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DISCUSSING INTERNATIONAL STANDARDS FOR DEMOCRATIC GOVERNANCE

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A. Introduction

Whether the way states are governed can be considered democratic or not plays a major role in international relations, international media reporting and academic research. However, the answers to this question are often not grounded in an analysis of international legal or political obligations (the summary term 'international standards' is used in this paper) for democratic governance which states have accepted.

In some areas of democracy analysis/promotion, such as elections, the discourse of international standards is employed more regularly[1]. It is likewise prevalent in human rights advocacy, e.g. in reports by Amnesty International, Human Rights Watch or the International Commission of Jurists. These are areas of "vertical accountability" (citizen-state relation), where standards are based on human rights instruments. However, in other dimensions of democratic governance, typically related to "horizontal accountability"[2] (relationship between state institutions), such as the separation of powers, the role of Parliaments, transparency, etc., there appears to be a lack of clarity on international standards. It is often argued that existing democracies entertain such a variety of political systems, that it is not possible to speak about international standards on the relationship of state institutions to each other. However, while it is obvious that human rights standards primarily address citizen-state relationships, rather than the design of political systems, this paper shows that they also impact on the 'horizontal' relations between state institutions.[3] International standards thus provide minimum benchmarks for democratic governance.

The need for research in this field has been recognised, e.g. by the UN.[4] This paper presents preliminary research, rather than an exhaustive study of the subject. Recently the National Democratic Institute (NDI) published a discussion document on international standards for democratic legislatures.[5] This current study, looking beyond legislatures and referring more to UN standards, is complementary to the NDI paper, which is more detailed as far as legislatures are concerned.

1 Election Observation Missions have increasingly based their findings on international standards, notably article 25 of the International Covenant on Civil and Political Rights, or in the case of the OSCE on detailed commitments agreed on by OSCE participating states, in particular the OSCE Copenhagen Summit 1990.

2 The notion of horizontal and vertical accountability has been coined by G. O'Donnell, "Horizontal Accountability in New Democracies. The self-restraining state: power and accountability in new democracies," in: A. Schedler, L. Diamond and M. F. Plattner (eds.), *Conceptualizing Accountability*, Boulder, 1999.

3 It is generally assumed that horizontal accountability, i.e. the separation of powers and the independence of the judiciary, favour the respect of human rights. Sometimes this is highlighted in specific cases, e.g. the UN Human Rights Committee noted that the undemocratic composition of the Chilean Senate "impedes legal reforms that would enable the State party to comply more fully with its Covenant obligations." Concluding Observations of the Human Rights Committee, Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 8

4 The UN expert seminar on the interdependence between democracy and human rights (Geneva, 2003) identified "international norms and standards for democracy" as an area requiring further attention (E/CN.4/2003/59, 27 January 2003).

5 "Toward the Development of International Standards for Democratic Legislatures", National Democratic Institute, January 2007

The purpose of this study is to contribute to the discussion of international standards on democratic governance. It should help clarifying the normative basis for international support to democratic governance (e.g. programmes with Parliaments, constitutional revision, etc.) and public understanding of what democratic governance entails. The study follows up on issues discussed at the ODIHR's Human Dimension Seminar on Democratic Governance in 2004.

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B. Methodology, Definitions

1. The Notion of 'International Standards'

The notion of 'international standards' refers to sources which have a degree of international authority, representing either legal obligations on states, or political commitments assumed in the framework of international organisations.

On this basis the primary research focus has been on treaties/instruments/declarations/statements/decisions, etc. by international governmental organisations, notably UN bodies. Particular attention has been given to the International Covenant on Civil and Political Rights (ICCPR), which is a legally binding international treaty.

The UN Human Rights Committee, which is mandated to monitor the implementation of the ICCPR, has accumulated a large 'case load' on the meaning of ICCPR articles: First, by issuing general comments on specific articles of the ICCPR, second, by publishing concluding observations on the regular reports submitted by state parties and third, by deciding on individual communications under Optional Protocol no.1[6]. This study is primarily based on a systematic review of general comments and concluding observations on regular state reports. Individual decisions have also been reviewed, though in a less systematic manner. In line with the approach of the leading commentary on the ICCPR, all these sources are considered an "authoritative interpretation" of the Covenant[7].

6 Optional protocol 1, which entered into force in 1976, recognizes the competence of the Human Rights Committee to receive complaints from individuals on alleged violations of ICCPR rights committed by a state which ratified the optional protocol.

7 "For the purpose of the present commentary, the entire case law on individual communications as well as all 'General Comments' and country-specific 'concluding observations' pursuant to Art. 40(4) have been treated as an 'authoritative interpretation' of the relevant provisions of the Covenant.", Introduction nr.21, M. Nowak, CCPR Commentary, 2nd edition, Kehl, 2005

Extensive reference is also made to OSCE commitments, given that in some aspects they represent the most advanced effort of establishing a regional "public order"[8]. OSCE commitments do not create legal obligations, but are politically binding on the participating States.

The Council of Europe is a key regional actor, in particular through its European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Court of Human Rights.[9] Analysing the case law of the Court was beyond the scope of this study and must be reserved for further research. However, this paper refers to opinions issued by the Council of Europe's 'Commission for Democracy through Law', which has addressed numerous concrete constitutional questions arising in member states. The Commission (also known, and quoted in this paper as 'the Venice Commission') has thus given substance and concrete detail on how standards on the relationship between state institutions can be understood and interpreted.

This study does not refer to comparative research into states' practices in this field, which requires a larger research undertaking.[10]

2. Focus on Standards Related to Relationships between State Bodies

The standards of democratic governance covered here are pre-dominantly related to the "horizontal" relationship of state institutions towards each other, in particular the separation of powers. Standards related to institutions playing a mediating role in the "vertical" relationship between citizens and state institutions (political parties, media, civil society organizations) are also addressed, though in less detail. The rights of individuals in the citizen-state relationship are not addressed; there is no shortage of literature on human rights.

While some minimum definitions of democracy do not include aspects of "horizontal accountability"[11], the UN Human Rights Commission[12] recognised vertical and horizontal dimensions in its definition of democracy:

> "The Human Rights Commission (…) *declares* that the essential elements of democracy include respect for human rights and fundamental freedoms, inter alia freedom of association, freedom of expression and opinion, and also include access to power and its exercise in

8 Notion used by G. Staberock, *Quo Vadis Caucasus? The Rule of Law or Rule of Power?*, Humanitäres Völkerrecht, 4 (2004), p. 262

9 The preamble of the Convention notes that fundamental freedoms "are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend";

10 But note the publication by the National Democratic Institute, which refers to comparative examples, above no.5.

11 One of the most influential minimum definitions, by Robert Dahl, covers essential political rights (freedoms of association, assembly, expression, right to vote, free media), but does not include the separation of powers. See Robert Dahl, *Democracy and its Critics*, New Haven, 1989. There are even more minimal definitions, i.e. J. A. Schumpeter, who defines democracy as a "competitive struggle for people's votes" in *Capitalism, Socialism and Democracy*, New York, 1943

12 The UN Human Rights Commission has been replaced in 2006 by the Human Rights Council. This is not to be confused with the Human Rights Committee, see B.1.

accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media;(…)"[13]

C. Findings

1. The Separation/Balance of Powers

The term separation of powers means that the legislative, the executive and the judiciary should not be concentrated in one hand, but stand alone in carrying out their respective functions. Historically, the idea of a separation of powers emerged as a protection against tyranny (Montesquieu, James Madison in the 'Federalist Papers').

The term is not explicitly used in international human rights instruments and only occasionally used in other international sources. E.g. the UN Human Rights Commission declared "that the essential elements of democracy include (…) the separation of powers, the independence of the judiciary."[14] The Commonwealth governments endorsed detailed "Principles on the Accountability of and the Relationship between the three Branches of Government"[15].

Nevertheless, the content can be derived also from legally binding instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the interpretations of the ICCPR given by the UN Human Rights Committee. The principle of separation is most clearly defined in regard to the judiciary, which needs to be independent from the other branches of power. Art. 14 ICCPR states: "(…) In the determination of any criminal charge against him, 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. (…)"[16]

13 Commission on Human Rights Resolution 2003/36, UN Doc E/CN.4/2003/59
14 Commission on Human Rights Resolution 2003/36, UN Doc E/CN.4/2003/59
15 These principles, which are also known as "Latimer House Principles", were endorsed by the Commonwealth Heads of Government in Abuja, Nigeria in 2003.
16 „The wording and historical background of Art.14 thus demonstrate that agreement was reached in a universal human rights treaty on a provision based on liberal principles of the separation of powers and the independence of the judiciary vis-à-vis the executive.", Nowak, above no.7, art.14, 2.

International bodies have stressed that:

The competences of the three branches of power must be clearly delimited

The UN Human Rights Committee noted "(…) with concern that the lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy."[17]

The Council of Europe's Venice Commission reiterated this point in an opinion on constitutional amendments in Kyrgyzstan:

"The Commission also observes that the proposed Constitution allows too frequently, and without explicit limitations, one power to encroach upon competencies reserved for another power. This raises concerns in the light of the principle of the separation of powers mentioned in Article 7 of the Constitution. Indeed, a number of the proposed changes risk introducing a certain amount of competency-related uncertainty instead of precisely separating the competencies among the individual bodies."[18] The Venice Commission criticized inter alia that the draft constitution gave the Parliament the right to "officially" interpret laws and the constitution, while that role should be left to the Constitutional Court; conversely the draft constitution appeared to give the Supreme Court the right of legislative initiative, which the Venice Commission considered inappropriate.[19] The Venice Commission gave a far more positive comment on a series of draft constitutional amendments which Kyrgyzstan presented in 2005.[20]

All Branches of Power are bound by the Rule of Law

In 2000 the President of Ukraine called a referendum seeking approval for constitutional amendments to be directly effective. However, the constitution did not foresee a procedure that would allow for directly changing the constitution through a referendum. The Venice Commission expressed its concerns about these provisions[21] and subsequently confirmed in its guidelines on referendums that "the use of referendums must comply with the legal system as a whole and especially the rules governing revision of the Constitution. In particular, referendums cannot be held if the Constitution does not provide for them, for

17 Concluding Observations of the Human Rights Committee, Slovakia, U.N. Doc. CCPR/C/79/Add.79 (1997), para 3.
18 Opinion on the draft amendments to the constitution of Kyrgyzstan, 13-14 December 2002, Point 18.
19 Ibid, points 28, 29.
20 "The Venice Commission welcomes the proposed constitutional amendments. They reflect the intention of the drafters to arrive at a better balance between the powers of the main state organs, strengthening both parliament and the government, and they strengthen the rule of law and human rights." Point 58, Interim opinion on constitutional reform in the Kyrgyz Republic, 21-22 October 2005
21 Draft Opinion on the Implementation of the Referendum in Ukraine, 27 September 2000. At the time the Constitutional Court of Ukraine declared some of the referendum provisions to be unconstitutional.

example where constitutional reform is a matter for Parliament's exclusive jurisdiction."[22] This highlights that no branch of power can use a direct call to voters to circumvent the constitutional order.

1.1. The Independence of the Judiciary

As mentioned above the requirement for the judiciary to be independent is clearly expressed in a number of international instruments. The "Basic Principles on the Independence of the Judiciary"[23], the OSCE commitments[24] and a recommendation by the Council of Europe's Committee of Minister[25] give operational guidance on how to secure the independence and tenure of judges.
Courts can play a vital role in ensuring horizontal accountability by adjudicating conflicts between different branches of power, e.g. in the realm of administrative or constitutional law.

The UN Human Rights Committee has been explicit in concluding observations on numerous country reports about the need for the judiciary to be clearly separated in law and *de facto* from the executive:

> "The President's role as both part of the executive and part of the judiciary system is noted with concern by the Committee (…)"[26]
>
> "Of particular importance in this respect were the adoption and the entry into force on 1 July 1992 of a new law resulting in the total separation of judicial and executive power (…)"[27]
>
> "(The Committee) remains concerned, however, about alleged cases of executive pressure on the judiciary."

In one case the Committee noted its concern with interference by the legislative into affairs of the judiciary:[28]

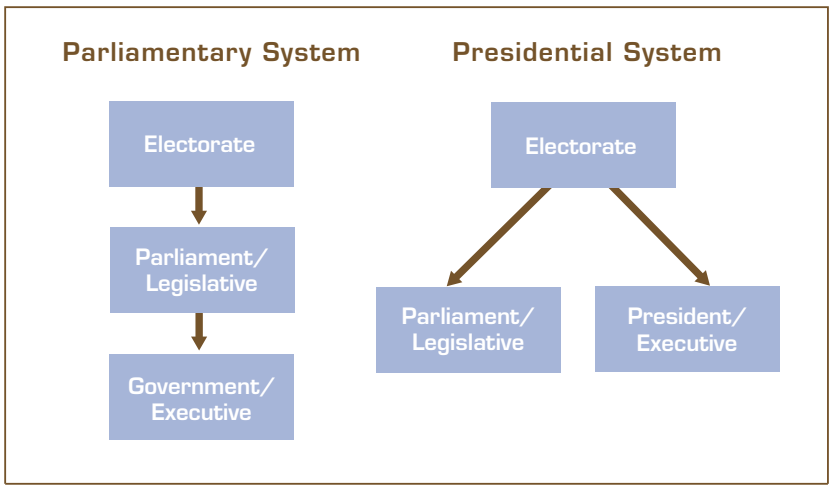
> "The Committee expresses its concern at the absence of an independent judiciary in the State party and at the conditions for the appointment and dismissal of judges, which are

22 Point B.3. Guidelines for Constitutional Referendums at National Level, 6-7 July 2001
23 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985; endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985
24 Point 19.2., Document of the Moscow Meeting, 3 October 1991, hereafter referred to as Moscow 1991
25 Recommendation (94)12 of the Council of Europe, Committee of Ministers, Recommendation no. R (94)12 "on the independence, efficiency and role of judges"; see also the Consultative Council of European Judges' Opinion no.1 (2001) "on standards concerning the independence and the irremovability of judges".
26 Concluding Observations of the Human Rights Committee, Egypt, U.N. Doc. CCPR/C/79/Add.23 (1993),para. 9
27 Concluding Observations of the Human Rights Committee, Iceland, U.N. Doc. CCPR/C/79/Add.26 (1993)
28 Concluding Observations of the Human Rights Committee, Albania 2004; UN Doc. CCPR/CO/82/ALB, 2 December 2004, para. 18

not such as to guarantee the proper separation of the executive and the judiciary. It is also concerned that, in an infringement of the powers of the judiciary, trials are being conducted by the House of Representatives of the People."[29]

1.2. The Relationship between the Legislative and the Executive

While the concept of the independence of the judiciary is generally accepted (if not always respected), the relationship between the executive and the legislative is more complex, as it depends on the political systems in place. Some Presidential systems, as the United States, operate a strict separation of the two branches of power, where the elected President appoints his own cabinet and is in charge of the executive. In other (Semi-) Presidential systems (France, Portugal), there may be a government which is responsible both to a directly elected President and the Parliament. In Parliamentary systems the separation is less marked, because the government is appointed from a Parliamentary majority; in other words, the executive depends on Parliamentary approval: A Prime Minister needs the confidence of Parliament to govern.[30] For this reason some prefer the notion of a 'balance of power', where each branch of power has a meaningful role to play.



From a point of view of democratic governance and legitimacy, the most sensitive question is, whether elected representatives, in whatever political system, have sufficiently significant competences to exercise governmental power, or to hold government accountable and for Parliaments to fulfil their role as legislators. The UN Human Rights Committee noted in this regard:

"Where citizens participate in the conduct of public affairs through freely chosen

29 Concluding Observations of the Human Rights Committee, Equatorial Guinea, U.N. Doc. CCPR/CO/79/GNQ (2004), para. 7
30 For an overview on the two systems: M.S. Shugart, Comparative Executive – Legislative Relations, The Oxford Handbook of Political Institutions 2006

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."[31]

The UN Human Rights Committee emphasizes that parliaments with little *de jure* or *de facto* power would not satisfy the requirements of art.25 ICCPR. In its comments on regular country reports the UN Human Rights Committee has clarified this aspect in some concrete ways:

There shall not be an over-concentration of powers in the executive branch of power

The over-concentration of powers in the executive is one of the most significant concerns of democratic governance in many states. Even if there is a direct election for President, this should not serve as a justification for sidelining a directly elected legislature. This is reflected in the UN HRC's comments on a number of country reports:

- "The Committee is deeply concerned that all government power in Iraq is concentrated in the hands of an executive which is not subject to scrutiny or accountability, either politically or otherwise. It operates without any safeguards or checks and balances designed to ensure the proper protection of human rights and fundamental freedoms in accordance with the Covenant. This appears to be the most significant factor underlying many violations of Covenant rights in Iraq, both in law and in practice."[32]
- "The Committee notes (…) the lack of legislative limits on the powers of the executive, and the growing concentration of powers, including legislative powers, in the hands of the executive, without judicial control"[33]
- "(…) significant amendments have been introduced in the Constitution and legislation so as to clarify the separation of powers between the three branches of the State, in particular moving from an over-concentration of power in the executive branch to a more balanced form of parliamentary oversight of the executive and strengthening of the independence of the judiciary."[34]
- "The wide scope of executive power in the hands of the King has implications for the effective independence of the judiciary and the democratic processes of Parliament."[35]

31 Point 7, UN Human Rights Committee, General Comments on art. 25 ICCPR (1996)
32 Concluding Observations of the Human Rights Committee, Iraq, U.N. Doc. CCPR/C/79/Add.84 (1997), para.7
33 Concluding Observations of the Human Rights Committee, Belarus, U.N. Doc. CCPR/C/79/Add.86 (1997), para. 7
34 Concluding Observations of the Human Rights Committee, Croatia, U.N.Doc. CCPR/CO/71/HRV (2001),para. 3
35 Concluding Observations of the Human Rights Committee, Morocco, U.N. Doc. CCPR/C/79/Add.44 (1994), para 16.

The Right of Heads of States to refer bills back to Parliament

Independent of the political system (Presidential- or Parliamentary), some states give their Heads of States (usually Presidents) the right to refer legislation back to Parliament for re-consideration[36], which is a relevant issue in executive-legislative relations. The rationale is that Heads of State should not promulgate legislation which they consider deficient, e.g. anti-constitutional. There are different models for this type of veto. In most cases Parliaments have to reconsider the bill in case of referral, but if they adopt it again, the Head of State has to promulgate it. In a few cases it is required that the Parliament adopts the bill with a higher majority after referral (art.94 Ukraine, Section 7 US constitution). There are also cases where the President can submit a draft bill to the constitutional court for review before promulgation.

1.3. The Role of Legislatures[37]

It is clear from the above that the role and proper functioning of directly-elected legislatures is key for democratic governance.

There are three main roles that legislatures ought to play: legislating, oversight of the executive and being a forum for public debate. These roles have been acknowledged in international documents, e.g. the Inter-Parliamentary Union (IPU), the international organisation of Parliaments, stresses that

> "Democracy (…) requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action."[38]

The IPU also "urges States to safeguard the role of parliaments and political institutions so as to enable parliamentarians to play their role properly and freely, inter alia by adopting legislation, overseeing the government and debating major societal issues;"[39]

Confirming the importance of a general legislative competence for legislatures, the Venice Commission expressed concerns in regard to constitutional reform proposals from Belarus: "It is not even clear whether Parliament has a general legislative competence."[40]

36 According to a study by the Venice Commission most Western European States do not give this possibility to Heads of States, see: Report on the Referral of a Law back to Parliament by a Head of State, 15-16 November 1996

37 For a more detailed study on standards related to legislatures, see the recent NDI study, above no.6

38 Universal Declaration on Democracy, Inter-Parliamentary Council, Cairo, 16 September 1997

39 "Ensuring lasting Democracy By Forging Close Links Between Parliament and the People", Resolution adopted by the 98th Inter-Parliamentary Conference, Cairo, 15 September 1997

40 CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic (doc. CDL (96) 90), point 17

1.3.1. The Set-Up and Rules of Legislature

The essential role of legislatures for democratic governance has been translated into a number of concrete prescriptions on the structure of legislatures and their working mode.

Second Chambers of Parliaments should either be accountable through elections or not be able to impact significantly on the powers of the directly elected chamber

Legislatures have either one chamber (unicameral) or they consist of a lower and an upper house (bicameral). In the case of bicameral legislatures the question of democratic legitimacy becomes important. When e.g. less democratic upper houses (based on hereditary principles or appointed by the President) have similar powers to directly elected lower houses, the principle of democratic accountability is weakened.[41] In federal systems (the US, the Russian Federation, Germany), upper chambers represent the interests of the constituent parts of the federation (states in the US, 'Subjects of the Federation' in the Russian Federation, Länder in Germany). This should not be a concern as long as federal states´ representatives have their own democratic legitimacy, i.e. are based on direct or indirect elections[42], or if the powers of these upper houses are limited.

The UN Human Rights Committee addressed this issue in the case of Chile, which had legislation providing that the Senate is partly composed of former high-ranking militaries:

> "The Committee is deeply concerned by the enclaves of power retained by members of the former military regime. The powers accorded to the Senate to block initiatives adopted by the Congress and the powers exercised by the National Security Council, which exists alongside the Government, are incompatible with article 25 of the Covenant. The composition of the Senate also impedes legal reforms that would enable the State party to comply more fully with its Covenant obligations."[43]

The Council of Europe's Venice Commission also drew attention to the fact that a second chamber should follow a constitutional logic: Belarus established a second chamber ("Council of the Republic"), composed of Presidential appointees and representatives of regions. The Venice Commission expressed concerns about this amendment, given that the Belarusian constitution does not contain any concept of regions; it was also concerned by the fact that the second chamber enjoyed powers that the directly related lower house does not have.[44]

41 See e.g. the discussion in the United Kingdom on reforming the House of Lords. However, while the House of Lords can return draft laws to the House of Commons, it accepts to be over-ruled eventually by the House of Commons. In other words, it provides an additional level of scrutiny and consultation, but it does not veto or overrule the directly elected chamber.

42 In the US senators are directly elected in the federal states. In Germany federal states´ (Länder) governments are represented in the upper house of Parliament (Bundesrat); this is a reflection of the fact that the federal states in Germany are based on Parliamentary systems.

43 Concluding Observations of the Human Rights Committee, Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 8

44 CDL-INF(1996)008, Opinion on the the amendments and addenda to the constitution of the Republic of Belarus as proposed by the President of the Republic, point 14

All seats in at least one chamber of Parliament should be freely contested

In order that democratic accountability of a legislature is not diluted, at least one chamber should be entirely composed of representatives freely chosen in direct elections. This is a clear standard in the OSCE's 1990 Copenhagen commitments.[45]

1.3.2. Autonomy of Legislatures

Given that legislatures represent the people, they must be free to organise their work autonomously. "The key standards of parliamentary democratic governance were defined as the effective independence of parliaments(...)"[46]

The IPU mentions the need for legislatures to have "the requisite powers and means to express the will of the people by legislating and overseeing government action."[47]

Legislatures should be free to adopt their own rules of procedure

A reflection of Parliament's autonomy is the right to adopt its own rules of procedures. This has been expressed most clearly by the Commonwealth Parliamentary Assembly: "Only the legislature may adopt and amend its rules of procedure."[48]

Legislatures should be free to schedule their sessions

A reflection of Parliament's autonomy is the right to freely schedule its sessions. The Venice Commission noted in relation to changes of legislation in Belarus: "The weakness of the Parliament is aggravated even by the schedule of its sessions: according to Article 95, the Houses shall be summoned for two regular sessions a year, for a maximum of 170 days; extraordinary sessions shall be convened only in the event of special necessity, following the initiative of the President, the Speakers of the Houses, or the majority of the full membership of each of the Houses. In other words, the assemblies do not have the power to organise independently their activity, and will have, in all probability, no time to satisfy the needs of legislation."[49] In another case the Venice Commission stressed that Parliaments should have the right to take the time they consider necessary to review draft legislation.[50]

45 The OSCE participating states committed themselves to "ensure that the will of the people serves as the basis of the authority of government" by permitting "all seats in a at least one chamber of the national legislature to be freely contested in a popular vote", point 7.2. Document of the Copenhagen Meeting, 29 June 1990, hereafter referred to as 'Copenhagen 1990'

46 OSCE Human Dimension Seminar on Democratic Institutions and Democratic Governance, Warsaw, 12-14 May 2004, Consolidated Summary, p.12. An expression of this can be found as far back as in the 1688 Bill of Rights, whose article 9 provides: "That the Freedome of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.", quoted from the Commonwealth' Latimer House principles.

47 Universal Declaration on Democracy, Inter-Parliamentary Council, Cairo, 16 September 1997

48 Recommended Benchmarks for Democratic Legislatures, § 2.1.1.

49 CDL-INF(1996)008, Opinion on the the amendments and addenda to the constitution of the Republic of Belarus as proposed by the President of the Republic, doc. CDL (96) 90

50 CDL-INF(1997)006, Opinion on the draft constitution of the Nakhichevan Autonomous Republic (Republic Azerbaijan Republic), point 5.

1.3.3. The Role of the Opposition

The Council of Europe's Venice Commission pointed out that "there is at least a general requirement to provide the parliamentary opposition with fair procedural means and guarantees. This is the condition sine qua non for the opposition to be able to fulfil its role in a democratic system."[51]

1.3.4. Legislative Powers

The power of legislation is the most essential of Parliaments' prerogatives. Confirming the importance of a general legislative competence for legislatures, the Venice Commission expressed concerns in regard to constitutional reform proposals from Belarus: "It is not even clear whether Parliament has a general legislative competence."[52]

The executive has the right to adopt legally binding acts (e.g. regulations, decrees), but it has to be entitled to do so by the constitution or Parliamentary legislation.

Transfer of legislative power to the executive may be permissible for brief periods, e.g. when a Parliament is not in session, but only "in a very limited scope and under strictly defined conditions", as the Venice Commission pointed out in an opinion on constitutional amendments in Kyrgyzstan.[53] The Commission concluded that a general shift of competencies from the legislative to the executive "is not acceptable in a democratic constitutional state".[54]

In this case, at the time when it is not in session, the executive power may discharge legislative functions to a very limited degree – i.e. in a very limited scope and under strictly defined conditions.

1.4. Independent Institutions

Independent institutions play a role in horizontal accountability by providing oversight of specific areas of executive action. Typical independent institutions include national human rights institutions (e.g. national human rights commissions or ombudsman), anti-corruption bodies and state auditing offices.
International instruments stress the importance of such institutions. The Inter-Parliamentary Union (IPU) notes: "Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded."[55]

51 Preliminary Opinion on the Draft Law on the Parliamentary Opposition in Ukraine, Opinion No. 422 / 2006
52 CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic (doc. CDL (96) 90), point 17
53 Opinion on the draft amendments to the constitution of Kyrgyzstan, 13-14 December 2002, point 19
54 Ibid, point 21
55 Point 17, Ensuring lasting Democracy by Forging Close Links between Parliament and the People, Resolution adopted by the 98th Inter-Parliamentary Conference, Cairo, 15 September 1997

With regards to human rights institutions the OSCE participating States expressed their intention "to facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law (...)"[56] The UN's 'Paris Principles' provide detailed guidance on the composition and guarantees for the independence of such institutions.[57]

The management of elections is increasingly entrusted to bodies which are not part of the executive, be it multi-party election commissions or independent expert election commissions or a mix of both. The UN Human Rights Committee underlined its preference for independent election management bodies: "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conduced fairly, impartially and in accordance with established laws which are compatible with the Covenant."[58]

1.5. Empowerment of the Executive during the State of Emergency

Under rules of the state of emergency, democratic governance tends to be diminished: The executive is temporarily empowered at the expense of the legislative and possibly the judiciary; human rights, including political rights, may be suspended or severely restricted.

However, while human rights instruments acknowledge that declaring a state of emergency may be necessary, 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[59], the ECHR[60] and OSCE commitments provide a number of detailed procedural and substantive guidelines on how to deal with such situations:

• A state of emergency must be proclaimed by a constitutionally lawful body

A state of emergency cannot be proclaimed by any part of the executive power of the state, e.g. the armed forces. The OSCE commitments make clear that only "a constitutionally lawful body, duly empowered to do so" may proclaim a state of emergency.[61] Usually this is the Head of State or the Government.

• A state of emergency should be proclaimed officially, publicly and in line with the law

A state of emergency should not be managed outside the confines of the rule of law, but rather in line with legal provisions. OSCE participating States stressed that "the decision to impose a state of public emergency will be proclaimed officially, publicly and in accordance with provisions laid down by

56 Point 27, Copenhagen 1990
57 "Principles Related to the Status of National Institutions (Paris Principles)",adopted by General Assembly resolution 48/134 of 20 December 1993
58 UN Human Rights Committee, General Comment on Art.25 (1996), point 20.
59 Note the UN Human Rights Committee's General Comment on the Art.4 ICCPR (2001) and the "Siracusa Principles", named after a conference of experts in Siracusa in 1984, which had a considerable impact on the interpretation of art.4 ICCPR.
60 Art. 15 ECHR
61 Point 28.2., Document of the Moscow Meeting, 3 October 1991, hereafter referred to as Moscow 1991.

law"[62], and "a *de facto* imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible."[63] Art. 4 ICCPR also indicates that state of public emergency needs to be "officially proclaimed".

• A state of emergency should be approved by the legislature; legislative bodies should continue to function

OSCE commitments recognize the importance of democratic accountability even in periods of emergency and stress that a proclamation of the state of emergency "should be subject to approval in the shortest possible time or to control by the legislature."[64] OSCE participating States also committed themselves to "ensure that the normal functioning of the legislative bodies will be guaranteed to the highest possible extent during a state of public emergency."[65]

• A state of emergency should be limited in time and geographically

Given that a state of emergency is an exceptional measure, OSCE participating States have committed themselves to limit the state of emergency as much as possible: "The state of public emergency will be lifted as soon as possible and will not remain in force longer than strictly required by the exigencies of the situation", and the decision to proclaim a state of emergency "will, where possible, lay down territorial limits of a state of public emergency."[66] The UN's Human Rights Committee likewise stressed this point: "The Committee also expresses concern at the long duration of the state of emergency in Egypt."[67]

• A State of Emergency should be managed transparently

Citizens have a right to be informed about public policy; in emergency situations this may be even more important than during normal times. OSCE participating States noted: "The State concerned will make available to its citizens information, without delay, about which measures have been taken."[68]

• Legal Guarantees should remain in place, derogations from fundamental rights should be as limited as possible

"Participating States endeavour to ensure that the legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency. They will endeavour to provide in their law for

62 Ibid, Point 28.3.
63 Ibid, Point 28.4.
64 Ibid, point 28.2.
65 Ibid, point 28.5.
66 Ibid, point 28.3.
67 Concluding observations of the Human Rights Committee, Egypt, U.N. Doc.CCPR/C/79/Add.23 (1993), para. 9
68 Moscow 1991, point 28.3.

control over the regulations related to the state of public emergency, as well as the implementation of such regulations."[69]

Under the ICCPR certain derogations to rights under the covenant are possible (art.4 ICCPR), although under strict conditions and a number of rights are non-derogable (e.g. right to life, prohibition of torture, freedom of thought). The Human Rights Committee notes: "The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers."[70] The OSCE participating States expressed their intention to "endeavour to refrain from making derogations from which, according to international conventions to which they are parties, derogation is possible under a state of emergency."[71]

1.6. Civilian Control of the Security Sector

The armed forces, police, intelligence services, etc. enjoy considerable potential *de facto* power in any state. From a point of view of democratic governance it is imperative that the security sector be fully controlled by civilian authorities which enjoy democratic legitimacy.

The OSCE participating States have committed themselves to a number of standards in this field, notably:

> "Each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy. Each participating state will provide controls to ensure that such authorities fulfil their constitutional and legal responsibilities. They will clearly define the roles and missions of such forces and their obligation to act solely within the constitutional framework. (…) Each participating state will, with due regard to national security requirements (…) provide for transparency and public access to information related to the armed forces. (…) The participating States will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities."[72]

The OSCE thus emphasizes in regard to the security sector the particular importance of democratic standards, such as: democratic legitimacy, accountability and transparency. The reference to control by authorities with democratic legitimacy points at a crucial role for parliaments in this regard.

69 Ibid, point 28.8.
70 Point 4, UN HRC, General Comment on art.4 (2001)
71 Ibid, point 28.7.
72 Points 21-25 of the Concluding Document of Budapest, 6 December 1994

2. Accountability

The notion of accountability appears in international standards, e.g. the OSCE's participating States committed themselves to a

> "form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate." (Copenhagen 1990)

The UN Human Rights Commission declared:

> "that the essential elements of democracy include (…) transparency and accountability in public administration (…)"[73]

The Inter-Parliamentary Union (IPU) gave an explanation of what accountability means:

> "Public accountability, which is essential to democracy, applies to all those who hold public authority, whether elected or non-elected, and to all bodies of public authority without exception. Accountability 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."[74]

The Commonwealth also adopted principles dealing with the issue of accountability.[75]

Political science has proposed a two-dimensional concept of accountability[76]:

Answerability

Being accountable to somebody indicates an obligation to respond to questions, providing information or explanations for actions taken. It obliges holders of power to public reasoning.

Enforcement

This 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" the violators by public reporting or by referring the case to appropriate state institutions. In the realm of vertical accountability, media

73 Commission on Human Rights Resolution 2003/36, UN Doc E/CN.4/2003/59
74 Point 14, Universal Declaration on Democracy, Inter-Parliamentary Council, Cairo, 16 September 1997
75 Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, adopted in Abuja, Nigeria in December 2003.
76 p.14, above no.2

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 through voting a government/ President out of office, or, where individuals feel their rights have been violated by appealing to court against actions by the state.

The separation of powers is a necessary condition for horizontal accountability to work. If powers are concentrated in one hand, there will be no institution to ask questions and expect answers. The question is then, who is accountable to whom? Obviously this depends on each individual political system, nevertheless international standards point at some minimum requirements of accountability:

The executive is accountable to the legislature, as is clearly stressed in the above-mentioned OSCE commitment. At a minimum this means that the legislature has the right to ask questions and that the executive has to answer these. This applies equally across political systems. This translates into concrete rights for Parliaments, e.g. to summon ministers, schedule sessions, adopt resolutions, etc. The right of sanction depends on the political system in place. In Presidential systems the electorate has the primary right of sanction, by voting a President out of office, while legislatures have usually only narrowly defined rights of impeachment. In contrast, legislatures in Parliamentary systems can punish a government by passing a non-confidence vote, forcing the resignation of the government.

The executive is accountable to the judiciary[77]**:** The executive, as any other public power, is bound by the rule of law and its actions can be reviewed by the judiciary, e.g. if aggrieved citizens appeal to administrative courts, or if other branches of power challenge executive action in courts.

The executive is accountable to independent (oversight) institutions: Where independent (oversight) institutions, such as anti-corruption bodies, election commissions or independent human rights bodies are created, the executive is answerable to them.

77 In most countries this is explicitly stated in the constitution. In others it resulted from court decisions, e.g. the US Supreme Court´s landmark case of *Marbury vs. Madison* (1803).

It is important to note that there is no minimum standard as to which degree the legislature is accountable for all its action to the judiciary. While in most states constitutional courts have the right to review whether parliamentary legislation is in line with the constitution[78], this is not the case everywhere and subject to diverging constitutional traditions.

3. Transparency

Transparency of public bodies is a key concept of democratic governance, as confirmed by the UN Human Rights Commission[79]. Without a level of transparency, there can be no accountability. This is underpinned by the right to freedom of opinion, expression and information. Art. 19 (2) 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(…)." To which degree the freedom to seek information includes a right to be informed by state bodies remains controversial, however at a minimum the state should inform the public on an equal basis[80] and the basic assumption under art.19 is that governments are obliged to provide information, subject only to narrowly construed exceptions, as confirmed by the UN Special Rapporteur on freedom of expression: "the Special Rapporteur (...) emphasizes, 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."[81]

The Committee of Ministers of the Council of Europe underlined in its recommendation on access to public documents:[82].

> "(…) the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest;"

and stressed that wide access to documents

> "allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging

78 Again, this is often explicitly stated in constitutions, while in some cases, such as the US it has resulted from court decisions (ibid).

79 The Commission noted that "the essential elements of democracy include (...) transparency and accountability in public administration (...)",Commission on Human Rights, Resolution 2003/36, UN Doc E/CN.4/2003/59

80 In the case *Gauthier vs. Canada* (No. 633/1995), the UN's Human Rights Committee found that Canada violated art.19 by unreasonably restricting access to the Parliament's media facilities.

81 UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, 1999 Report to the Commission on Human Rights, E/CN.4/1999/64

82 Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents

informed participation by the public in matters of common interest;"[83]

In the OSCE, participating States have committed governments to provide information to the public:

> "We will make our governments more transparent by further developing processes and institutions for providing timely information, including reliable statistics, about issues of public interest in the environmental and economic fields to the media, the business community, civil society and citizens (…)."[84]

OSCE participating States further committed themselves "not to discriminate against independent media with respect to affording access to information, material and facilities."[85]

The IPU also pointed at an obligation for the state, noting that democracy "goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs. (…) Accountability entails a public right of access to information about the activities of government (…)."[86]

The issue of transparency is often mentioned in texts related to good governance or corruption and in particular in relation to action by the executive. Transparency is however a key concept also for the legislature; this has been recognised by OSCE participating States:

> "legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability."[87]

The Commonwealth' Latimer House principles provide some detailed guidance on legislative processes, stressing 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, etc.[88]

83 Ibid, preamble
84 Point 2.2.5., Document of the 11th Meeting of the Ministerial Council, Maastricht 1-2 December 2003, hereafter referred to as Maastricht 2003.
85 Moscow 1991, Point 26.2.
86 Point 14, Universal Declaration on Democracy, Inter-Parliamentary Council, Cairo, 16 September 1997
87 Copenhagen 1990, Point 5.8.
88 Principle 7.2, Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, adopted in Abuja, Nigeria in December 2003.

4. Mediators of Vertical Accountability

Elections are considered to be the most important means of direct vertical accountability (citizen – state). In elections the electorate holds the legislative and – in Presidential systems – the executive accountable. There are detailed legal standards (art.25 ICCPR, Art. 3 of Protocol No.1 of the ECHR) and commitments (in the OSCE context in particular the Copenhagen commitments) at the international level related to elections; these have been addressed elsewhere and are therefore not subject of this paper.[89]

An individual citizen alone cannot usually forcefully formulate and advocate interests, beliefs, etc. vis-à-vis the state. Political parties and civil society organisations aggregate and mediate citizens' interests and beliefs. For this to be meaningful there must be a free flow of information and free media. The importance of all three is recognized in international standards.

4.1. Political Parties

The right to establish and operate political parties is protected by art. 22 ICCPR (freedom of association and trade unions).

The OSCE participating States noted:

> "To ensure that the will of the people serves as the basis of the authority of government, the participating States will (…) respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities."[90]

The absence of political parties, or existence of one party has been pointed out as a concern by international bodies.[91] There are a number of concrete obligations on states; notably:

• There should be a legal framework for the operation of political parties

The UN Human Rights Committee indicated that the absence of regulation or legislation governing the creation and registration of political parties "runs counters to the provisions of art.25 ICCPR, as it may adversely affect the rights of citizens to participate in the conduct of public affairs through freely chosen representatives (…)."[92] The above mentioned OSCE commitment points in the same direction.

89 See e.g. UN Human Rights Committee, General Comment on art.25 (1996); *Existing Commitments for Democratic Elections in OSCE participating States*, OSCE/ODIHR, Warsaw 2003; *International Electoral Standards*, IDEA 2002; M. Nowak, ICCPR Commentary on art.25 ICCPR, above no.7. Numerous international organizations have also issues handbooks for election observers, e.g. the OSCE/ODIHR and the EU.

90 Copenhagen 1990, Point 7.6

91 See e.g. Concluding Observations of the Human Rights Committee, Kuwait, U.N. Doc. A/55/40, para. 452-497 (2000), point 42 "The Committee is concerned about the absence of political parties in Kuwait."

92 Concluding Observations of the Human Rights Committee, Democratic People's Republic of Korea, U.N. Doc. CCPR/CO/72/PRK (2001). Point25

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

It is a generally recognized rule of interpretation of human rights texts to interpret restrictions narrowly. [93] Restrictions may be placed on the right to freedom of association, if they are "necessary in a democratic society 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" (art.22 II ICCPR).

There have been a number of cases in which the Human Rights Committee considered restrictions to be excessive: "The Committee is deeply concerned about excessively restrictive provisions of Uzbek law with respect to the registration of political parties as public associations, by the Ministry of Justice (article 6 of the Constitution, Political Parties Act of 1991). This requirement could easily be used to silence political movements opposed to the Government, in violation of articles 19, 22 and 25 of the Covenant."[94] The European Court of Human Rights has decided a number of times on the prohibition of political parties.[95] The Council of Europe's Venice Commission adopted "Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues"[96], which provides further elaboration of international standards related to political parties.

While international standards are supportive of the role of political parties, it is clear at the same time that membership to a political party should not be made a pre-condition to be eligible to vote or to stand for elections.[97] While list-based proportional election systems tend to favour parties, they should nevertheless be open for lists of independent candidates.

4.2. Civil Society Organisations

Civil society organisations serve to organise and mediate political, economic, social and other interests vis-à-vis the state. Civil society organisation is a wide notion and may include trade unions, religiously inspired groups, as well as human rights NGOs.

Numerous international documents have stressed the importance of civil society for democracy. OSCE participating States have agreed that NGOs "are an integral component of strong civil society"[98] and indicated that the participating States "will facilitate the ability of such institutions to conduct their national activities freely"[99] and that the "OSCE will continue to support and help strengthen civil society organisations."[100]

93 See M.Nowak, above no.9, Introduction Point 20
94 Concluding Observations of the Human Rights Committee, Uzbekistan, U.N. Doc. CCPR/CO/71/UZB (2001).: point23
95 For an overview, see: *Existing Commitments for Democratic Elections in OSCE Participating States*, OSCE ODIHR, Warsaw 2003, p.64
96 Study no. 247 / 2004, adopted in March 2004
97 See UN Human Rights Committee case *Bwalya vs. Zambia*, (No.314/1988) and General Comment on article 25 points 10, 17, 26.
98 Point 27, Istanbul Document, Istanbul 19 November 1999
99 Point 43, Moscow 1991
100 Point 36, Maastricht 2003

4.3. Media

Free media are vitally important for democracy, as has been re-affirmed in numerous statements by international bodies. Rights for media are enshrined in art. 19 ICCPR (freedom of opinion, expression and information). This not only protects against state interference, but also creates a state obligation to protect against interference by private parties, e.g. states should prevent excessive media concentration.[101]

The OSCE participating States "recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms."[102]

There are permissible restrictions to the freedom of the media (see art. 19 III ICCPR), but these need to be narrowly construed.

D. Conclusions

While there are clear international standards on the relationship between a democratic state and its citizens in the form of human rights, notably political rights, it is often assumed that there are no international standards related to the relationship between state bodies, i.e. the constitutional architecture of a state and the functioning of the institutions.

It has been shown here – on the basis of preliminary research on selected sources – that this assumption should be reviewed. There is a growing body of relatively precise standards that can mainly be derived from international human rights instruments and their interpretation by authoritative bodies, as well as political commitments that governments have made, including:

- An obligation for a separation of powers between the executive, the judiciary and the legislative;
- Abiding by detailed standards for the independence of the judiciary;
- There shall be no over-concentration of powers in the executive and the executive shall be accountable to the legislative;
- All members of the first chamber of Parliament should be directly elected, the power that

101 See M. Nowak, above no.9, Art.19; point 21
102 Moscow 1991, point 26

second chambers enjoy should be commensurate to how representative they are and they should respond to a constitutional logic (e.g. representation in federal states);

• Legislatures cannot transfer the power of legislating to the executive, except under specific circumstances and conditions for short time periods;

• Legislatures should enjoy autonomy on how to organise their work. The process of legislating should be transparent involving public procedures; legislation must be published;

• Independent institutions (anti-corruption bodies, human rights institutions, etc.) can play an important role in providing accountability, but their legal status, composition, etc. must provide for true independence;

• The security sector should be fully controlled by institutions enjoying democratic legitimacy;

• There are detailed rules to prevent potential damage that states of emergencies can do to democratic governance;

• There should be a legal framework for the work of political parties, civil society organisations and the media. The legal framework should respect international human rights standards.

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