

DEMOCRACY
REPORTING
INTERNATIONAL

REPORT

INTERNATIONAL
CONSENSUS:
ESSENTIAL ELEMENTS
OF DEMOCRACY

Michael Meyer-Resende of *Democracy Reporting International* (DRI) wrote this report. The author wishes to thank Kate McGuinness for her contribution to this text. It follows on from two previous reports by the author about the notion of democracy:

Discussing International Standards for Democratic Governance (2007), funded by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and available at: http://www.democracy-reporting.org/files/standards_go.pdf

Democracy Revisited (2009), commissioned by the Office for the Promotion of Parliamentary Democracy of the European Parliament and available at: http://www.democracy-reporting.org/files/oppd-defining_democracy.pdf

For a French-language version of *Democracy Revisited*, see: http://www.europarl.europa.eu/pdf/oppd/Page_1/OPPD-La_democratie_revisitee.pdf

© *Democracy Reporting International* (DRI), October 2011. All rights reserved. Distribution for all non-commercial purposes is encouraged, provided DRI is acknowledged as the source and sent copies of any translation. DRI will provide an Arabic translation.

**INTERNATIONAL
CONSENSUS:
ESSENTIAL ELEMENTS
OF DEMOCRACY**

	
EXECUTIVE SUMMARY	05
	
POLITICAL BACKGROUND	06
	
ESSENTIAL ELEMENTS OF DEMOCRACY	08
01. THE SEPARATION AND BALANCE OF POWER	08
02. INDEPENDENCE OF THE JUDICIARY	10
03. A PLURALIST SYSTEM OF POLITICAL PARTIES AND ORGANISATIONS	11
04. THE RULE OF LAW	12
05. ACCOUNTABILITY AND TRANSPARENCY	13
06. FREEDOM OF THE MEDIA	14
07. RESPECT FOR POLITICAL RIGHTS	15

INTERNATIONAL CONSENSUS: ESSENTIAL ELEMENTS OF DEMOCRACY

DEMOCRACY IS NOT AN *ANYTHING GOES* FORM OF GOVERNMENT. VARIOUS INTERNATIONALLY AGREED DOCUMENTS INCLUDE AN OUTLINE OF THE CORE COMPONENTS OF WHAT DEMOCRACY MEANS. A RANGE OF THEM ARE 'HARD' LEGALLY BINDING INTERNATIONAL LAW. OTHERS MAY BE CONSIDERED SOFT LAW. WHILE THESE DOCUMENTS DO NOT GIVE AN EXHAUSTIVE DEFINITION OF DEMOCRACY, THEY INCLUDE BASIC KEY ELEMENTS, EACH OF WHICH IS A NECESSARY CONDITION FOR A DEMOCRATIC FORM OF GOVERNANCE.

EXECUTIVE SUMMARY

The demonstrators of the Arab Spring demand democracy in a region that has been ruled by authoritarian regimes for decades. While the demand is clear, it may be less clear what kind of democracy the people demand. Everybody is in favour of transparent, competitive elections. But at the same time many are concerned about tyrannical majorities imposing their view of the state and society on those who are not represented in government.

Questions about the extent and the limits of majority rule are as old as the very concept of democracy itself and there are no hard and fast answers. Indeed, there is no generally accepted concept of what makes a democracy. Academic definitions range from the minimalist ('competitive struggle for votes') to the far-reaching (including a degree of economic equality or well-being). Looking at states that are considered to be democratic may not be helpful either, because there is a large variety of political systems and practices in them.

Yet, democracy is not an *anything goes* form of government. Various internationally agreed documents include an outline of the core components of what democracy means. A range of them are 'hard' legally binding international law. Others may be considered soft law. While these documents do not give an exhaustive definition of democracy, they include basic key elements, each of which is a necessary condition for a democratic form of governance.

In 2004, the UN General Assembly adopted a resolution that lays out seven 'essential elements' of democracy, including:

- Separation and balance of power
- Independence of the judiciary
- A pluralistic system of political parties and organisations
- Respect for the rule of law
- Accountability and transparency
- Free, independent and pluralistic media
- Respect for human and political rights; e.g., freedoms of association and expression; the right to vote and to stand in elections

This report explores the implications of these seven elements in the hope of offering support to the debate in Egypt, Tunisia and other countries in the region, about what, exactly, a democratic state should look like. It is noteworthy that all Arab states endorsed the UN General Assembly resolution, except Libya and the United Arab Emirates, which abstained from the vote. Democracy activists in the region therefore should not hesitate to invoke these essential elements. They have been accepted in numerous internationally agreed documents, some of which represent international law.

POLITICAL BACKGROUND

Recent events throughout the Arab states, especially the popular uprisings in Egypt and Tunisia, provide the impetus for this report. From Morocco to Bahrain protesters are demanding democratic reforms. In some countries, these developments have moved the debate to questions about what democracy really means. What should the priorities for constitution writers in Tunisia, Egypt and Libya be as they try to establish democratic regimes? What should civil society contribute to the democracy building process and how? What reforms are necessary to better ensure, for example, genuinely democratic elections?

There are many definitions of what democracy means, especially in academic circles. These range from Schumpeter's minimalist 'competitive struggle for votes'¹ to more extensive definitions that include reference to political freedoms and specific institutional arrangements; e.g., parliament, an independent judiciary and so on. The most wide-reaching definitions of democracy even incorporate a notion of economic rights.²

Looking beyond academic debates about how to define democracy, it is important to acknowledge that this term has also been elaborated in numerous internationally agreed documents, such as international and regional inter-governmental organisations like the United Nations, the African Union or the Organization for Security and Co-operation in Europe (OSCE). Some of these may be characterised as soft law while others are legally binding treaty obligations. Altogether they represent a growing international consensus about the essential elements that make a democracy.

In 2004, the UN General Assembly adopted a resolution (A/RES/59/201) that lays out these 'essential elements of a democracy'.³ The resolution was endorsed by 172 states, with 15 abstentions (including Libya and the United Arab Emirates); no state voted against the resolution.⁴ It therefore both represents and consolidates an international consensus on what democracy means and how it should function.

According to paragraph 1 of this resolution, these essential elements include:

...respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen

representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.

By referring to essential elements, UN member states outline the core components of democracy. At the same time, they leave open the possibility of exploring whether there are other elements not included here that also make a democracy. As such, this definition does not strive to be exhaustive. Rather its goal is to define the basic minimal requirements necessary for a state to be considered democratic.

The 2004 UN General Assembly resolution builds on a similarly worded UN Human Rights Commission resolution from 2003⁵ and other legally binding international treaties that include many aspects of the essential elements resolution from 2004, namely the International Covenant for Civil and Political Rights (ICCPR).⁶ The 2004 UN General Assembly resolution, along with the ICCPR, provide the primary frame of reference for this paper, which analyses the various components of this definition of democracy in more detail. Occasional reference is also made to regional agreements that represent a codification of good practice around the world.

At the outset, it is worth noting that the UN resolution addresses two distinct aspects of democracy. The first is sometimes referred to as 'vertical accountability' and relates to how a state interacts with its people. This is the realm of human rights, which is codified in binding treaties reflecting the Universal Declaration of Human Rights.⁷ The promotion and protection of all human rights is a prerequisite for a democratic society, which is also stressed by the UN resolution. This area of democracy has already been well explored in many publications and extensively documented. Hence it is not closely examined here.

The second aspect of democracy identified in the 2004 UN resolution is sometimes called 'horizontal accountability'. It relates to how state institutions interact and, ultimately, how they are constructed and organised. How are the three branches of government structured as organisational entities and how do they function? How does the executive branch of government relate to the legislative branch? What types of relationships operate between the judiciary and the executive? How do

1 J. A. Schumpeter (1943), *Capitalism, Socialism and Democracy*.

2 International IDEA (July 2009), *Democracy in Development, Global Consultation on the EU's role in democracy building*. See: http://www.idea.int/publications/democracy_in_development/index.cfm.

3 Adopted 20 December 2004, the resolution was officially published in 2005. See: <http://www.undemocracy.com/A-RES-59-201.pdf>. All subsequent references in the text to this UN General Assembly resolution are from this source.

4 For documentation on the vote results, including abstentions, see: http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=13167S8448CT7.132415&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=A%2FRES%2F59%2F201&matchopt=0%7C0&oper=AND&x=10&y=9&aspect=pow&er&index=.VW&term=&matchopt=0%7C0&oper=AND&index=.AD&term=&matchopt=0%7C0&oper=AND&index=BIB&term=&matchopt=0%7C0&limitbox_1=VI01+%3D+vi_a&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=

5 UN Human Rights Commission Resolution 2003/36, UN Doc E/CN.4/2003/59. See: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/105/74/PDF/G0310574.pdf?OpenElement>.

6 See: <http://www2.ohchr.org/english/law/ccpr.htm>. All subsequent references in the text to the ICCPR are from this source (with the exception of extracts from General Comment 25 of the UN Human Rights Committee; see footnote 17 below). Arab League states that are not state parties to the ICCPR include: Comoros, Oman, Qatar, Saudi Arabia and the United Arab Emirates. For information about the current status of ICCPR state parties, see: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en#EndDec.

7 See: <http://www.un.org/en/documents/udhr/>. All subsequent references in the text to the Universal Declaration of Human Rights are from this source.

independent state institutions, such as human rights commissions, election management bodies or fiscal oversight agencies, relate to all three branches of government power? As it remains critically under explored, this aspect of democracy is the primary focus of this report.

Existing democracies entertain a wide range of institutional arrangements—presidential or parliamentary systems (or a mix of both), republics, constitutional monarchies, executive and non-executive heads of state, unicameral and bicameral legislatures, centralised or decentralised government, federal and non-federal states, written and unwritten constitutions and the like. Consequently, it is often assumed that it is impossible to speak of the term ‘democracy’ as a unified concept commanding consent about how it is defined. Certainly there is not one model of democracy, but many diverse forms spread over a spectrum of possible political systems. At the same time, however, this does not suggest that democracy is an *anything goes* form of government. It is not.

Nothing reflects this better than the political realities of Arab autocracies over the last several decades. Not only have these governments violated their own constitutions, for instance, by rigging elections or gerrymandering election boundaries. On paper their constitutional arrangements have been undemocratic. In Syria, for example, the constitution merges the three branches of government in the presidency and thus allows for no separation and balance of power. In Egypt, there has been no equal right to stand for presidential elections. In Jordan, the king could dissolve parliament at will. And Libya had no constitution or rule of law to begin with.

Arab states have generally lacked institutional democracy at three levels:

- Many governmental institutions have not been accountable through elections: most obviously, various Arab monarchs enjoy genuine political power, but are not elected. Furthermore, key institutions, such as militaries, are not held accountable by elected institutions. Militaries in the Arab states generally do not report to parliament, nor do they offer parliament an opportunity to review military budgets and expenditure.
- There are elected institutions, parliaments in particular, but they do not enjoy genuine powers. More often than not, parliaments in Arab states have been rubberstamping bodies that follow the lead of the executive branch of power, rather than the will of the electorate.
- Electoral accountability has been undermined by electoral fraud and the absence of genuinely competitive elections.

Democratic state-building is now the central challenge in Egypt, Tunisia, Libya, and beyond. This paper strives to make a contribution to this process by highlighting the essential elements that define democracy according to international consensus, and which need to be addressed across the region.

ESSENTIAL ELEMENTS OF DEMOCRACY

01. THE SEPARATION AND BALANCE OF POWER

The terms ‘separation of power’ and ‘balance of power’ mean that the power of the three branches of democratic government – the legislative, executive and judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective functions. The separation and balance of power rests on two main principles. First, the competencies of the three branches of governmental power must be clearly delimited and defined. Second, all branches of government are bound by the rule of law (also see section 4 below).

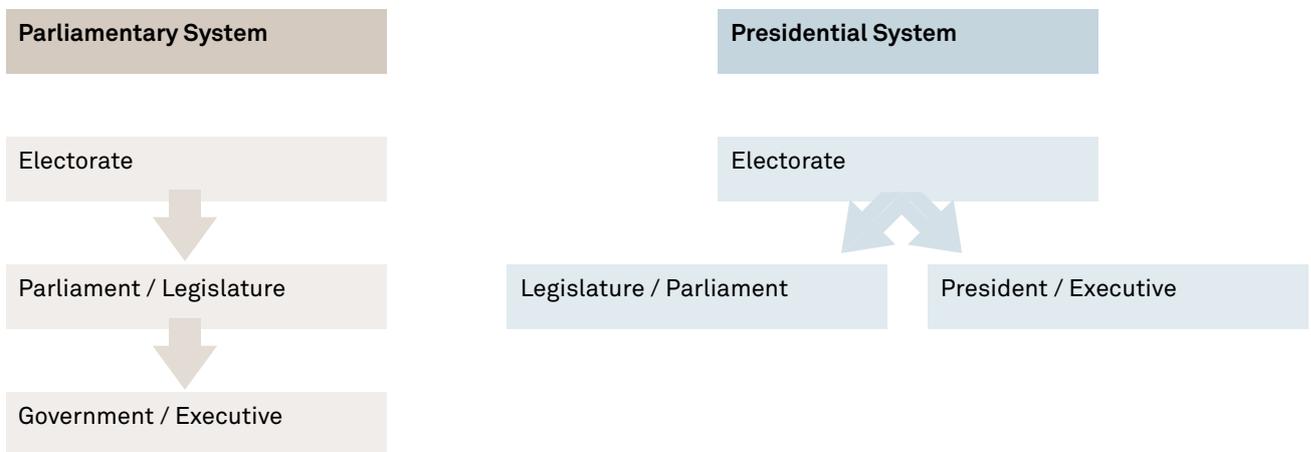
The idea of a separation and balance of powers emerged in an historical context as a protection against tyranny.⁸ This is also reflected in contemporary human rights instruments, such as the ICCPR, and other sources such as the Latimer House Principles.⁹ The separation of power is most clearly defined with respect to the judiciary, which must be independent from the other branches (see Section 2 below). In contrast, the separation of power is more complex in terms of the distinction between the executive and legislative branches of power.

Executive-legislative relations

While the idea of an independent judiciary is generally accepted, if not always respected, the relationship between the executive and legislative branches of power is less uniform. The separation or balance of power between these two branches of government depends on the given political system that is in place.

Presidential systems, like the United States, have a clearer separation of legislative-executive powers than other political systems: directly elected presidents do not depend on the confidence of the legislature; their term in office is independent of that of the legislature; and they can appoint and instruct their cabinet. In semi-presidential systems, like France and Portugal, the government is answerable both to a directly elected president and to the legislature.

In parliamentary systems, in contrast, the separation of power is less marked because the government, including the executive, is appointed from a parliamentary majority. Consequently, the executive depends on parliamentary approval: a prime minister requires the support of parliament to govern and, without this, can be dismissed by a vote of no confidence.¹⁰



⁸ For example, see: Baron de Montesquieu (1750, first English translation), *The Spirit of the Laws* and James Madison, Alexander Hamilton and John Jay (1788), *The Federalist Papers*.

⁹ Officially known as the *Principles on the Accountability of and the Relationship between the three Branches of Government*, the Latimer House Principles offer a detailed description of the separation and balance of power that was endorsed by the Commonwealth heads of government at a 2003 meeting in Abuja, Nigeria. See: http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf. All subsequent references in the text to the Latimer House Principles are from this source.

¹⁰ For an overview, see: M.S. Shugart (2008), “Comparative Executive-Legislative Relations” in *The Oxford Handbook of Political Institutions* (Eds. R. A. W. Rhodes, Sarah A. Binder, and Bert A. Rockman).

From the perspective of international consensus on essential elements of democracy, then, the key issue is not the type of political system or government regime. Presidential and parliamentary systems are equally acceptable.¹¹ Rather, the salient issue is whether elected legislators have sufficient powers. Do elected representatives actually have the competencies they need to exercise power? Are they able to hold government accountable? Can parliament fulfil its legislative role?

It is in this sense that the separation or balance of power should be understood within the context of executive-legislative relations. That is, it defines a standard that requires each branch of government to have the capacity to play a meaningful and sufficiently independent role in governance – whatever the political system.

In Arab states, most legislatures have been dominated by the executive branch of power, diminishing the relevance of parliaments and parliamentary elections. The need for parliaments to play a meaningful role logically follows from the right to vote and to stand in elections, which is enshrined in article 25 of the ICCPR. As paragraph 7 of General Comment 25 of the UN Human Rights Committee notes, “Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in Article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for the exercise of that power.”¹²

The UN Human Rights Committee emphasises that parliaments with little *de jure* or *de facto* power do not satisfy the requirements of article 25 of the ICCPR, and it has clarified in various concluding observations on states’ reports this aspect in three concrete ways.¹³

- *No over-concentration of power in the executive branch of government*

The over-concentration of power in the executive is one of the most significant concerns of democratic governance in many states. Even if there is a direct election for the head of state, this should not serve as a justification for sidelining a directly elected legislature.

- *The right of heads of state to refer bills back to the legislature*

Independent of the political system (presidential or parliamentary), some states give their head of state (usually presidents) the right to refer legislation back to parliament for reconsideration. The rationale for this approach is that

the head of state should not promulgate legislation that s/he considers deficient; e.g., anti-constitutional.¹⁴

- *Civilian control of the security sector*¹⁵

The armed forces, police, intelligence services, and so on enjoy considerable potential *de facto* power in any state. International consensus on democratic governance indicates that it is imperative for the security sector to be fully controlled by civilian authorities with democratic legitimacy. The Human Rights Commission resolution on democracy and the rule of law, Human Rights Resolution 2005/32, Paragraph 14 (b)(vii), states, “The military remains accountable to democratically elected civilian Government.”¹⁶ Emphasis on the particular importance of democratic standards in relation to control of the security sector, namely legitimacy, accountability and transparency, suggests that parliament has a crucial oversight role.

The role of the legislature

A properly functioning and directly elected legislature is key to democratic governance. The rule of law requires that all important legislation be adopted by the legislature. A pluralistic system of political parties is based on competition over legislative interests. And transparency results from genuine, widespread and inclusive public consultation on draft legislation and debates on public affairs in the legislature. Thus, the legislative branch of government is the lynchpin of democratic institutions.

The three main functions of the legislative branch – passing laws, maintaining oversight of the executive and serving as a forum for public debate and deliberation of citizens’ interests – have been acknowledged in a number of international documents.¹⁷ The essential role of legislatures for democratic governance has also been translated into a range of concrete prescriptions about the structure of legislatures and their working modes, as follows.

14 There are different models for this type of veto. In most cases, for example, parliament must reconsider the bill in case of referral; but if they adopt it again, the head of state must promulgate it. In a few cases, it is required that parliament adopts the bill with a higher majority after referral. There are also cases where the head of state can submit a draft bill to the constitutional court for review before promulgation.

15 The Geneva-based organisation DCAF (Democratic Control of Armed Forces) has a range of relevant publications on civilian control of armed forces. For more information, see: <http://www.dcaf.ch/Publications/Series/Detail?lng=en&id=18411>.

16 For Human Rights Resolution 2005/32, see: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-32.doc. OSCE participating states have also committed themselves to a number of standards in this field; for example see: Points 21-25 of the Concluding Document of Budapest, 6 December 1994; <http://www.osce.org/mc/39554>.

17 For example, see publications by the Inter-Parliamentary Union (IPU): <http://www.ipu.org/english/home.htm> and the National Democratic Institute, in particular *Towards the Development of International Standards for Democratic Legislatures* (2007); see: <http://www.ndi.org/node/13674>. Of further interest: the Commonwealth Parliamentary Association (December 2006), *Recommended Benchmarks for Democratic Parliaments*; see: http://www.cpaq.org/cpaq/Mem/Document%20Library/Benchmarks_for_Democratic_Legislatures/Recommended%20Benchmarks%20for%20Democratic%20Legislatures.aspx and the Southern African Development Community Parliamentary Forum (2001), *SADC Parliamentary Forum: norms and standards for elections in the SADC region*; see: <http://www.sadc.int/amlibweb/webquery.html?v1=pbMarc&v4=0&v5=5A&v8=84830&v9=0&v10=N&v13=4A&v20=4&v23=0&v25=PARLIAMENTARY%20and%20%20STANDARDS&v27=6989&v29=5A&v35=00000000&v40=84828&v46=84830>.

11 This has been made explicit in the UN Human Rights Commission’s resolution ‘Promotion of the Right to Democracy’ (1999): ‘The Commission on Human Rights... affirms... the right of citizens to choose their governmental systems through constitutional or other democratic means’. For UN Doc E/CN.4/Res/1999/57, see: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4660.

12 The provisions in article 25 of the ICCPR are elaborated in General Comment 25. See: <http://www.unhcr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb>. All subsequent references in the text to General Comment 25 are from this source.

13 For detailed references, see Democracy Reporting International (2007), *Discussing International Standards for Democratic Governance*: http://www.democracy-reporting.org/files/standards_go.pdf.

The set up and rules of the legislature

Legislatures have either one chamber or house (unicameral) or two (bi-cameral). There are two important principles for bi-cameral legislatures:

- *All seats in at least one legislative chamber or house should be freely contested*

To ensure that the democratic accountability of a legislature is not diluted, at least one chamber should be entirely composed of representatives freely chosen in direct elections.¹⁸ In many Arab states, however, the head of state has the power to appoint a number of members of parliament, often to both houses or chambers, thus undermining the principle of freely elected representatives.

- *A second legislative chamber or house should either be accountable through elections, or not be able to impact significantly on the powers of the directly-elected chamber or house*

The question of democratic legitimacy becomes important in the context of a bicameral legislature. When a non-elected upper chamber or house (e.g., based on hereditary principles or appointed by the head of state) has powers that are similar to those of a directly elected lower chamber or house, the principle of democratic accountability is weakened.¹⁹

In federal systems, such as the US, the Russian Federation and Germany, the upper chamber or house represents the interests of the constituent parts of the federation (i.e., the 50 states in the US; 'Subjects of the Federation' in the Russian Federation; *Länder* in Germany). This should not be cause for concern so long as the representatives of federal states have their own democratic mandates (e.g., based on direct or indirect elections),²⁰ or if the powers of these upper chambers or houses are limited. The Council of Europe's Venice Commission has drawn attention to the fact that a second chamber or house should follow a constitutional logic, in other words its mandate and role should have an objective justification.

Legislative autonomy

Given that legislatures represent the people, they must be free to autonomously organise their work. This is generally understood in two ways. First, the legislature should be free to adopt and amend its own rules of procedure on an independent basis. Second, the legislature should be free to schedule its sessions, set the pace for organising its own

activities and have the right to determine how much time is required to draft, review or amend proposed legislation. In many Arab states, the autonomy of legislatures has been greatly circumscribed and their role has been one of rubberstamping.

Legislative power

The power of legislation is the most essential of a legislature's prerogatives and it should have the competence and authority to undertake this role. Although the executive branch of government has the right to adopt legally binding acts (e.g., regulations, decrees), it must be entitled to do so by the constitution or through law adopted by the legislature. Transfer of legislative power to the executive may be permissible for brief periods, for example when the legislature is not in session. However this transfer of power should only be very limited in scope and have strictly defined conditions. As the Venice Commission asserts, a general shift of competencies from the legislative to the executive 'is not acceptable in a democratic constitutional state'.²¹

02. INDEPENDENCE OF THE JUDICIARY

Article 14 of the ICCPR states that 'in the determinations of any criminal charges against him [or her], or of his rights and obligations in a suit of law, everybody shall be entitled to a fair and public hearing by a competent, independent and impartial court established by law'. There is, then, a 'hard' international obligation to establish an independent judiciary. Moreover, the UN Human Rights Committee has made it clear that the ICCPR stipulates judicial independence beyond the realm of criminal law such that it also comes to bear on administrative law and the organisation of the state.

In particular, this pertains to both the legal and *de facto* separation of the judicial and executive branches of government. That is, the courts can play a vital role in ensuring government accountability by adjudicating conflicts, for instance, in the areas of administrative or constitutional law. The independence of the judiciary can also be relevant within the context of election-related disputes.

The principles and practices of an independent judiciary are delineated in a number of international documents. For example, the UN's *Basic Principles on the Independence of the Judiciary* provides operational guidance on how to secure the independence and tenure of judges, addressing issues like recruitment, remuneration, promotion, immunity and removal.²²

18 This is a clear standard, for example, in the OSCE's Copenhagen 1990 commitments. See: <http://www.osce.org/odihr/elections/14304>. All subsequent references in the text to the Copenhagen 1990 commitments are from this source.

19 The discussion in the United Kingdom on reforming the House of Lords offers a relevant example. While the House of Lords can return draft laws to the House of Commons, the House of Lords accepts the possibility that it can be over-ruled by the House of Commons. As such, there is an additional level of scrutiny and consultation, but this does not veto or over-rule the directly elected chamber (i.e., the House of Commons).

20 In the US, senators are directly elected by each state. In Germany, *Länder* (federal states) governments are represented in the upper house of parliament (Bundesrat), which reflects the fact that the federal states in Germany are based on parliamentary systems.

21 Point 21, Venice Commission Opinion of the draft amendments to the constitution of Kyrgyzstan, 13-14 December 2002.

22 Endorsed by UN General Assembly resolutions 40/32 (29 November 1985) and 40/146 (3 December 1985). See: <http://www2.ohchr.org/english/law/indjudiciary.htm>.

03. A PLURALIST SYSTEM OF POLITICAL PARTIES AND ORGANISATIONS

Political parties

Arguably, the need for a pluralistic system of political parties follows logically from the protection of freedom of association, including participation in political parties, as this is enshrined in article 22 of the ICCPR (also see section 7 below). While a controversial issue some decades ago, there is now international consensus that the existence of a one-party state or the prohibition of political parties is not consistent with freedom of association and related freedoms.²³ As paragraph 17 of General Comment 25 states, “The right of persons to stand for elections should not be limited unreasonably by requiring candidates to be members of parties or specific parties.” And paragraph 26 of General Comment 25 states, “Political parties and membership in parties plays a significant role in the conduct of public affairs and the election process.”

A pluralistic system of political parties implies that states should not hinder the development of political parties, but instead have an obligation to favour political pluralism based on parties. Pluralism indicates that a party system should not only consist of a multitude of parties, but it should also include parties that represent genuinely alternative policy choices. Political systems with a mere façade of a multi-party system, which disguises a pattern of state-sponsored domination of one or several parties, fall short of this core element of democracy.

Effective opposition both inside and outside parliament is a key condition of a functioning democracy, providing an element of checks and balances. The rights of opposition or ‘electoral minorities’ in parliament should be codified in parliamentary rules of procedures and, partly, in constitutions. In many democracies such rights include a guarantee of participation, rights to supervise and scrutinise government, the right to delay or, in some cases, to block majority decision²⁴ and sometimes the right to demand the constitutional review of laws.²⁵ In the European context, such opposition rights have been recognised at the international level.²⁶ The Inter-Parliamentary Union adopted similar standards at working level.²⁷

In terms of fostering a system defined by political pluralism, states are bound by a number of concrete obligations, including:

- *A legal framework for the operation of political parties should be in place*

The UN Human Rights Committee indicates that the absence of regulation or legislation governing the creation and registration of political parties ‘runs counter to the provisions of Article 22 of the ICCPR, as it may adversely affect the rights of citizens to participate in the conduct of public affairs through freely chosen representatives’.²⁸

- *Restrictions to the right to register a political party should be narrowly constructed*

In the context of international human rights instruments, it is a generally recognised rule to adopt a narrow interpretation of restrictions. Article 22(2) of the ICCPR takes a similar approach to interpreting possible limitations to the right to freedom of association, stating that if restrictions are necessary in a democratic state, these should be ‘in the interests of national security, or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others’.²⁹

- *Political party membership should not be mandatory*
- While international consensus is supportive of the role of political parties, at the same time it is clear that membership in a political party should not be made a pre-condition for participating in the political life of a country. This bears on such issues as eligibility criteria for the right to vote and to stand for elections; e.g., see General Comment 25, particularly paragraphs 10, 17 and 26. Although list-based proportional representation election systems tend to favour political parties, they should also accommodate lists of independent candidates.

Civil society organisations

Civil society organisations (CSOs) serve to organise and mediate political, economic, social and other interests *vis-à-vis* the state and government. Civil society is a broad concept, which is reflected in the wide and varied range of organisations and groups that constitute it. For example, civil society organisations may include trade unions, professional associations, religion-based groups, women’s associations and networks, sports clubs, business associations and chambers of commerce, philanthropic organisations, human rights NGOs and other types of advocacy and watchdog organisations, student associations, and so on. They should enjoy freedom of association as enshrined in article 22 of the ICCPR.

23 During the Cold War, for example, it was a matter of controversy as to whether freedom of association could be exercised in one-party systems.

24 An example would be the need for ‘super-majorities’ for constitutional amendments.

25 For an in-depth study on these issues, see the Venice Commission’s “Report on the Role of the Opposition in a Democratic Parliament” (2010). See: [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)025-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)025-e.pdf).

26 Council of Europe, Parliamentary Assembly Resolution 1601 (2008), Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, see: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/eres1601.htm>.

27 See: <http://www.ipu.org/dem-e/opposition.pdf>.

28 Point 25, Concluding Observations of the Human Rights Committee, Democratic People’s Republic of Korea, UN Doc. CCPR/CO/72/PRK (2001). See: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.72.PRK.En?OpenDocument>.

29 For further elaboration of international standards related to political parties, also see: Venice Commission (2004), “Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues”, Study no. 247/2004; <http://www.venice.coe.int/docs/2004/CDL-AD%282004%29007-e.pdf>; and OSCE ODHR (2003), *Existing Commitments for Democratic Elections in OSCE Participating States*, especially page 64; <http://www.osce.org/odihr/elections/13957>.

International consensus about the value of civil society for democracy, in particular as this bears on fostering both political and social pluralism, is reflected in numerous international instruments. For example, paragraph 8 of the 2004 UN General Assembly resolution invites (among others) ‘non-governmental organizations to engage actively in work at the local, national, sub-regional and regional levels for the constant promotion and consolidation of democracy’. Paragraph 12 of the resolution also encourages ‘non-governmental organizations to initiate networks and partnerships with a view to assisting the Governments and civil society in their respective regions in disseminating knowledge and information about the role of democratic institutions and mechanisms in meeting the political, economic, social and cultural challenges in their respective societies’.

04. THE RULE OF LAW

There are few definitions of the rule of law in the context of international instruments related to ensuring democratic practices within states.³⁰ Nonetheless, its core meaning is clear. That is, the rule of law commits all public authorities to comply with independently and impartially administered legal and justice systems, such that states make continuous efforts ‘[g]uaranteeing that no individual or public or private institution is above the law’.³¹

Sometimes the rule of law is narrowly construed as an efficient and effective system of justice and law enforcement. Beyond that, it is also interpreted to imply certain standards for the legislative process, namely that this should be an open and transparent process that reflects the will of the people and the outcomes of which are public and freely available. Increasingly, the rule of law is seen through a broader conceptual framework that links it to human rights and democratic order; e.g., UN Human Rights Commission resolution on democracy and the rule of law (resolution 2005/32), the OSCE Copenhagen 1990 commitments and the Charter of Paris for a New Europe.

As an inherent element of democracy, the rule of law therefore indicates that the will of the majority has clear and certain limits, not only in the form of universal human rights, but also in relation to the constitutional framework of a state. Consequently, for example, public referenda should not be used to overrule constitutional provisions.

State of emergency

The rule of law is organically linked to the other essential elements of democracy, including the separation and balance of power, especially an independent judiciary, and transparency and accountability. The convergence of these elements, as well as the necessity to uphold and preserve them, can be made no clearer than in a state of emergency. In such situations, the rule of law is of paramount importance. This issue is highly relevant in the Arab region, where many states imposed a state of emergency for decades (e.g., Syria, Egypt and Algeria).

During a state of emergency, democratic governance tends to be diminished. The executive branch of government is temporarily empowered at the expense of the legislative branch, and possibly the judiciary. Human rights, including political rights, may also be suspended or severely restricted. While human rights instruments acknowledge that declaring a state of emergency may be necessary, at the same time they recognise that this does not give a free hand to the executive branch of power to adopt whatever measures it deems necessary.

International and regional instruments, notably the ICCPR, the Arab Charter on Human Rights, along with the European Convention of Human Rights and OSCE commitments, provide a number of detailed procedural and substantive guidelines on how to deal with such situations.³² As follows, a state of emergency:

- must be declared by a constitutionally lawful body; usually this is the head of state or government
- should be declared officially, publicly and within the law
- should be approved by the legislature, which should continue to function
- should be temporally and geographically limited
- should be managed transparently
- should require that legal guarantees remain in place and derogations from fundamental rights should be as limited as possible³³

Although protection in ‘exceptional situations of emergency which threaten the life of a nation’ (article 4, paragraph 1, Arab Charter on Human Rights) is the primary intent for declaring a state of emergency, such actions by many Arab states have played and still play a major role in curtailing human rights. For example, Egypt has been ruled under a state of emergency since 1967 (except for an 18-month break in 1980–1981), which extended police powers, suspended constitutional rights, legalised censorship and sharply curtailed political activity by civil society organisations, including formal bans on street demonstrations and political organisations without government approval. While the state of emergency was lifted in the context of Mubarak’s overthrow, controversially it was re-introduced in September 2011.

30 See paragraph 14(b) of the UN Human Rights Commission’s resolution (Resolution 2005/32, 19 April 2005) on ‘democracy and the rule of law’: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-32.doc. However, the clearest explanation of rule of law can be found in OSCE commitments, notably Point 2 of Copenhagen 1990, which asserts participating states ‘consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression’.

31 See point 5.3 Copenhagen 1990.

32 For a more detailed elaboration of these restrictions to declaring a state of emergency, see DRI’s *Discussing International Standards for Democratic Governance* (2007) and *Democracy Revisited* (2009), as referenced in footnote 2 above.

33 Where the ICCPR references seven specific protections that cannot be derogated in a state of emergency, the Arab Charter on Human Rights identifies twice as many, with 14 specific protections that cannot be violated in any circumstance.

05. ACCOUNTABILITY AND TRANSPARENCY

As stated in both the 2005 UN General Assembly resolution and the 2003 declaration by the UN Human Rights Commission, ‘transparency and accountability in public administration’ are essential to democracy. Without exception, this applies to all those with governmental and public authority (whether elected or not) and to all bodies of government and public authority. Elaborating this, the Inter-Parliamentary Union’s Universal Declaration on Democracy explains, “Accountability [and transparency] entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms.”³⁴

Accountability

Accountability thus implies both answerability (i.e., the obligation to provide information and explanation; the right to ask questions and expect reasonable answers) and enforcement (i.e., a capacity to hold those who are responsible to account for their actions, including punishment).³⁵ Public authority can be held accountable through elections and legislative bodies, as well as through the courts or other independent oversight institutions. As an essential element of democracy, accountability is therefore closely linked to the principles related to elections and the rule of law.

In addition to the public accountability of government, another crucial dimension of accountability is that pertaining between public institutions.³⁶ In this case, the separation and balance of power is a necessary condition for accountability to function properly. The question is, then, who is accountable to whom?

While the exact answer depends on each individual political system, international consensus points to some minimum requirements, both of which focus on the executive branch:

- *The executive is accountable to the legislature*
This means the legislature has the right to ask questions that the executive must answer, which is a principle that applies equally across political systems. This translates into concrete rights that a legislature has: for example, to summon government

ministers, schedule sessions and hearings, adopt resolutions and so on.

The right of sanction depends on the political system that is in place. In presidential systems, the electorate has the primary right of sanction – by voting a president out of office when the next scheduled election is held, while the legislature usually has only the narrowly-defined right of impeachment. In contrast, legislatures in parliamentary systems can punish the government by passing a no-confidence vote, forcing the resignation of the government.

- *The executive is accountable to the judiciary*
As with any other public position of power and authority, the executive is bound by the rule of law. Consequently, actions undertaken by the executive can be reviewed by the judiciary; e.g., if aggrieved citizens appeal to administrative courts. In some systems the legislature, or parts of the legislature (e.g., a parliamentary fraction), can appeal to a court (e.g., a supreme court or constitutional court) if it deems that the executive overstepped its powers.

It is important to note that there is no minimum standard about the degree to which the legislature is accountable to the judiciary for all of its actions. While in most states, constitutional courts have the right to review whether legislation is in line with the constitution, this is not the case in every democratic state.

Transparency

Without some level of transparency, there can be no accountability. The concept of transparency is underpinned by freedom of expression, which is likewise closely related to freedom of information. As article 19(2) of the ICCPR states everyone ‘shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds’. Although the precise limits of the right to information remain controversial, an accepted minimum standard relies on the assumption that a state should inform the public on an equal basis.

The UN Special Rapporteur on freedom of expression provides further guidance that reflects a degree of international consensus, emphasising that:

...everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems – including film, microfiche, electronic capacities, video and photographs – subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.³⁷

³⁴ See: <http://www.ipu.org/cnl-e/161-dem.htm>. For additional principles dealing with the issue of accountability, also see the Latimer House Principles.

³⁵ Enforcement implies that the body held accountable may be punished if it does not respond or if answers are considered unsatisfactory. Punishment can have many meanings: a human rights institution can usually only ‘punish’ violators by public reporting or referring the case to appropriate state institutions. In the realm of vertical accountability, media usually have the political power to ask questions and expect answers and they can punish by reporting facts or publishing negative opinions. The electorate can also ask questions (e.g., lodge petitions) and can punish the executive branch by voting a government and/or president out of office. Where individuals feel their rights have been violated, they can appeal to the judiciary against actions by the state.

³⁶ Whereas the public accountability of government relates to ‘vertical’ relationships within a democratic system (i.e., the relationships between citizens and state institutions), this dimension of accountability refers to ‘horizontal’ relationships (i.e., the relationships between the three branches of government). In line with international consensus, both aspects of accountability are considered to be equally important elements of democracy.

³⁷ See: UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, 1999 Report to the Human Rights Commission, E/CN.4/1996/64; <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.1999.64.En?Opendocument>. This view was also welcomed by the UN Human Rights Commission, as is reflected in Resolution 1999/36, paragraph 2; ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1999-36.doc.

A study on freedom of information notes, “It is perhaps as an underpinning of democracy that freedom of information is most important. Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should be able to access it.”³⁸

Indeed, without sufficient information and wide public access to official documents, there is no basis for holding state authorities accountable. The right to vote, for example, becomes less meaningful in the absence of sufficient public information that allows voters to judge and evaluate government performance. The capacity to make informed judgments is likewise impaired by lack of access to or availability of reliable statistical information concerning matters of public interest; e.g., census, population and demographic data; economic and labour force statistics; environmental data; government expenditures and so on.

Transparency is often mentioned in documents related to good governance, particularly as this bears on the issues of corruption and actions by the executive. However, transparency is also a key principle for the legislature. Specifically, new legislation and amendments to existing legislation should be adopted only at the end of a public procedure, with these regulations published in and for the public interest as part of a public record, which should be the condition for their application.

Along similar lines, the Commonwealth Latimer House principles provide detailed guidance related to the transparency of legislative processes. These principles stress the need for public exposure of draft legislation, consultation, time lines between introducing legislation and debate in parliament, the establishment of select committees to allow detailed examination of major legislation and so on.³⁹

Independent institutions

Independent institutions play an important role in relation to governmental accountability and transparency. In particular, they provide oversight for specific areas of executive and judiciary branch activity, or they have responsibility for making policy recommendations to the government, which requires a degree of distance from the parliamentary majorities of the day (such as judicial commissions, civil service commissions or media boards). As such, they serve as a guarantor for the rule of law upon which any democracy is founded. Typical independent institutions or bodies include national human rights institutions⁴⁰ (e.g., national human rights commissions

or ombudsman offices), anti-corruption bodies, state auditing offices, civil service commissions or judicial commissions.

Increasingly, the management of elections is also entrusted to bodies that are not part of the executive. These can be multi-party election commissions, independent expert election commissions or a mix of both. Paragraph 20 of General Comment 25 underlines the preference for independent election management bodies: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant [i.e., the ICCPR].”

06. FREEDOM OF THE MEDIA

Media freedom is vitally important for democracy.⁴¹ It contributes to creating plural, open societies and accountable, transparent systems of government, as well as safeguards human rights and fundamental freedoms. In particular, a free media sector plays an essential role in guaranteeing the freedom of expression and freedom of information, both of which are necessary for facilitating the effective participation of citizens in democratic processes. International consensus on media freedom is reflected in article 19 of the ICCPR, which is spelled out in paragraph 40 of General Comment 34 of the UN Human Rights Committee:

The Committee reiterates its observation in General Comment 10 that ‘because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression’. The State should not have monopoly control over the media and should promote plurality of the media.⁴²

Freedom of expression therefore includes an obligation on states to prevent excessive media concentration and control. As special representatives on media freedom from four international organisations note, “In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership.”⁴³ This is especially important with respect to fostering independent media, which should not be discriminated against in terms of access to information, material and facilities.

Article 13(3) of the American Convention on Human Rights specifies the protection of media freedom in greater detail

38 Toby Mendel, “Freedom of Information as an Internationally Protected Human Right”, briefing paper for Article 19, page 1. See: <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>.

39 For in-depth analysis of legislative reform processes in the context of electoral law, see DRI’s *Electoral Law Reform Processes: Key Elements for Success*, briefing paper 12 (May 2011); http://www.democracy-reporting.org/files/dri_briefing_paper_12_-_good_practices.pdf.

40 The UN’s ‘Paris Principles’ provide detailed guidance on the composition and guarantees for the independence of such institutions. See: <http://www2.ohchr.org/english/law/parisprinciples.htm>.

41 Although article 19(3) of the ICCPR permits restrictions to media freedom, as with other aspects of this covenant, these must be narrowly construed.

42 General Comment 34 on article 19 of the ICCPR from July 2011 replaces the earlier General Comment 10 (adopted in July 1983). See: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

43 Joint Declaration on Diversity in Broadcasting, 12 December 2007, agreed by: UN Special Rapporteur on Freedom of Expression and Opinion, The OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and People’s Rights. See: <http://www.article19.org/data/files/pdfs/igo-documents/mandates-broadcasting.pdf>.

in its far-reaching provision in favour of media pluralism: “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”⁴⁴

07. RESPECT FOR POLITICAL RIGHTS

Freedoms of assembly and expression

The freedom of political debate, along with freedom of association and assembly, are at the centre of the concept of democracy. These essential political rights are well defined in legally binding treaties, such as the ICCPR. They are also identified in a number of declarations about democracy by the UN General Assembly. For example, article 19 of the Universal Declaration of Human Rights defines freedom of expression as including ‘freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’. Paragraph 1 of the 2004 UN General Assembly resolution declares that ‘the essential elements of democracy include... fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion’.

The right to freedom of expression has wide-ranging implications on the access of opposition parties to state controlled media, for election campaign regulations, media legislation and citizens’ rights to access to information. Freedom of assembly protects ‘intentional, temporary gatherings of several persons for a specific purpose’ and has a ‘clear democratic function in the process of forming, expressing and implementing political opinions’.⁴⁵ Freedom of association is ‘indispensable for a democracy, because political interests can be effectively championed only in community with others (as a political party, professional interest group, organisation or other association for pursuing particular public interests)’.⁴⁶

Participation in public affairs, the right to stand and vote in elections

A core element of democracy is the right to participate in the conduct of public affairs, and to stand for and vote in elections.⁴⁷ Participation in public affairs can take place directly, for instance, by referenda. It can be indirect; e.g., by voting for elected representatives. More generally, participation can refer to being politically active.

Recognised in the 2005 General Assembly resolution, these rights of participation are also enshrined in article 25 of the ICCPR and in article 21 of the Universal Declaration of Human Rights. Article 25 of the ICCPR further stipulates that these rights should be granted to citizens ‘without any of the distinctions mentioned in article 2’, which prohibits discrimination of ‘any kind such as race, color, sex, language and political or other opinion’.⁴⁸ In Arab countries, often only Muslims are eligible to run for presidential office— a violation on religious grounds. Participation on a non-discriminatory basis is reinforced by a range of other specific conventions that prohibit discrimination, as well as call for specific measures to overcome existing inequalities.

For example, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) calls on states to take measures to eliminate discrimination against women in the political, public and private spheres. Article 4 of CEDAW states, “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.”⁴⁹ As such, CEDAW allows prescribing quotas for female candidates in elections.

Other conventions and commitments in favour of specific groups also reiterate the need for participation without discrimination; e.g., the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD); the UN Convention on the Rights of Persons with Disabilities (CPRD); and the General Assembly resolution on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities.⁵⁰

44 See: <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

45 Manfred Nowak (2005), *International Covenant on Civil and Political Rights: CCPR Commentary*, second edition, pages 482 and 481 (respectively).

46 *Ibid*, 496.

47 Standards for good practice in democratic elections, including equality, secrecy, universal suffrage and periodic elections, have been well defined; e.g., see: General Comment 25 of the ICCPR. The Carter Center also offers a detailed, searchable guide on democratic election standards, see: <http://www.cartercenter.org/peace/democracy/des.html>.

48 Article 25 of the ICCPR further elaborates these rights by asserting that states must also provide their citizens with the ‘opportunity’ to participate. This means, for example, that states should adopt positive measures to allow detainees or physically disabled people to vote.

49 See: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

50 Respectively, see: <http://www2.ohchr.org/english/law/cerd.htm>; <http://www.un.org/disabilities/convention/conventionfull.shtml>; and <http://www2.ohchr.org/english/law/minorities.htm>.

Democracy Reporting International is an independent, non-partisan and not-for-profit organisation which operates on the conviction that democratic, participatory governance is a human right and that governments need to be accountable to their citizens.

Through careful assessment of the institutional aspects of the democratic process such as elections, the role of parliaments and constitutional arrangements *Democracy Reporting International* seeks to provide citizens, legislators, the media, and the international community with specialist analysis.

Democracy Reporting International also offers policy advice and recommendations on how improvements can be made in line with international standards and engages political actors to advocate for these reforms.

Democracy Reporting International

Schiffbauerdamm 15
10117 Berlin / Germany
T / +49 30 27 87 73 00
F / +49 30 27 87 73 00-10
info@democracy-reporting.org
www.democracy-reporting.org