. The office of the LRO previously employed four permanent staff which have been increased to twelve since September 2021. Correspondingly, DEC's are chaired by a District Returning Officers who are generally members of district administrative staff, with parties represented in the District Assembly also represented in the LEC.

Ordinarily, polling stations are staffed by at least seven and as many as nine workers, but the LEC and DEC's have permitted an increase of up to 12 polling workers per polling station for these re-run elections. The LRO informed the ODIHR NAM that training for polling station chairpersons, as well as the three members of the EB with a designated role, would take place in person, with all other staff having the option to conduct online on-demand trainings.

The LEC and DEC's informed the ODIHR NAM that 42,000 poll workers had been recruited for these elections rather than the 38,000 employed in the previous elections and that the stipends for these roles had been increased to attract more polling staff.⁵ While DEC's noted that the 90 days time frame for holding these re-run elections was significantly shorter than the six to nine months they would normally have, they were nevertheless confident that they would be able to conduct the elections effectively. Almost all ODIHR NAM interlocutors expressed confidence in the independence of the election administration and were convinced that there would not be a re-occurrence of similar procedural errors as those which disrupted the September 2021 elections. Election administrators pointed to the lightened burden on polling staff given that COVID restrictions would not apply for these elections as well as the decision to hold a referendum six weeks after the re-run rather than concurrently with the re-run election.

All voters are entitled to cast a postal ballot should they request to do so, and DEC's noted that they had already sent out mail ballot request forms for the upcoming elections. Most ODIHR NAM interlocutors indicated that they expect voters to rely more heavily on postal voting, citing Germany's long history with postal ballots.

D. VOTER REGISTRATION

German citizens who are 18 years of age with a registered residence in Berlin are eligible to vote in the elections for the House of Representatives. European Union citizens, aged 16 years or older, who are registered in Berlin can vote in the district assembly elections. Individuals convicted by a court of certain serious crimes are ineligible to vote. The LEC informed the ODIHR NAM that 2.4 million voters are registered for these elections.

Voter registration is passive and voter lists are extracted from district civil registers, based on voters' permanent residence. Invitations to vote will be delivered to voter's registered residence three weeks ahead of the elections, though an invitation to vote is not a precondition for voting. Voters will be able

⁵ From EUR 60 to EUR 240 per day.

to review voter lists from 21 January, and request corrections in cases of mistakes or incomplete information.⁶

All ODIHR NAM interlocutors expressed confidence in the voter registration process and the accuracy of the voter lists.

E. CANDIDATE REGISTRATION

As these are re-run elections, all the candidates and candidate lists remained the same as those for the September 2021 elections with the exception of those candidates who are since deceased, were no longer resident in Berlin or their respective district or who had withdrawn their candidacies. Where candidates have been removed from the proportional lists they have been replaced by the next candidate on the list and candidates for majoritarian seats, have been replaced by the first-placed candidate on the proportional list.

Ordinarily, party lists must be submitted to the respective LEC returning officer and need to be supported by signatures of 1 per 1,000 eligible voters in the *Länder*, but not more than 2,000 signatures. However, in light of the COVID-19 pandemic, the requirements were reduced to 25 per cent of the standard at all levels and signatures which were presented electronically for the 2021 elections. Decisions on the registration of candidates and party lists are generally taken by the DEC and LECs, respectively. Most political parties that the ODIHR NAM met with indicated that they apply internal gender quotas.

All ODIHR NAM interlocutors were satisfied with the candidate and party registration process.

F. ELECTION CAMPAIGN

The conduct of the election campaign is mostly regulated at *Land* level, with the Berlin Road Act stipulating campaign-related ordinances. Federal legislation provides limited regulation, which includes provisions of the Basic Law, the 1978 Law on Assemblies and Parades regarding the organization of public events, and the Political Party Act that requires authorities to treat political parties equitably.

ODIHR NAM interlocutors from political parties noted that campaigns are likely to include door-to-door canvassing, billboards and leaflets, meetings with voters, spots in broadcast and advertisement in print media, as well as the use of social media. Political parties noted that the political circumstances of the elections had considerably changed since September 2021 which would likely result in lower turnout as these elections are not coupled with the Bundestag elections. Parties also highlighted that recruiting campaign staff was hampered by the shorter time frame for the election preparations, particularly for smaller parties, and cited that campaigning in winter would be an inconvenience. Most ODIHR NAM interlocutors considered the campaign environment open and free and did not expect any challenges with access to venues.

G. CAMPAIGN FINANCING

The Federal Political Party Act provides the main legal framework for party and campaign finance, including at the state level, setting no limits on the amounts that political parties may raise or spend during the campaign. Other than the provisions of the Federal Political Party Act, which also apply at the state level, there are no specific state level requirements for the disclosure of funding sources.

⁶ Voters can inspect and verify the voter list in person and challenge the registration of other voters if she/he produces facts confirming that the voters' register is incorrect or incomplete.

Overall, political finance is not regulated at the state level except for the sections of the Berlin Land Election Act elaborating on the payment of state funds to political parties.

Parties are mostly financed through membership fees, private contributions and public funding, which cannot be higher than the funds the party collects from private sources.⁷ Parties cited that there were no additional resources for financing re-run elections which would have a particular impact on the capacity for smaller parties to campaign. Parties' campaign-related income and expenditure are reported through annual financial reports, audited by a certified auditor or auditing firm, and submitted to the President of the *Bundestag* at the Federal Level. No separate reporting during or shortly after an electoral period is required, except for donations exceeding EUR 50,000, which must be reported immediately and sources of donations totaling above EUR 10,000 within one year to be included in the annual party finance reports.⁸ In practice, the annual reports that will cover the campaign-related expenses for these elections will be made public in about one year. By law, failure to submit a financial report or an inaccurate report may result in financial or criminal sanctions or a party can lose its legal status for six years.

Most ODIHR NAM interlocutors were satisfied with the existing regulation of party and campaign financing, however, previous ODIHR reports have noted that the transparency of party and campaign funding could benefit from a lowering of the threshold for immediate disclosure of donations, requiring at least some degree of financial reporting during campaign periods, and publication of separate campaign finance reports immediately after elections.

H. MEDIA FRAMEWORK

The media landscape is pluralistic and characterized by a strong tradition of public service broadcasting and a vibrant print media market. There are generally no media-related regulations at the federal level and the activities of broadcast media are regulated by *Land* laws. The Interstate Treaty on Broadcasting and Telemedia provides a general framework stipulating requirements of plurality of opinion, balanced coverage for all important political, ideological and social forces, and requires those parties with a list in at least one *Land* be granted an 'appropriate amount' of broadcasting time. The allocation of airtime is based on each party's result in the previous general elections. In public media, election broadcasts are provided free-of-charge, while in private media electoral contestants can purchase broadcasting time on equal conditions.

Oversight of media conduct in public broadcasting corporations is ensured by independent Broadcasting Councils and private broadcasters are scrutinized by supervisory bodies at the *Land* level. Most ODIHR NAM interlocutors expressed confidence in the professionalism of the media and considered the political and election coverage as fair and balanced. While most ODIHR NAM interlocutors were satisfied with the equitable access to media, smaller parties may struggle to purchase broadcasting time, particularly in light of a re-run election within a single election cycle.

⁷ The Berlin Land Election Law states that individual candidates who have obtained at least ten per cent of the valid first votes cast in the constituency shall receive EUR 2.56 per valid vote. This also applies to a by-election, substitute election or re-election.

⁸ The GRECO [reports](#) on the transparency of party funding in Germany, among others, recommended that the country: "i) should introduce a system for the publication of election campaign accounts at the federal level, which would make the information available shortly after election campaigns; ii) to lower the 50,000 Euro threshold for the immediate reporting and disclosure; iii) to consider reducing significantly the threshold for the disclosure of donations and donors; iv) to ensure that the body to which the supervision of party financing is attributed, enjoys a sufficient degree of independence and is equipped with proper means of control, adequate staffing and appropriate expertise".

I. COMPLAINTS AND APPEALS

Voters can submit complaints to various levels of election administration with respect to voter registration, polling cards and the nomination of candidates and party lists. Other election related complaints including on the validity of elections are handled by the Berlin Constitutional Court which has no specific measures in place for the expedited hearing of election related cases. All ODIHR NAM interlocutors expressed confidence with the system as well as the timelines for the resolution of election disputes.

J. ELECTION OBSERVATION

The legislation states that polling shall be public and that the public shall have access to the polling station during voting, counting and announcement of results without disrupting the process. Neither federal nor *Land* election legislation, however, contain specific provisions for the presence of international election observers.⁹

IV. CONCLUSIONS AND RECOMMENDATIONS

ODIHR NAM interlocutors generally welcomed an external assessment of the re-run elections, but almost all were of the view that the observation activity formats which ODIHR would be in a position to deploy for these elections would not be necessary or beneficial. The ODIHR NAM noted a high level of confidence in the capacity of the Berlin LEC and the DEC's to implement these re-run elections effectively as well as a number of practical changes introduced following the recommendations of the expert commission on elections. Based on the findings of this report, ODIHR does not recommend the deployment of an election observation activity for these elections. However, ODIHR encourages the Berlin authorities to continue to work with Federal authorities to address previous ODIHR electoral recommendations and stands ready to assist the authorities in implementing these recommendations.

⁹ Paragraph 8 of the 1990 OSCE Copenhagen document states that: “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. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.”

ANNEX: LIST OF MEETINGS

Berlin Ministry of the Interior, Digitalization and Sport

Iris Spranger, State Senator for the Interior, Digitalization and Sport
Dr. Kai Kottenstede, Head of Senator's Office

Office of the Berlin Returning Officer

Prof. Dr. Stephan Bröchler, Returning Officer Berlin State
Bettina Melzer, Public Relations Adviser
Roland Brumberg, Deputy Returning Officer
Guido Kleinert, Head of Office
Tobias Kirchner, Staff Member
Florian Stinner, Staff Member

Berlin Election Expert Commission

Daniela Berger, Election Volunteer
Prof. Dr. Ralf Schnieders,
Prof. Dr. Christian Waldhoff

District Returning officers

Marc Albrecht, Returning Officer Berlin Pankow District
Rolfdieter Bohm, Returning Officer Berlin Friedrichshain-Kreuzberg District
Nicole Max, Returning Officer Berlin Tempelhof-Schöneberg District
Sabine Wolf, Returning Officer Berlin Mitte District

Berlin House of Representatives

Dennis Buchner, President Berlin State House of Representatives
Dr. Kristin Brinker, State Party chair, AfD Berlin
Stefan Evers, Secretary General, CDU Berlin
Paul Fresdorf, Manager of parliamentary group in the Berlin state House of Representatives
F.D.P. Berlin
Philom Ghirmai, State Party Chair, Bündnis90/Die Grünen Berlin
Christian Hochgrebe, Member of the Berlin State House of Representatives, SPD Berlin
Susanne Mertens, State Party Chair, Bündnis90/Die Grünen Berlin
Katina Schubert, State party chair, Die Linke Berlin

Civil Society Organizations

Dr. Andrey Demidov, Project Manager, Bertelsmann Foundation
Carlo Greß, Project Manager, Bertelsmann Foundation
Marie Jünemann, Board Member Mehr Demokratie e.V.
Christian König, Board Member Mehr Demokratie e.V. Berlin-Brandenburg

International and Diplomatic Community¹⁰

Representatives of resident embassies of OSCE participating States: Ireland, Italy, Portugal, Slovenia, Switzerland, and Türkiye.

¹⁰ The ODIHR NAM extended an invitation to representations of all OSCE participating States resident in Germany.