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Towards a fairer, more peaceful world.

Access to Justice and Electoral Integrity

A policy brief of the
Electoral Integrity
Initiative



Policy brief No.3



Access to Justice and Electoral Integrity: A Policy Brief by María del Carmen Alanis Figueroa¹

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I. Rule of law and access to justice as cornerstones of electoral integrity

Introduction

The challenges of preventing rigged elections, guaranteeing a level playing field during electoral competitions and correcting flaws in vote tabulation to ensure truly representative electoral processes are some of the main concerns by academics and practitioners who study democracy through elections.² Less attention has been given to an essential democratic condition: the availability of mechanisms to uphold the rule of law and to promote and protect human rights linked to political participation and representation. Broad public access to justice at the local, national, regional and international levels must be available against violations to those rights, along with the corresponding reparation and remedies.³

Political rights are human rights;⁴ thus, the connection between the rule of law and electoral integrity is self-evident. For instance, regarding national action for elections with integrity, the Global Commission on Elections, Democracy and Security noted that:

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

obstacles to their political enfranchisement. Civil society organizations can monitor and report on the functioning of state institutions in these respects.”⁵

Moreover, in its first recommendation to pursue electoral integrity, it observed that:

“To promote and protect the integrity of elections, governments should: build the rule of law in order to ensure that citizens, including political competitors and opposition, have legal redress to exercise their election-related rights.”⁶

Access to justice is, hence, essential for electoral integrity. In line with this logic and in order to provide further elements to analyse the link between electoral integrity, rule of law and legal frameworks, a core group of the Electoral Integrity Initiative has discussed these concepts, their implementation and interactions. This paper stems from their deliberations and research on the importance of granting access to justice for the rule of law and electoral integrity. It also addresses three questions: What is the importance of granting access to justice for the rule of law and electoral integrity? What are the key principles for effective, timely and impartial administration of justice? Under which institutional forms and mechanisms is it possible to effectively provide judicial remedies to violations to fundamental human rights linked to political participation and representation?

As other policy papers prepared by the EII, this paper reviews international standards and best practices in which key principles are applied at the crossroads of elections and human rights. It demonstrates the importance of an effective institutional framework that provides legal redress to protect and effectively exercise rights linked to political participation and representation, as well as the remedies and reparations of those violations

This paper does not present guidelines on choosing from a given set of mechanisms to implement the rule of law, but rather lays out an analytical compilation of approaches to the topic and how these have been carried out under different institutional frameworks. It aims to highlight the links and dynamics between effective, impartial, independent, timely and enforceable justice and electoral integrity.⁷



“Creating mutual security among political competitors is easier when they have faith in impartial, independent courts and police.”

Deepening democracy pg. 21

The rule of law and access to justice

The rule of law is widely acknowledged as the foundation to protect and safeguard human rights. The concept is translated and interpreted in different ways, but in general it refers to a system of governance which creates the necessary structure to support “equal accountability before the law, the fight against impunity for human rights violations, legal certainty and predictability, as well as the independence and impartiality of the judiciary.”⁸ It has been proclaimed a basic principle at the regional level by the Organisation of American States, the African Union and the Council of Europe, and at the international level by the United Nations.⁹ In words of the Kofi Annan, former Secretary General of the United Nations, it is:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹⁰

The rule of law determines the organization of a given society –including the relationship between the State and society. It is supported by the rules and regulations that shape this particular form of organization, by the values upon which they are built and by the means to adjudicate and enforce them.

The rule of law directly impacts the promotion of democratic values and human rights. “The ability of society to resolve conflicts without violence requires debate, information, interaction among citizens, and a meaningful participation in their own governance, all of which have the potential to change people’s minds and allows governments to take authoritative decisions.”¹¹

Discussion on the post-2015 development agenda suggest that that the rule of law could be understood as:

- A.** A social and political reality that exists according to different values, norms and institutional forms.
- B.** A system of rules values and organizations that underpins governance.
- C.** A set of processes, enabling conditions and outcomes that operate at multiple levels and cuts across sectors to affect sustainable human development.¹²

Moreover, that goal 16 of the Sustainable Development Goals refers to peace, justice and strong institutions and includes a target to “promote the rule of law at the national and international levels and ensure equal access to justice for all,”¹³ reveals that this conceptualization of the rule



of law and its link to access to justice is most relevant when building and strengthening electoral integrity.

The EI's scope of action is in line with this interpretation of the rule of law, which aims at being operational under diverse contexts. When the rule of law is operational, it contributes to the enhancement of conditions which allow better governance and sustainable human development by:

- A.** Enabling economic growth by promoting stability based on the protection of individual rights, providing certainty about the applicable market regulations and making available judicial instances that are accessible to enforce and protect them.
- B.** Facilitating an institutional framework to foster equality, inclusion and social justice through the legal recognition and enforcement of rights for all segments of society.
- C.** Strengthening accountability and providing checks on power, which can reduce abuses of power and corruption, including through the enforcement of civil, political and human rights.

If the rule of law provides a legal framework under which everyone is treated equally and with the certainty that resolutions and sentences will be fulfilled, it must also be applied systematically. In this sense, broad access to justice should translate into the transparent enforcement of laws and regulations to ensure that “all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”¹⁴

Therefore, from this perspective, access to justice is the keystone of the rule of law. **The justice system must create the mechanisms and structures to guarantee equal protection of the law for everyone, to process claims within a reasonable time and to do so with independence and impartiality.**

By establishing a legal procedure to solve disputes and claims – known and respected by all political actors – the justice system, particularly the electoral courts at the heart of efforts to hold governments and contestants accountable, plays a central role in managing political turmoil, establishing government authority (legitimacy), improving the quality of governance and fighting against corruption and impunity. Nonetheless, it also serves as a catalyst for advancing the rule of law in a given society, as contestants and stakeholders understand that the law is the single means of addressing a conflict or controversy.

An electoral process with inclusion, transparency, accountability and security or, in other words, an electoral process with integrity, can only be guaranteed by a justice system that can:

- Increase the credibility and legitimacy of electoral outcomes by providing an instance to process complaints and protect rights linked to political participation.
- Enhance the conditions for winners to accept their victory graciously and losers to agree on future opportunities to participate in electoral competitions –and possibly win.



II. Key principles for effective, timely and impartial administration of justice

Given the close relationship between the rule of law, access to justice and electoral integrity, it is no surprise that the Global Commission underscored the importance of providing guarantees for political participation and representation. The effectiveness of such guarantees is closely related to the underlying principles that guide the action of those who hear and adjudicate cases.

The Global Commission outlined its recommendations based on standards built through decades of work by the international community. These include documents with worldwide coverage, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, but also regional documents that have provided guidance to States in shaping a Judiciary that provides effective, timely and neutral administration of justice.

Article 2, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR), requires that in addition to effective protection of Covenant rights, States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. [...] Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced.”¹⁵

At the regional level, instruments such as the American Convention on Human Rights include “the right to simple and prompt recourse, or any





other effective recourse, to a competent court or tribunal for protection against acts that violate his [sic] fundamental rights.”¹⁶ Based on this, the Inter-American Commission on Human Rights has argued that in a democratic State, judges are the main stakeholders responsible for achieving judicial protection of these rights, as well as of the due process that must be observed when a State establishes a sanction.¹⁷ The existence of an adequate mechanism for the protection of fundamental rights and the role of judges as operators and guardians of these mechanism are particularly relevant in electoral processes. Hence, the importance of knowing, understanding and fulfilling the key principles which guide these processes, and which are readily available in national laws and international standards.

Key principles and international standards

Independence and impartiality

Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) and related jurisprudence of the Human Rights Committee (CCPR)¹⁸ call upon legal frameworks of States Parties to guarantee the independence and impartiality of tribunals. Legally predetermined procedures for the appointment and tenure of judges are required to promote the independence, impartiality and competence of judicial bodies in order to ensure equal treatment under the law.

According to CCPR's General Comment 32, "the first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task."¹⁹

Under the same logic, the Basic Principles on the Independence of the Judiciary establish that they "shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."²⁰

Moreover, the Bangalore Principles of Judicial Conduct states that "independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."²¹

The absence of prejudice, undue influence (internal or external) or biased assessment of facts is a necessary condition in the adjudication of cases and must be reflected both in the process and in the final decision as they are fundamental to guarantee the acceptance of rulings.

Access to justice and transparency

The European Network of Councils for the Judiciary rightly points out the need for judicial and similar bodies to preserve the rule of law, and to do



so by fostering an open and transparent system of justice. Such a system is one in which:

- A. Legislation, including EU legislation, is accessible and can easily be understood.
- B. All proceedings are dealt with by the competent jurisdictions within a reasonable time, at the lowest reasonable cost, consistent with the principles of justice. Standard time periods can be established for different categories of cases taking into account quality standards.
- C. Judicial decisions are clearly reasoned and made public. Publication takes into account data protection, privacy, personal security and confidentiality.
- D. The well-founded interests of all those involved in judicial proceedings (such as parties, victims and witnesses) are taken into account and all are treated with consideration and fairness
- E. The Executive and/or Legislative Powers have a duty to provide sufficient funds for the judicial system. The budget must be prepared in a transparent manner and duly implemented.”²²

Article 14.1 of the ICCPR also establishes that everyone shall be entitled to a fair and public hearing. More specifically, CCPR jurisprudence requires that electoral dispute resolution bodies of States parties hold public hearings. These hearings, combined with free access to the media, are a key element to reinforce equality of all parties and to strengthen transparency during the process. Any mechanisms controlling public access to hearings and to elements supporting the arguments by parties or decisions by judges should be clear to everyone and included in the legal framework.²³

Principle 1 of the Istanbul Declaration on Transparency in the Judicial Process clearly states that “public access to court hearings is a fundamental requirement in a democratic society. The principle of public proceedings implies that citizens and media professionals should be allowed access to the court rooms in which judicial proceedings take place. The court should, therefore, ensure that the public and the media can attend court proceedings.”²⁴

Even in cases in which the public is excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public.²⁵ Public proceedings and decisions contribute to the transparency and accountability of the process and to guarantee the uniform and equal application of the law.²⁶

Therefore, access to justice must be also granted by opening the process to the public and, even more importantly, by explaining clearly how judges form their conclusions. It is therefore important that rulings and other documents are “drafted in an accessible, simple and clear language. [Also,] Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing[, and] (...) use appropriate case management methods.”²⁷

Accessibility

The Committee on the Elimination of Discrimination against Women (CEDAW) establishes in the General recommendation No. 33, that “The right to access to justice is multidimensional. It encompasses justiciability,



availability, accessibility, good quality, the provision of remedies for victims and the accountability of justice systems.”²⁸

The right of stakeholders to access electoral justice mechanisms, under equal conditions, regardless of the timing and type of alleged grievance filed, must be provided by law. For instance, the centralization of courts in the capitals and principal cities, and the money and time required access them, can impede access to justice. Accessibility is a key element for the rule of law and access to justice.

The right to an effective remedy is protected from various angles by different ICCPR articles, and includes the opportunity for all interested parties to respond and to provide evidence. ICCPR article 2.3 expressly requires that legal frameworks establish a competent judicial, administrative or legislative body to hear alleged violations of all ICCPR-related rights. Establishing functioning remedies well in advance of an electoral process plays an important preventive and deterrent role.

The CCPR convenes parties to reflect on the possibility to adopt alternative conflict resolution mechanisms, such as arbitration, conciliation or mediation, and vest them with legal effects. That is the case of Human Rights Commissions or ombudspersons, which are particularly relevant for those who are not entitled to present complaints before other electoral dispute resolution bodies. Such measures fall under the electoral justice concept of enlarging the spectrum of remedies available to stakeholders on electoral grievances. It is important to note that these alternative mechanisms should always count on appropriate resources to achieve results.²⁹

According to CCPR, article 2, paragraph 3, in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.³⁰

Security

Article 9.2 of ICCPR states that “everyone has the right to liberty and security of person” while article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination establishes that the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

The United Nations Convention against Corruption (UNCAC) in its article 32 requires States Parties to incorporate witness protection safeguards into their legal frameworks. Fear of reprisal can deter witnesses from testifying to the competent authorities, thereby compromising the guarantee of the right to an effective remedy.



Electoral justice and specific key principles

The importance of the rule of law and access to justice is not limited to a fair outcome of one's search for a remedy for grievances in compliance with human rights. **When related to electoral processes, access to justice is a necessary condition to promote democratic values and human rights, as it guarantees the exercise of those rights and, in case of violations, a means for redress.**

In the adoption and implementation of the general key principles to enhance access to justice, there are at least four elements that are particularly relevant for electoral justice:

- A. To recognize political rights as human rights, increasing the importance of addressing any abuse or undermining of these rights;
- B. To ensure due process and the right to a fair and public hearing;
- C. To clearly explain the reasoning behind the judgement; and
- D. To grant access to an effective remedy and redress.

Once these cardinal principles are established and observed, a number of other principles enshrined in some UN and regional human rights treaties find adequate protection through electoral justice mechanisms: right and opportunity to vote and to be elected, equality between men and women, freedom of association, the right to security of the person and the right and opportunity to participate in public affairs. **Electoral justice also guarantees a more thorough protection of a number of fundamental freedoms like opinion and expression, freedom of assembly, gender equality, transparency and right to information.**

National and supranational protection of political rights

In the *Matthews v United Kingdom* case, the decision of the European Court of Human Rights had important implications on the right of people from Gibraltar to vote for the European Parliament.

The applicant, a British citizen and resident of Gibraltar, applied to the Electoral Registration Office for Gibraltar to be registered as a voter at the elections to the European Parliament on 12 April 1994. She was told that, under the terms of the European Community Act on Direct Elections, Gibraltar was not included in the franchise for the European Parliamentary elections.

The applicant argued that this constituted a violation of her right to vote in free elections, as established in Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR). The British government contended that activities of the European Parliament fell outside the scope of Article 3 given that the activities of the European Parliament are deemed as a supranational institution, over which the United Kingdom had no control.

The Court accepted the wide margin of appreciation that states have regarding the choice of their electoral system. Nevertheless, in this particular matter, the applicant as well as Gibraltarians and other EU nationals residing in Gibraltar were denied the opportunity to express their opinion on who should constitute a member of the European Parliament; although legislation deriving from the European Community was part of the legislation of Gibraltar.

The Court also found that the European Parliament is sufficiently involved in the specific legislative processes and in the general democratic supervision of the activities of the European Community, to constitute part of the legislature of Gibraltar for the purposes of Article 3 of Protocol 1.

Thus, through this sentence the Court underlined the obligations of Member states to ensure that citizens of each state are given opportunity to vote in European elections. As a result, in 1999 Gibraltar was included in the South West England constituency for the European Parliament election as of 2004.





III. Electoral justice and the importance of remedies

Electoral justice receives very little attention in the international assistance agenda: for donor agencies, supporting electoral dispute resolution or electoral justice mechanisms remains a complementary activity. When the priority becomes establishing the rules of the game, the role and resources to be attributed to its final arbiter is often neglected. **The consolidation of a solid electoral justice system contributes to the integrity of the electoral process, advances democracy and rule of law and fosters confidence building.**

It has been thoroughly discussed that there is no ideal formula for organizing elections or solving complaints and guaranteeing free and fair participation in electoral processes. The myriad of institutions established for these purposes are designed based on different needs, contexts and degrees of institutionalisation. In any case, “in both new and older democracies, arguments advocating the establishment of independent electoral bodies highlight the importance of these structures in promoting democratic transparency and technical efficiency”³¹ – and, as the experience in Latin America shows, the argument could also be extended to judicial bodies which guarantee access to justice to protect political rights. This relationship between their independence and specialized nature with democratic transparency, highlight their role in strengthening, overall, the democratization process and in providing means for redress against violations of human rights. As an example, the creation of tribunals, specialised courts, juries, electoral boards or councils – often at the constitutional level – responsible for solving electoral disputes, has been a key element in the transition and consolidation of democracy within Latin America.

The institutional transformations that have facilitated democratic development and strengthened electoral justice institutions in Mexico are closely linked to the dialogue between national and international instances.

For example, on May 17, 1990 in its resolution number 01/90, the Inter-American Commission on Human Rights (IACHR) published a report on three cases involving state and municipal electoral processes in Mexico. The Commission assessed the importance of the country having adequate means, effective and prompt resources or any other resource before independent, competent and impartial judges or courts, which protect those who seek remedy against acts that violate their political rights.

The Commission considered that such a resource did not exist in the country and stated its knowledge of the reform to the electoral legislation at the time, which was published just three days later, on May 20, 1990. These reforms included the publication of the Federal Code of Institutions and Electoral Procedures that mandated the creation of the Federal Electoral Court (Trife) as the main judicial body specialized in electoral matters, endowed with full autonomy, as expounded other relevant principles recommended by the IACHR.

The Electoral Court of Mexico (TEPJF) is currently a specialized court responsible for solving electoral disputes, and protecting political and electoral rights of citizens. Its Superior Chamber is the electoral equivalent of the Supreme Court and its decisions on electoral matters are final.

The establishment of a legal framework that ensures the independence of electoral justice bodies is the first step in increasing citizen confidence, but it is necessary to adopt other policies that ensure their complete independence and impartiality. The foremost consideration in a democratic process should be the functional independence, regardless of institutional forms. Proper legal frameworks and budgetary procedures can help ensure impartiality, while public hearings and sessions can strengthen citizen confidence and making information public in a timely fashion helps provide transparency and accountability.³²

It needs to be noted that providing the legal framework is just the starting point. Implementation is key. Granted, the creation of electoral justice bodies has a direct impact in the cost of the elections, but in turn it bolsters public confidence and strengthens the rule of law.

The cost of elections varies greatly across and within different regions of the world. One major factor in cost variations is the extent of previous experience with multi-party elections. Significant discrepancies exist between these costs in stable democracies, in transitional systems, and those under special peace-keeping conditions. This tends to be the case regardless of the region of the world, the level of economic development and whether or not electoral traditions have been interrupted by periods of military dictatorship. Statistically, the least costly elections (in U.S. dollars), at around \$1 to \$3 per voter, largely take place in countries with a long electoral experience such as the United States and most Western European countries. Others include, in Latin America: Chile (\$1.2), Costa Rica (\$1.8) and Brazil (\$2.3); in Africa: Botswana (\$2.7) and Kenya (\$1.8); in Asia and the Pacific: India (\$1), Pakistan (\$0.5), and Australia (\$3.2).³³

These financial resources allocated to the administration of elections and to provide means for the protection of human rights linked to political participation, are a positive investment when they are distributed in training staff, in guaranteeing professional stability, in strengthening the independence of decision makers and in implementing best practices. This should be well communicated to all stakeholders and avoid perceptions of wrongdoing and unsustainable costs.

As some examples in Latin America show, investment in creating institutions at the highest level possible, which provide permanent protection of political rights, has produced a space in which most political actors decide to contend for the exercise of power and sort out their differences. These bodies, in whatever institutional form is more suitable to the specific political, social and economic context of each democracy, should also be provided with capabilities, resources and powers to provide remedies in a timely manner that allow them to repair or compensate any damage to political rights.

The importance of remedies

As it has been argued so far, access to justice –and particularly in the case of rights linked to political participation– significantly contributes to building the rule of law. Therefore, **it is necessary that States take measures that ensure effective remedies when human rights and freedoms are violated at any point of electoral processes – even before starting electoral campaigns.**

An effective remedy provides timely and sufficient restitution. It also implies an obligation for any authority within the State to end violations of human rights linked to political and electoral participation or representation. Therefore, a remedy for violations of human rights should be in line with these principles:

Equal and effective access to justice

The victims of violations of political rights shall have equal access to an effective judicial remedy as provided. This obligation implies the state obligation to:

- Disseminate information about all available remedies for violations of human political rights law;
- Take measures to minimize the inconvenience to stakeholders and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families, witnesses and co-workers, before, during and after judicial, administrative, or other proceedings that affect the interests of stakeholders;
- Provide proper assistance to stakeholders seeking access to justice;.

Adequate, effective and prompt reparation for damage suffered;

Adequate, effective and prompt reparation is intended to promote justice by redressing violations of human rights linked to political and electoral participation. Reparation should be proportional to the severity of the violations and the damage suffered. This stage requires the satisfaction of two criteria:

- Restitution should, whenever possible, restore the stakeholder to the original situation before the violations of their human rights law. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life, and restoration of employment and restitution of a candidacy.
- Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.

Access to relevant information concerning violations and reparation mechanisms.

- This entails the effective and open dissemination by States of information about all available judicial remedies which is accessible in clear and simple language for all stakeholders.



IV. Annex, Select bibliography

Jesús Orozco-Henríquez et al., “Electoral Justice: The International IDEA Handbook”, IDEA Internacional, 2010

Having an effective electoral justice system is a key element to fair, free, and genuine democratic process. Without a system that helps to mitigate and manage the perception of disparities or inequality, a lack of legitimacy to the elected government is created. The Handbook examines the concept of electoral justice and how to prevent electoral disputes. The notion of electoral justice further encompasses the means and mechanisms for ensuring that electoral processes are not marred by irregularities, and for defending electoral rights. Electoral justice mechanisms include all the means in place for preventing electoral disputes. It uses examples such as Afghanistan, Bhutan, Brazil, France, Mexico, amongst others.

The Handbook highlights that electoral justice plays a decisive role in ensuring the stability of the political system and adherence to the legal framework, therefore ensuring the access to electoral justice and contributing to the consolidation of democratic governance. Additionally, the Handbook analyses the concepts of electoral justice, and electoral rights and their defense. It also provides guidelines for preventing conflict and examples of dispute resolution.

http://www.idea.int/publications/electoral_justice/index.cfm

“Global Study on Legal Aid”, United Nations Development Program (UNDP)

The purpose of the document is to promote the provision of legal aid assistance in a concrete manner, so that the rule of law will impact on access to justice and contribute to have a more equitable development by empowering the poor and marginalized groups through a better access to justice. Under the idea that a key step is to translate international normative frameworks into domestic legislation and practice, the study gathers information on the state of legal aid in order to identify priorities for assistance and capacity building in various countries. The study concentrates primary and secondary sources of legal aid and can be useful for mapping good practices around the world.

http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/how_we_work.html#1

Gender Equality and Justice Programming: Equitable Access to Justice for Women, UNDP, 2007

The document outlines the main obstacles and barriers that women face in accessing justice, and suggests strategies and interventions to overcome these difficulties. The main objective of this strategy is to achieve equality between men and women. Most of the document focuses on access to justice and social relations between men and women that create inequalities.



After reviewing different international mandates of the United Nations that promote gender equality and justice, the document analyses the key gender issues for gender programming, such as women's inheritance rights, marriage, divorce, traditional versus formal violence, barriers to women's access to justice, amongst others. In general terms, the document underlines the importance to acknowledge that women and men have different justice needs and often face very different barriers to access, based on their gender. Therefore, the document proposes several entry points in order to promote women's access to justice.

http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/gender-equality-and-justice-programming-equitable-access-to-justice-for-women/GenderGovPr_Justice_2.pdf

“International Access to Justice: Barriers and Solutions” Bingham Centre for the Rule of Law Report

After observing access to justice at an international level and conceptualizing how barriers operate, the document provides the basis for analyzing the links between jurisdictions, since there is a certain degree of universal on the nature of these barriers. Nonetheless, there are two relevant provisions: First, no barrier operates separate of another - rather they interact with reciprocal effects that intensify its impact - and secondly, no strategy by itself is sufficient to overcome barriers to access to justice.

The significance of access to justice cannot be overestimated. Access to justice is fundamental for the maintenance and establishment of the rule of law, allowing people to have their own voice and exercise their

legal rights, depending on whether those rights come from constitutions, statutes, common law or statutory instruments. Access to justice is fundamental for promoting emancipation and ensuring human dignity. The document analyses groups of obstacles to access to justice, such as societal, institutional, intersectorial and cultural barriers, as well as related examples of projects and best practice adopted to surmount them. With this, common trends, approaches and solutions are identified for achieving and improving access to justice by eliminating, reducing or side-stepping the obstacles.

http://www.biicl.org/documents/485_iba_report_060215.pdf

Transforming our world: The 2030 agenda for sustainable development, United Nations, A/RES/70/1

The declaration of the Agenda of the Sustainable Development Goals, emphasizes the need to build peaceful and fair societies, which provide access to equal justice for all, and that are based on respect for human rights (including the right to development) in an effective rule of law, and good governance at all levels, as well as transparent, effective and accountable institutions. Goal 16 establishes the need to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions to all levels. Specifically, it states the importance of the promotion of the rule of law at the national and international level, ensuring equal access to justice for all, and the need to ensure responsive, inclusive, participatory and representative decision making at all levels. This agenda will most likely guide development programs and policies of countries for the next 15 years.



<https://sustainabledevelopment.un.org/post2015/transformingourworld>

Andrew Kent, “Disappearing legal black holes and converging domains: changing individual rights protection in national security and foreign affairs”, *Columbia Law Review*, Vol. 115, No. 4 (Mayo 2015), pp. 1029-1084

This article discusses the distinction between the protection of individual rights in the context of national security and international affairs. Historically, the U.S. Constitution has changed its applicability under certain characteristics, creating spaces where there has been no legal protection for certain people. National security and international affairs have been marked by these black holes, even though, as shown in the document, it has declined in recent years. The effect has been to suggest a kind of continuity in legal thought about how people are protected from overreaching by the U.S. government.

The author states that the future of national security and foreign affairs is likely to see more aggressive judicial review and further application and extension of ordinary constitutional and other legal norms. The number of persons, places, or contexts that are legal black holes will continue to shrink, as national security and foreign affairs will become less and less legally exceptional. The relevance of this article is to find the spaces of convergence between national security principles and the universal protection of human rights.

“In order for elections to peacefully and credibly resolve the competition for governmental office ... governments must ensure equal protection under the laws on election-related rights, and effective remedies when they are broken.”

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Yuval Shany, “Assessing the effectiveness of international courts: a goal-based approach”, *The American Journal of International Law*, Vol. 106, No. 2 (April 2012), pp. 225-270

In recent years there has been an increase in international courts and tribunals, with an expansion of its jurisdiction. These developments have changed the international law and international relations. The establishment and operation of judicial bodies that are able to comply with international agreements, to interpret international treaties and even to resolve international conflicts has facilitated the establishment of international legal norms. Nonetheless, this new international composition creates certain questions that will try to be answered throughout the article, such as: Are International courts effective tools for international governance? Do they encourage compliance with international standards?

Measuring the effectiveness of international courts is a serious challenge, as it would require a thorough analysis of the different goals of international courts, and reliable measurement criteria and indicators need to be identified and further supplemented by quantitative analysis. Nonetheless, the author holds that the study of court effectiveness should be based on the specific goals set for each particular court. This article can serve as a guide to make international decisions more effective.

Alec Stone Sweet and Thomas L. Brunell, “Trustee Courts and the Judicialization of International Regimes. The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization” *Journal of Law and Courts*, Vol. 1, No. 1 (March 2013), pp. 61-88

The article focuses on the three international judicial policy regimes. The courts of these regimes act supremacist over the states. These courts meet three requirements: 1) the court interpreter is the highest authority in the matter; 2) the jurisdiction of the court is mandatory; and 3) it is virtually impossible for countries to reverse the decisions of these courts. In addition to the power of the courts, it discusses how judges have used their powers and a “majority activism” to generate laws reflecting standard practices and consensuses.

Manuel Iturralde, “Democracies without Citizenship: Crime and Punishment in Latin America”, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 13, No. 2 (Spring 2010), pp. 309-332

The purpose of this article is to demonstrate how, despite the efforts of political and economic reforms, social and economic exclusion and authoritarianism are still the key features of Latin America. For this reason, they may be considered as stateless democracies. The author questions the effectiveness in the use of force, as Latin American state security agencies traditionally have been responsible for human rights violations and an excessive use of force. The lack of credibility of law and the justice system are crucial factors to partially explain the contested legitimacy of Latin America and the assimilation of democracy in the region. The article can be useful in order to understand security and judicial issues within the region, as a fundamental factor for designing public policy for the defence of human rights. Finally, the author underlines the necessity in Latin America to create mechanisms for granting full citizenship to the whole of the population and implementing criminal policies



that, instead of excluding the most vulnerable and marginalized.

Julio Ríos-Figueroa and Andrea Pozas-Loyo, “Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America”, *Comparative Politics*, Vol. 42, No. 3 (April 2010), pp. 293-311

While trying to answer the question regarding when and why it can be expected that the process of creating constitutions produces an institutional framework to promote constitutionalism, a typology to characterize the processes of creation of constitutions and their dynamic nature is implemented in the article. The hypothesis is that multilateral processes tend to establish institutional frameworks consistent with constitutionalism. In order to exemplify the elements of constitutionalism, the authors underline that the concept is based on non-arbitrary government and the belief that the concentration of political power leads to such government. Additionally, a bill of rights is arguably another fundamental element of constitutions that promotes constitutionalism.

The importance of the results of the article relies on the main conclusion, which challenges the consensus that in Latin America constitutions are *de jure* in accordance with the principles of constitutionalism, while *de facto* these principles are systematically violated. The typology used by the authors presents a new model to analyse constitutionalism, distinguishes between ordinary and constitutional laws, and captures the interrelation between law and politics, and the dynamism inherent in constitution and law-making processes.

Nicholas O. Stephanopoulos, “Our Electoral Exceptionalism”, The University of Chicago Law Review, Vol. 80, No. 2 (Spring 2013), pp. 769-858

The article studies the processes of redistricting in several U.S. states, taking into account the levels of politicization and prosecution, the homogeneity or heterogeneity in the districts and patterns of minority representation. After analyzing the factors and processes of redistricting, and evaluating them, the author centers his attention on the institutions, characterized by two dimensions: the involvement of the elected branches in the task of district design, and the vigour with which the courts supervise this activity. In the end, it concludes that there are various mechanisms to make the American model less unique, through citizen initiatives, state legislation, judicial intervention and actions of the Congress. This article can be of crucial interest for access to electoral justice, as redistricting, if done correctly, can ensure representation and participation of minority groups, as well as providing further legitimacy to electoral processes.

Francisco Javier Ezquiaga Ganuzas, “Justice, electoral justice and democracy”, Universitas, Bogotá (Colombia) N ° 112, July-December 2006, pp. 9-33

This article introduces a series of reflections on justice, fairness and electoral democracy by asking questions such as: is the judiciary an important factor for strengthening democracy? What common features and what differences have electoral justice in relation to the judiciary in general strengthen democracy? What social model should be promoted by the electoral justice? And finally, does electoral justice and democracy have a future as couple? The author uses Luigi Ferrajoli’s dimensions of





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constitutional democracy to study electoral justice: political, institutional and guarantying dimensions. To exemplify his hypothesis, the author uses the case of Mexico, and specifically of the Electoral Tribunal of the Federal Judiciary.

Deepening Democracy: A strategy for improving electoral integrity in the world, International IDEA, 2012

When elections are held with integrity, electoral processes are the core of the capacity of democracy to solve conflicts peacefully. The ability of societies to settle disputes free of violence requires debates, information, interaction between citizens and meaningful participation in their own governance, all elements that can change the mindset of people and allow governments to make the best decisions. The elections with integrity can strengthen democracy and intensify the discussions and reasoning of the population on key issues and how to address them.

In order to achieve electoral integrity, the document signals certain government actions, for instance, to ensure a rule of law that guarantees access to justices for all citizens, political parties and organizations. In addition, a requisite for electoral integrity is to establish independent electoral management bodies, create mechanisms to avoid electoral violence, promote participation of women, youth, minorities, etc. The key to electoral integrity is to empower the citizenship and provide them with trusted institutions.

<http://www.idea.int/publications/deepening-democracy/loader.cfm?csModule=security/getfile&pageid=54626>



V. Indication of sources for this brief

1 The views expressed in this paper are those of the author, and do not necessarily reflect those of the Kofi Annan Foundation. **2** See, for example, John Keane (2009) *The Life and Death of Democracy*, London: Simon & Shuster. **3** The terms reparation and remedies are used in this paper following the definitions provided in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Remedies are understood following guideline VII(11), defined as “(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms”. Reparation is defined according to guideline IX(18-23), which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In this sense, remedies are understood as the means to protect and exercise rights linked to political participation and representation, while reparation is the substantive relief when those rights are violated. **4** Sarah Joseph and Melissa Castan (2013) *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary – Third Edition*, Oxford: Oxford University Press. **5** Global Commission on Elections, Democracy and Security, *Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide* (2012), para. 93. **6** *Ibid.*, p. 62. **7** See SG/Inf(2016)3rev, *Challenges for judicial independence and impartiality in the member states of the Council of Europe*, by the Consultative Council of European Judges, 2010, and the Report on the Independence of the Judicial System Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010) CDL-AD(2010)004-e). **8** International IDEA, 2014. *International Obligations for Elections*, p. 49. **9** See the Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session, Venice 11-12 March, 2016. **10** Report of the Secretary-General: *The rule of law and transitional justice in conflict and post-conflict societies* (2004), para. 6. **11** Global Commission on Elections, Democracy and Security, *Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide* (2012), para. 23. **12** *Advocates for International Development, Post-2015 and the rule of law*, p. 23, 2015.

13 UN General Assembly resolution A/RES/70/1 “Transforming our world: the 2030 Agenda for Sustainable Development“, p. 25, 2015. **14** General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 2012, A/RES/67/1 **15** Human Rights Committee, on the International Covenant on Civil and Political Rights, General Comment No. 25 Article 25: Participation in Public Affairs and the Right to Vote, CCPR/C/21, 12 July 1996, para.11 **16** Organization of American States (OAS), Article 25 of the American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, available at: <http://www.cidh.org/basicos/english/Basic3.American%20Convention.htm> [accessed 16 October 2016]. **17** Inter-American Commission on Human Rights, Guarantees for the Independence of Justice Operators. Towards the Strengthening of Access to Justice and the Rule of Law in the Americas, Washington, D.C : CIDH, 2013, available at: <http://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf> [accessed 16 October 2016]. **18** Paul Perterer v. Austria, Communication No. 1015/2001, U.N. Doc. CCPR/C/81/D/1015/2001 (2004), parra. 9.2; Communication No. 961/2000, Everett v. Spain, para. 6.4. **19** Human Rights Committee on the International Covenant on Civil and Political Rights, General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 7. **20** Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para. 2. **21** The Bangalore Principles of Judicial Conduct (2002), p. 3: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf **22** ENCJ (2009) Resolution on Transparency and Access to Justice. **23** Human Rights Committee on the International Covenant on Civil and Political Rights, General Comment No. 32 Article 14: Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 29 March 2007, para. 28. **24** Istanbul Declaration on Transparency in the Judicial Process, p. 2. **25** Human Rights Committee, on the International Covenant



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