



Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition

International IDEA Constitution-Building Primer 22





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1. Introduction

This Primer examines the recognition, roles and rights of the opposition and the legislative minority in democratic constitutions. Opposition parties operating in democracies rely upon a wide range of constitutional protections, such as the freedoms of association, assembly and expression, backed by an independent judiciary and an impartial civil service. These protections ensure that opponents of the government continue to enjoy equal rights and are not criminalized, harassed or disadvantaged. However, many constitutions go further, formally recognizing the role, powers and responsibilities of the opposition or legislative minority in democratic politics. This recognition reflects the principle of political pluralism (that power should not be permanently monopolized by one party) and shows a commitment to democratic dialogue—hearing the other side—in decision-making.

Definition of terms

At the outset it is necessary to define the terms ‘opposition’ and ‘legislative minority’. Often, especially in a parliamentary system, these two things are the same: the minority party or bloc in the legislature is also in opposition to the government (executive), since the prime minister is in effect chosen and supported by a majority party or bloc in the legislature. In presidential or semi-presidential systems, however, it is possible for the president to be of one party and the legislative majority of another, so the party that is in a minority position in the legislature might not necessarily be in opposition to the president.

‘In countries with a recognized leader of the opposition, ‘the opposition’ (sometimes capitalized)’ usually means the official opposition—that is, the main, largest opposition party, from which the leader of the opposition is chosen. The term ‘opposition parties’ includes, besides the official opposition, any other parties in the legislature not supporting the government. In some contexts,

the second largest opposition party may be referred to as the ‘third party’ (if it is the third party in size, after the government party and the official opposition party), while other opposition parties, having fewer members of the legislature than the third party, may be referred to as ‘minor opposition parties’.

Opposition parties can also include parties that are not represented in the legislature (‘the extra-legislative opposition’); however, this Primer’s main focus is on the role of the opposition and legislative minority within legislatures, not on very small parties with no legislative representation.

Scope and content of this Primer

The ways in which the recognition of the opposition and/or legislative minority is achieved varies widely in both form and substance. Section 2 of the Primer discusses matters of substance. Although political opposition and the rights of legislative minorities are, at least to some extent, features of all democratic systems, there are important conceptual and practical differences in how the opposition works, and how the legislative minority is empowered, in different institutional contexts: the leader of the opposition in a parliamentary system is not in quite the same position as the leader of the opposition or legislative minority leader in a presidential system. Although sometimes found elsewhere, formally recognized leaders of the opposition are most closely associated with political systems that are parliamentary and majoritarian and that have a British historical legacy. In other institutional contexts (in presidential and semi-presidential systems, and in parliamentary systems based on proportional representation), it is more usual to focus on other ways of empowering the legislative minority, although a few presidential systems give both recognition and significant powers to the leader of the opposition.

In form, some constitutions recognize the opposition or rights of the legislative minority only in outline, leaving much of the detail to be determined by ordinary legislation, by the standing orders or rules of procedure of the legislature, or by convention, custom and tradition. Other constitutions provide for the opposition or legislative minority in considerable detail. The question of how much detail is put into the constitution, and how much is left to subconstitutional rules, is discussed in Section 3.

The next two sections focus on those systems in which there is a recognized opposition. Section 4 examines rules for the appointment, selection and removal of the leader of the opposition, and Section 5 considers the opposition’s roles and responsibilities.

Section 6 considers the roles and rights of legislative minorities in those countries which do not have a constitutionally recognized opposition. This includes such constitutional mechanisms as minority delay procedures, minority-veto referendums, the right of minorities to appeal to the constitutional court,

minority-party inclusion in appointments and minority-party presence in legislative leadership.

Section 7 offers decision-making questions for reflection and discussion. Section 8 provides tables of example constitutional provisions regarding the opposition and legislative minority.

Advantages and risks

There are three main advantages that stem from a country's recognition of the opposition, or the legislative minority, in its constitution. 'First, recognizing the opposition proclaims' the value and legitimacy of opposition parties as an accepted part of the political system, curtailing any attempt to establish a one-party regime, and preventing governments and incumbent majorities from excluding opposition voices or evading scrutiny. In cases where the opposition has not been constitutionally recognized—as in the 1960 Constitution of Nigeria—majority parties have sometimes failed to follow convention in accepting the presence and role of the opposition in a democracy (Crowcroft 2020: 187). Second, recognition of the opposition or the legislative minority in the text of the constitution is necessary if specific provision is to be made for the opposition or legislative minority in the legislative or scrutiny processes. As discussed in following sections, this might include, for example, giving the opposition a guaranteed share of legislative committee chairs, or giving the legislative minority investigatory powers or veto powers. Third, it enables the opposition or the legislative minority to be involved in other, non-policy decisions, such as appointments to judicial and fourth-branch (regulatory and oversight) institutions, thereby protecting the institutional integrity of judicial, administrative, electoral and financial systems and helping to prevent the capture of these institutions by the government (which would have negative consequences for the rule of law, good governance and democracy).

There are no risks directly associated with the recognition of the opposition or the legislative minority, but care must be taken to prevent the opposition or the legislative minority from having so much veto power that it hinders effective policymaking. A certain amount of delay, public scrutiny and frustration can be beneficial in helping to improve policy outcomes, but a political system can stand only so much of this. Decisions cannot be bogged down indefinitely; otherwise, public trust in the effectiveness of the state and in the ability of the elected leadership to deliver on their electoral promises would be undermined. It is therefore important to consider the role of the opposition or legislative minority in the context of the overall set of checks and balances in the constitutional order. The intention is that opposition parties or the legislative minority should be present, should have a voice and should be able to scrutinize, to offer alternatives and to prevent abuses of power—but not that they should make a country ungovernable.

2. What is the issue?

2.1. The principle: democracy and dialogue

Modern democracy is not merely crude majority rule. It is a political system that combines representative and responsible government with fundamental rights, the rule of law, checks and balances, impartial administration, and means of participatory engagement and open public discussion. In allowing free and fair competition for public office through elections, democracy presupposes differences of both interest and opinion, and therefore recognizes the legitimacy of political pluralism, including political opposition.

Opposition in democracies is not merely tolerated but also valued as a vital element of the political system. Opposition parties perform crucial roles in bringing new issues to the policy agenda, shaping public debate, holding the government to account, informing and mobilizing voters, and providing voters with a choice of credible alternatives at elections. Effective opposition can help the government to avoid mistakes—or swiftly correct them—thereby improving governance outcomes. Legislative minorities able to contribute to the policymaking process can likewise make policies more inclusive and more responsive.

A capable and empowered opposition or legislative minority allows for democratic dialogue: the back-and-forth of argument and counterargument, where the governing majority has the final authority to decide, but the presence of the opposition or legislative minority makes it necessary to hear the other side, to engage in public reasoning and to justify the decisions taken.

Recognition of the opposition may improve the legitimacy and resilience of the political system as a whole both by normalizing the democratic transfer of power and by giving 'consolation prizes' to the losers. In systems where the opposition is

recognized, the runner-up in an election does not hold power but can nevertheless enjoy the office, salary, prestige, public visibility and opportunities for influence and patronage that come with being the leader of the opposition. This makes it less painful to accept election defeat, perhaps avoiding post-election boycotts of parliament or street demonstrations. In other contexts, where there is no leader of the opposition, recognition of the legislative minority leadership may integrate those otherwise out of power into the political system—giving them a platform from which to criticize and influence policy while also building a base of support.

Although characterized by a clash of partisan politics, democracy also demands a degree of underlying cooperation, mutual respect, forbearance and toleration if the system as a whole is to function well (Levitsky and Ziblatt 2018). Parties may attempt to defeat their opponents in elections, but they must not deny their right to exist, nor may they arrest, harass or engage in civil war against them. Taken together, the rules and procedures recognizing opposition and legislative minority rights help to build a political culture in which government and opposition, majority and minority, although not in agreement, nevertheless recognize each other as legitimate participants in the democratic process, each with its own rights and duties, responsibilities and privileges. This all contributes to the health and resilience of democracy.

Recognition of the opposition or legislative minority is not power-sharing

It is important to remember that recognition of the opposition or the legislative minority is primarily intended to promote political dialogue, scrutiny, accountability and compromise. It is not intended chiefly as a means of power-sharing.

In transitional or peacebuilding situations, additional measures – such as, for example, national unity governments – may be needed to build trust and ensure the inclusion and cooperation of different political interests during an interim period. Similarly, in situations where there are permanent minorities defined by ascriptive characteristics such as ethnicity, language or religion, other constitutional mechanisms may be required -in addition to or besides recognition of the opposition or legislative minority -to include and protect minorities. These other mechanisms might include, for example, proportional electoral systems (enabling more minority representation and facilitating multiparty politics), federalism, non-territorial autonomy, group cultural or language rights, and guaranteed participation in central state institutions (e.g. through quotas or reserved seats).

2.2. The institutional practice: opposition and the legislative minority

The decision of whether or not to have a constitutionally recognized leader of the opposition often reflects a coherent logic of institutional design: it is usually—but not always—associated with a parliamentary system of government and majoritarian elections, because these are the conditions in which the leader of the opposition is both the leading scrutinizer and critic of the government and the obvious candidate to replace the prime minister in the event that the majority party loses power at the next election. Other combinations of system of government and electoral system (whether a presidential or semi-presidential system, or a parliamentary system with multiparty proportional politics) may recognize the opposition or legislative minority leader as the chief critic of the governing majority but do not usually expect them to act as an alternative government-in-waiting.

Leaders of the opposition in Westminster-model democracies

Westminster-model parliamentary democracies, which were developed in Britain and the Commonwealth over the course of the 19th and 20th centuries, concentrate executive power and legislative leadership in a cabinet, consisting of ministers led by a prime minister who is the leader of the majority party or coalition in the lower house of parliament. The prime minister and cabinet are politically responsible to the lower house of parliament for the policy and conduct of the government, but while in office they can usually rely on the loyal support of a majority in that house. The prime minister can therefore direct the whole business of policymaking and implementation. Westminster-model constitutions, especially those adopted after the 1950s, make extensive provision for the recognition and powers of the leader of the opposition, both inside and outside parliament, because a recognized opposition is a necessary counterweight to this fusion of powers in the cabinet. The opposition provides the checks and balances that would otherwise be missing from a majoritarian system, preventing prime ministerial leadership from tipping over into autocracy. The Westminster model makes ‘criticism of administration as much a part of the polity as administration itself’ (Bagehot 1873: 53). The clear recognition of the opposition in such constitutions may be the secret of their relative durability.

A crucial characteristic of the opposition in Westminster-model democracies is that it serves a dual role in the political system, moderating power and contesting for power. As a moderating force, the opposition seeks to influence government policy, to extract policy concessions and to force the government to take into consideration the interests represented by the opposition. Success on this front can result in better, more inclusive and more broadly accepted policy decisions.

As a contesting force, however, the opposition may choose to focus on scrutinizing the government and publicly highlighting its failures, while giving the government enough scope to make mistakes and then be held responsible. This enables the opposition to present itself as a more competent and compelling alternative at the next election. As noted above, the opposition in such systems is in a sense an alternative government, or a potential government-in-waiting. Today's leader of the opposition may become tomorrow's prime minister if their party wins the next general election.

Many Westminster-model democracies also feature a so-called shadow cabinet. Just as the prime minister has a counterpart in the leader of the opposition, so the cabinet is shadowed by a committee of senior opposition parliamentarians with responsibility for articulating opposition policy in relation to particular departments. So, for example, the foreign secretary (minister of foreign affairs) will be shadowed by a shadow foreign secretary: a senior opposition parliamentarian who acts as the opposition's spokesperson on foreign affairs. In Canada, these opposition spokespersons are known as 'critics' (e.g. the minister of national defence is shadowed by the defence critic), which hints at part of their role: to lead criticism and scrutiny of the government in the area of their portfolio. However, criticism is not the only duty of the shadow cabinet. It is also to enable the opposition to serve as an alternative government-in-waiting. Specialization in a particular portfolio enables opposition leaders to gain subject-matter expertise, to build contacts with various stakeholders, to understand the issues and complexities involved, and to formulate workable alternative policies. An incoming prime minister is not obliged to appoint shadow cabinet members to the actual cabinet, although they often do so, at least initially, to ease the transition from opposition to government.

Opposition leaders in multiparty parliamentary democracies

Parliamentary systems—especially those in the continental European tradition—may be characterized by multiple parliamentary parties, reflecting complex social cleavages (for example, socio-economic divides may be intertwined with religious or cultural divides). In such circumstances, instead of two large coherent blocs competing for office and alternating in power, there may be an array of small parties. Government formation may be a process of negotiation, with shifting alliances as parties move in and out of coalitions according to political circumstances. In these conditions, the notion of a single leader of the opposition may be inappropriate. Instead of a leader of the opposition, there are leaders of opposition parties. The leaders of opposition parties may perform various roles—as spokespersons for their parties, as critics of the government and as potential coalition negotiators—but they do not necessarily have the same status as the leader of the opposition in a Westminster-model system as a potential prime-minister-in-waiting.

This situation may be underpinned by a system of proportional representation but need not necessarily be so. There are counterexamples on both sides, highlighting the paramount importance of history. The French Third Republic, for example, used a majoritarian electoral system for most of its existence but featured multiparty politics and fragile coalition governments, with the corresponding absence of a clearly designated leader of the opposition. In contrast, New Zealand and Fiji both (now) have proportional electoral systems but still designate the leader of the largest opposition party as leader of the opposition, with the expectation that they will be a future prime minister.

In multiparty parliamentary systems, the principle that the governing coalition cannot simply dictate terms and that political opposition should have an opportunity both to moderate and to contest the use of power may also be expressed in other ways—for example, through minority delay procedures, the right of minorities to appeal to the constitutional court, the right to establish an investigative commission and the proportional inclusion of political parties in certain appointments both inside and outside parliament. These are discussed in more detail in Section 5.

2.3. Leaders of the opposition in presidential and hybrid systems

Although usually associated with Westminster-model parliamentary systems, there are several constitutions in the world today where a constitutionally recognized leader of the opposition exists alongside a directly elected executive president. These include the constitutions of Burkina Faso, Madagascar, Niger, Senegal, Seychelles, Sri Lanka, Uganda, Zambia and Zimbabwe.

Regardless of names and origins, there are two important functional distinctions that differentiate the role and status of a leader of the opposition in a presidential or hybrid system from their counterparts in a parliamentary system.

Firstly, separate elections for the legislature and the presidency mean that the party in government might not be the majority party in the legislature. Some presidential systems that recognize the leader of the opposition specify that the leader of the opposition is chosen by the largest party in the legislature other than the president's party (e.g. Constitution of Zambia, article 74 read in conjunction with article 266). It is therefore possible for the leader of the opposition in a presidential system to control a majority of seats—in other words, the leader of the opposition could be a majority, not minority, leader.

Secondly, the leader of the opposition in a system with a directly elected presidency is not automatically the obvious front-running opposition candidate at the next presidential election. It may be the leader of the opposition who runs against the president at the next election, but it need not be. It is possible—because of the way presidential candidates are selected—for the expected front-

runner in the next presidential election to be someone who is not in the legislature at all.

From the perspectives of democratic dialogue, inclusion, stability and resilience, there may be very good reasons to at least acknowledge the legitimate role of the opposition in a presidential or semi-presidential system. Even if the leader of the opposition is not the obvious candidate to contend the next presidential election, the existence of the office may give opposition politicians the visibility and name recognition needed to conduct a credible election campaign. The recognition of the legitimacy of the opposition may help make democracy more genuinely competitive, especially where it is fragile. Nevertheless, one should not be distracted by similar names: the fact remains that the substance and role of the office of leader of the opposition is rather different from that found in a parliamentary system. It is interesting to note, for instance, that the leader of the opposition in Zambia is treated not as the counterpart of the president (as the leader of the opposition in a parliamentary system would be the counterpart of the prime minister), but as the counterpart of the leader of government business in the National Assembly—an important, but somewhat lesser, role.

Minority leaders in presidential systems

Some presidential systems formally recognize the position of minority leader in the legislature. One notable example of formal recognition is provided by the Constitution of Kenya (article 108), which states that ‘The leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties.’ This is the opposition counterpart to the leader of the majority party, who is the leader of the largest party or coalition of parties in the National Assembly. In contrast to the leader of the opposition identified in the previous subsection, these positions depend solely on the number of seats held in the National Assembly, not on which party is in government. As noted in the introduction, it might well be that the minority leader is from the president’s party and therefore is not in opposition, even though he or she is in a minority in the legislature.

3. Constitutional or subconstitutional rules?

This Primer is a guide to constitutional design. Many of the rules, procedures and privileges surrounding leaders of the opposition and leaders of the legislative minority are often found, however, not in constitutions but in subconstitutional documents- in ordinary statutes, in standing orders of legislatures, in cabinet manuals or even as unwritten but well-accepted conventional norms.

As always with constitutional design, the text of the written constitution provides only the foundations of the institutional structure. The subconstitutional elements are like the walls and roof. The question often arises whether a given rule, procedure or practice should be written into the constitution or not. The answer to this question depends on the historical background, present context and future expectations.

Historical background

In older Westminster-model constitutions (e.g. Australia, Canada, India and Malaysia), the office of the leader of the opposition, despite being a well-established political institution and recognized either in a statute or in parliamentary standing orders, was not mentioned. The functions of the leader of the opposition were seen primarily as a matter of parliamentary privilege or conventional courtesy. After the 1950s it became usual for new Westminster-model constitutions to formally recognize the leader of the opposition, to specify the appointment procedure and tenure of office, and to confer upon the leader of the opposition certain constitutionally specified powers and functions (De Smith 1964). This can best be seen as a development in constitutional technology—a recognition that the office and roles of the leader of the opposition could be constitutionally specified, whereas before it had not seemed possible to do so. In

the same way, older presidential constitutions, like that of the United States, do not mention leaders of the opposition or minority leaders—although newer ones, like those of Kenya, Senegal and Seychelles, do constitutionalize these offices.

Present context and future expectations

Subconstitutional provisions may be adequate where a strong sense of fair play and mutual respect between the government and the opposition prevails. In the absence of favourable conditions, subconstitutional rules might easily be evaded or amended by the government to weaken the opposition and to prevent effective scrutiny. Even if the current government can be trusted not to weaken, harass or undermine the opposition, a future government might do so. Stipulating these rules in the constitution is therefore best understood as a form of future-proofing, protecting gains from being rolled back. At the same time, once rules are constitutionalized, they become harder to adjust in response to changing circumstances. As a result, it is sometimes prudent to set out principles or broad parameters in the constitution, leaving the details to be worked out in legislation or regulations. In the end, the decision on whether or not a certain rule should be featured in the constitutional text is highly dependent on context, although the trend is certainly towards increasingly long and detailed constitutions.

To illustrate the current comparative practice, Table 3.1 below sets out a range of rules relating to the rights and responsibilities of the political opposition by how commonly such rules feature in constitutional texts around the world.

Table 3.1. Examples of constitutionalization in different institutional contexts

	Widely constitutionalized	Rarely constitutionalized
Westminster-model parliamentary systems	<p>Appointment and removal of the leader of the opposition</p> <p>Right of the leader of the opposition to participate in judicial appointments and in appointments to regulatory and oversight (fourth-branch) institutions</p>	<p>Right of the opposition to choose the chair of the public accounts committee</p> <p>Right of the opposition to be included on parliamentary committees</p> <p>Requirements for opposition seats on committees</p> <p>Opposition days in parliamentary calendar</p>
Consensual, proportional and multiparty parliamentary systems	<p>Inclusive (supermajority or multiparty) appointments to fourth-branch institutions</p>	<p>Right of the opposition to choose the chair of the public accounts committee</p> <p>Proportional representation on committees</p> <p>Right of the minority to refer bills to the constitutional court</p> <p>Right of the minority to establish committees of inquiry</p> <p>Minority-veto referendums</p> <p>Minority delay procedures</p>
Presidential and semi-presidential systems		<p>Appointment and removal (or recognition) of the legislative minority leader</p> <p>Recognition of the leader of the opposition</p> <p>Requirements for opposition seats on committees</p> <p>Opposition days in parliamentary calendar</p> <p>Right of the opposition or minority leader to choose the chair of the public accounts committee or equivalent (e.g. Tunisia)</p>

4. Leader of the opposition: appointment and removal

4.1. General rules

Appointment and removal in parliamentary systems

In those parliamentary democracies where a leader of the opposition is recognized, the rules governing how the leader of the opposition is chosen vary in detail, although the general principle is that the leader of the single largest opposition party in the lower house of parliament is appointed to this office. Various formulations of the rule are shown in the examples below:

- The Constitution of Malta (article 90) provides that the president shall appoint as leader of the opposition the member of the House of Representatives who is the leader of the party ‘whose numerical strength in the House of Representatives is greater than the strength of any other opposition party’. If there is no opposition party, or if two or more opposition parties have an equal number of seats, then the president should appoint as leader of the opposition ‘the member of the House who, in the judgment of the President, commands the support of the largest single group of members of the House in opposition to the Government who are prepared to support one leader’.
- The Constitution of Barbados (section 74) requires that the governor-general appoint as leader of the opposition ‘the member of the House of Assembly who, in his judgment, is best able to command the support of a

majority of those members who do not support the Government, or if there is no such person, the member of that House who, in his judgment, commands the support of the largest single group of such members who are prepared to support one leader’.

- The Constitution of Mauritius (section 73) provides that the leader of the opposition should be ‘the member of the Assembly who is the leader in the Assembly of that party whose numerical strength in the Assembly is greater than the strength of any other opposition party’, or ‘where there is no such party, the member of the Assembly whose appointment would, in the judgment of the President, be most acceptable to the leaders in the Assembly of the opposition parties’.

Under these rules, there is little discretion in the appointment of the leader of the opposition, and no discretion at all when there is an easily identifiable largest party in opposition with a recognized leader. The authority and credibility of the leader of the opposition derives in part from this position as leader of a party—they speak for that party and its voters.

Leaders of the opposition typically serve for as long as they continue to lead the largest opposition party in the lower or only house. In other words, their constitutional position depends on their party position. If they lose their party leadership (e.g. through an internal leadership challenge), then they will also lose the office of leader of the opposition, and the new party leader will take their place. Ceasing to be a Member of Parliament will also cause the leader of the opposition to lose office.

Appointment and removal in non-parliamentary systems

In presidential or semi-presidential systems, it is important to reiterate the distinction between opposition leadership (i.e. those opposed to the incumbent president) and minority leadership (i.e. those opposed to the legislative majority). In a presidential system these are not always the same, since it is possible for the president’s party to have only a minority of seats in the legislature. In designing the appointment and tenure rules for a leader of the opposition in such systems, this distinction must always be borne in mind. Whenever there is an executive president, it makes sense for the leader of the opposition always to be drawn from a party other than that of the president; otherwise, they would not be able to oppose and scrutinize the executive.

- In Seychelles, the Constitution (article 84) states that the leader of the opposition must be elected by the National Assembly from among its members, but that only those who do not belong to the president’s party can be elected as leader of the opposition and can vote in the election. In

this way, the leader of the opposition might, in theory, have the support of the legislative majority, though they will always come from a party that is in opposition to the president.

- The Constitution of Madagascar (article 14) provides that, in the absence of an agreement between the different opposition groups in Parliament, ‘the head of the political group of the opposition having obtained the greatest number of votes’ is considered as the official head of the opposition. It implies—although does not explicitly state—that the term ‘opposition’ applies to those in opposition to the president, not to those in opposition to the legislative majority.
- The Constitution of Zambia (article 74) states simply that ‘The opposition political party with the largest number of seats in the National Assembly shall elect a Leader of the Opposition from amongst the Members of Parliament who are from the opposition.’

4.2. Additional constitutional rules

Note: The following additional rules are neither universal nor even standard. Some are recent developments or responses to particular circumstances. Nevertheless, they are included here as examples of the constitutional design choices that might be considered in drafting a constitution.

Anti-defection clause

In Dominica (section 66), a Member of Parliament (MP) who is elected as part of the majority party cannot, without first seeking re-election, be eligible for appointment as leader of the opposition. This rule prevents a disaffected member of the government party breaking away and becoming leader of the opposition (as happened in Barbados in 2018).

Extra-parliamentary opposition

In Grenada, in 2016, a constitutional amendment was proposed (but ultimately rejected in a referendum) that would have allowed the appointment of a leader of the opposition from outside Parliament if no opposition members were elected to Parliament. Under this rule, the leader of the opposition party winning the highest number of votes would have been appointed as the leader of the opposition and thereby become an *ex officio* MP. Especially in small legislatures using first-past-the-post (single-member plurality) elections, this would be a sensible precaution, ensuring that some opposition presence in Parliament—and an opposition voice in bipartisan appointments and other decisions where the opposition has a conventional right to be consulted—is maintained in the event

of a clean sweep (i.e. an election where one party wins all the seats) (Bulmer 2020).

Minimum size of the opposition

In India, the Salary and Allowances of Leaders of Opposition in Parliament Act 1977 assigns the role of leader of the opposition to the leader of the largest opposition party in each house of Parliament (see below on bicameralism). However, an earlier direction by the speaker of the House of the People, the lower house of India's Parliament, ruled that a 'party' (as distinct from a mere group of MPs) must consist of at least 10 per cent of the membership of the House. If no opposition party wins at least 10 per cent of the seats, the office of the leader of the opposition remains vacant. However, a former secretary-general of the House of the People has argued that the 10 per cent rule is unlawful, as the speaker's ruling was overturned in 1985 by the 52nd amendment to the Indian Constitution (Achary 2019). This is an example of how ambiguous or deficient constitutional rules can result in the exclusion of the opposition precisely at the time when, owing to the small size of opposition parties, a recognized leader of the opposition is most needed for democratic dialogue. In order to avoid such a situation, it should perhaps be made clear in the Constitution that there is no minimum number of members necessary to support a leader of the opposition.

Bicameral systems

In bicameral parliaments, the leader of the opposition must usually be a member of the lower house (that is, always a popularly elected house). Historically, opposition leaders could sit in the upper house, but since in most Westminster-model democracies the prime minister must now be chosen from the lower house, the same condition applies to the leader of the opposition. In some bicameral systems, there are parallel leaders of the opposition in the lower and upper houses. For example, in India (Salary and Allowances of Leaders of Opposition in Parliament Act 1977) there is a recognized leader of the opposition in the House of the People (lower house) and one in the Council of States (upper house). Similarly, there is in Australia a leader of the opposition in the Senate as well as a leader of the opposition in the House of Representatives.

Once again, the distinction between those systems where the executive is headed by a prime minister who leads and is responsible to the majority in the lower house, on the one hand, and where the executive is headed by a president who is directly elected by the people, on the other hand, is important. In bicameral parliamentary systems, even if there is a leader of the opposition in both houses, only the opposition leader in the lower house has the full range of functions, roles and privileges as leader of the opposition, since only he or she is likely to be an alternative prime minister. In other words, the official leader of the opposition leads the opposition both inside and outside parliament, while the

leader of the opposition in the senate has a narrower and strictly parliamentary remit as the chief opposition spokesperson in the senate or as manager of opposition business in that house. Where a bicameral system coexists with a presidential executive, such as in Zimbabwe, there may be a leader of the opposition in each house without functional distinction, because the leader of the opposition in a presidential system is not, as already discussed, an automatic candidate to replace the head of the executive.

Appointment during dissolution

Many constitutions (e.g. Belize, section 47; Dominica, section 66; Saint Lucia, section 67) provide that, if an appointment to the office of leader of the opposition has to be made between the dissolution of parliament and the next general election, a person who was an MP immediately before the dissolution may be appointed as leader of the opposition. This rule would come into play if the leader of the opposition party were to die suddenly or resign in the middle of an election campaign and a new party leader had to be chosen.

Recognition of third parties, minor parties and independents

Many democracies in which the leader of the opposition is recognized have two dominant parties. However, third parties and minor parties may also be present in parliament. This raises the question of how party leaders—other than the official leader of the opposition—should be treated and recognized, both inside parliament and more generally. Some rules or practices benefiting the official opposition (as noted below) may also be extended to other opposition parties: the allocation of committee positions, opposition days and funds to support parliamentary and partisan activities can be distributed between opposition parties. In the United Kingdom, the leader of the second-largest opposition party is also usually sworn in as a privy councillor. The Constitution of the Solomon Islands (section 66), in addition to recognizing a leader of the opposition, also recognizes a leader of independent members. This offers a potential precedent on which future constitution-builders could rely: if a leader of independent members can be recognized, similar recognition could also be given to the leaders of other opposition parties.

Leader of the opposition in subnational governments

In countries with multi-level governance (whether in the form of powerful local governments, devolved regional authorities or a federal system), an opposition exists in parallel at different levels. This leads to additional design considerations: for example, should the role of leader of the opposition also be recognized at the state level as well as at the national level? For example, in South Africa the national Constitution directs provincial legislatures to provide for recognition of

the leader of the opposition as the 'leader of the largest opposition party' in their parliamentary rules (section 116.2)

5. Political opposition: roles and responsibilities

This section focuses on the roles and responsibilities of the opposition as outlined’ to ‘focus on the roles and responsibilities of the opposition or legislative minority as outlined’

5.1. Scrutiny and oversight

Prime minister’s question time

The leader of the opposition’s most visible function in parliament—at least in parliamentary systems—is to lead the questioning during the prime minister’s question time. This is usually held weekly when parliament is in session. Although ineffective as a means of detailed policy or legislative scrutiny (which is better handled by committees), it does give MPs an opportunity to ask the prime minister topical questions, to highlight issues of current public concern and to force the prime minister to justify and explain his or her actions (or inaction). The leader of the opposition opens the questioning; he or she is followed by the leaders of any other opposition parties, and then the floor is opened to questions from backbenchers. The leader of the opposition therefore has a chance to set the tone and direction of questioning and to influence the agenda. It is also an opportunity to shape the public conversation, as questions in parliament may be reported and debated in the media.

Confidence debates

The leader of the opposition usually takes the lead in debates on a vote of no confidence in the government. In Westminster-model systems, the leader of the opposition also takes the lead in debates in reply to the speech from the throne.

This speech, setting out the government's policy priorities and legislative agenda for the coming session, is traditionally delivered by the head of state or the governor-general at the opening of each session of parliament. It is followed by a general debate on government policy, which leads to a vote that is taken as a vote of confidence in the government. This therefore gives the leader of the opposition a regular (approximately annual) opportunity to question the whole of the government's programme and performance and to force the government to prove that it commands the confidence of the House.

Committees

Much of the work of parliament—especially the detailed legislative and policy scrutiny work—is done in committee. It is usual for parliamentary committees to broadly reflect the partisan composition of the given house (i.e. with a government majority and other committee positions distributed among the opposition parties according to their strength). While the composition of committees is often determined subconstitutionally, by ordinary statute or by parliamentary standing orders, some constitutions do prescribe general rules ensuring a balance between the government and the opposition. For example, the Constitution of Malta (article 67) states that 'Committees of the House to enquire into matters of general public importance shall be designed to secure that, so far as it appears practicable to the House, any such Committee is so composed as fairly to represent the House'. Likewise, the Constitution of Tunisia (article 59) requires that committees be chosen by proportional representation, while the Constitution of Papua New Guinea (section 118) requires that membership of committees 'be spread as widely as practicable among the back benchers'. The Constitution of Sierra Leone (section 93) states that, 'The composition of committees [...] shall, as much as possible, reflect the strength of the political parties and Independent Members in Parliament'.

The chairpersonship of committees might also be proportionately distributed between the government and the opposition. In New Zealand, for example, about half of all committees typically have a chairperson from an opposition party (either the official opposition or one of the other opposition parties), while in Australia, the government usually provides the committee chairpersons, although the deputy chair comes from the opposition (Rhodes, Wanna and Weller 2009: 208). These principles can be constitutionally recognized. The Constitution of Madagascar (article 78), for example, entitles the opposition to chair at least one-third of parliamentary committees.

Special rules often apply to the finance committee or public accounts committee—the principal committee for the scrutiny of public expenditure. It is usual in Westminster-model parliaments for finance committees to be chaired by an opposition member. The Constitution of Trinidad and Tobago (section 119), for example, provides that 'The Chairman of the Public Accounts Committee

shall be a member of the Opposition in the House [of Representatives]'. A similar role for the opposition on key committees is found in semi-presidential Tunisia, where the Constitution (article 60) provides that 'The opposition is assigned the chair of the Finance Committee, and rapporteur of the External Relations Committee.'

Commissions or committees of inquiry

Some constitutions allow legislative minorities, or a certain minimum number of the members of the legislature, to establish a committee of inquiry. When it exists, this is a potentially powerful tool in the hands of the opposition or the legislative minority, enabling them to scrutinize and probe policy decisions.

- In Portugal, for example, each member may, once per session, propose the formation of one committee of inquiry; if one-fifth of the members support the proposal, the committee is established (article 178).
- The Constitution of Mozambique enables each parliamentary group to propose the formation of committees of inquiry (article 197).
- In Tunisia, the opposition has the right to establish and head a committee of inquiry annually (article 61); a similar rule applies in Burkina Faso (article 96.1).
- The Constitution of Georgia (article 42) allows investigatory commissions to be established at the request of one-fifth of the MPs, with the approval of one-third of the members; the rule empowers the opposition to launch inquiries. All parliamentary factions in Georgia have a right to at least one member of an investigatory commission, with the opposition factions guaranteed a majority of the membership.

Opposition days

Some parliaments set aside certain sitting days for non-governmental business. Opposition days, where the opposition can determine the agenda, are a long-standing feature of some (if not all) Westminster-model parliaments. In the United Kingdom, there are about 20 opposition days in each annual session. Most of these are allocated to the official opposition (i.e. the largest opposition party); the others are shared between the other opposition parties. Since 2009, additional days (known as 'backbench business days') are set aside for matters proposed by a cross-party committee representing backbench MPs (i.e. those who are neither in ministerial office nor part of the opposition's front-bench shadow cabinet). Parliamentary time may also be set aside for private members' business, which gives individual MPs the opportunity to propose legislation; the chance of

such legislation passing is usually minimal unless it strikes a chord and is taken up by the government. Regardless, it does provide an opportunity to put issues onto the agenda, to publicly set out priorities and to offer alternatives. The principle of giving the opposition parties an appropriate share of parliamentary time can be written into a constitution. For example, the Constitution of Morocco (article 10) guarantees the opposition ‘effective participation in the legislative procedure, notably by inclusion of proposals of law in the agenda of both Chambers of the Parliament’ (i.e. the right to introduce legislation and to have space for opposition-sponsored bills in the parliamentary timetable). In Seychelles, the speaker of the National Assembly must consult with the leader of the opposition before determining the priority for the discussion of bills.

5.2. Appointments to public institutions

Another sphere in which political moderation can be constitutionalized is that of appointments—especially appointments to neutral or apolitical bodies that perform guardianship, monitoring or oversight functions. Such bodies include the judiciary as well as independent fourth-branch bodies, such as an electoral commission, boundaries commission and public service commission.

Judicial and fourth-branch institutions

The principle is that the boundaries between the government and the permanent, non-partisan institutions of the state should be protected, and that these permanent non-partisan institutions should remain beyond the government’s sole control. A working parliamentary majority thereby gives the government a mandate to set policy and to implement its legislative agenda, but does not permit it to obtain hegemonic control of the political system as a whole. In particular, the independence of the judiciary, the neutrality of the administration and the integrity of electoral processes must be upheld.

There are several ways in which the opposition’s role in such appointments may be exercised: establishing a consultative procedure, a concurrent procedure or a representative procedure; using an appointments or constitutional offices commission; granting appointing power directly to the opposition; establishing a proportional procedure for inclusion in appointments; or requiring appointments to be made by a supermajority decision.

- Consultative procedure. Often the role of the leader of the opposition in these appointments is merely consultative. In Jamaica, as a typical example, the prime minister must consult the leader of the opposition before appointing the chief justice, the president of the Court of Appeal, the members of the Public Service Commission and the Police Service Commission, and the three nominated members of the Judicial and Legal

Service Commission. The prime minister is under a constitutional obligation to consult the leader of the opposition before an appointment is proposed. If the leader of the opposition agrees, then the governor-general (on behalf of the Queen, who is the head of state) makes the appointment. If the leader of the opposition objects, the governor-general must ask the prime minister to reconsider, but the decision of the prime minister ultimately prevails. The leader of the opposition has no ultimate veto. The effectiveness of a consultation procedure depends on many factors, including the personal and political relationship between the prime minister and the leader of the opposition and the strength of political conventions of bipartisan cooperation.

- **Concurrent procedure.** The concurrent procedure requires that the prime minister and the leader of the opposition agree on an appointment. This gives the leader of the opposition a veto. The idea is that the person appointed should be acceptable to both sides: it is a mechanism that promotes moderation. The concurrent procedure is rarer than the consultation procedure. In existing constitutions, it is used only in Belize, where two (of five) members of the Electoral and Boundaries Commission are appointed in this manner (Constitution of Belize, section 88), and Guyana, where the concurrence of the leader of the opposition is required to remove the chair of the Human Rights Commission from office (article 212N). Nevertheless, this is a potentially useful constitutional design choice that could be adopted to reinforce moderation in situations where the consultation procedure has not resulted, or is not likely to result, in meaningful consultation or compromise with the leader of the opposition.
- **Representative procedure.** The third procedure is to allow both the prime minister and the leader of the opposition to make a certain number of appointments so that the commission or institution as a whole includes opposition perspectives. In Dominica, for example, the Constitution (section 56) provides that two (of five) members of the Constituency Boundaries Commission and two (of five) members of the Electoral Commission are nominated by the leader of the opposition. In each of these institutions, the government side is also represented by two members nominated by the prime minister. The fifth member of the Constituency Boundaries Commission is the speaker, who is supposed to be impartial. The fifth member of the Electoral Commission is appointed ‘at the deliberate judgement’ of the head of state (that is, at the head of state’s personal and non-partisan discretion, not bound by ministerial advice). Similarly, in Antigua and Barbuda, the leader of the opposition nominates one member (out of four) of the Constituency Boundaries Commission; two members are nominated by the prime minister, and one, the chair, is

appointed by the concurrent procedure (Constitution of Antigua and Barbuda, section 63). In the 2010 Constitution of Kyrgyzstan, one-third of the members of the Central Commission on Elections and Referenda and one-third of the members of the Chamber of Accounts were appointed by the parliamentary opposition; one-third, by the parliamentary majority; and one-third, by the president (article 74).

- Proportional procedure. This is a type of representative procedure best adapted for multiparty contexts and for appointments to multi-member bodies. Its principle is election or appointment by proportional representation so that parties are represented in proportion to their strength in the legislature. In Austria, for example, ombudsman functions are performed by a board of three members who are elected by the National Council (the lower house of Parliament) in such a way that 'each of the three parties with the largest number of mandates in the National Council is entitled to nominate one member' (Constitution of Austria, article 148G). Similarly, the electoral authority consists of a mixture of judges and partisan members, with the latter being 'appointed on the basis of proposals of the campaigning parties corresponding to their proportion in the preceding election to the National Council' (Constitution of Austria, article 26A).
- Appointments commission procedure. Some countries, including Fiji, Nepal, Seychelles and Sri Lanka, have established constitutional offices commissions or similar bodies, which include the leader of the opposition and which in turn make appointments to other institutions. In Fiji, for example, the Constitutional Offices Commission is responsible for nominating members of other fourth-branch institutions (including the Human Rights and Anti-Discrimination Commission, the Electoral Commission, the Public Service Commission, the police commissioner and the auditor-general). It consists of six members: the prime minister, the leader of the opposition, the attorney-general, two persons nominated by the prime minister and one person nominated by the leader of the opposition. Since the attorney-general is a government minister appointed in effect by the prime minister, this means that the government side has a total of four members of the Commission, while the opposition has two. There is representation but not parity. In effect, this means that, while the opposition can have its say, it has no veto; it operates therefore more like a consultation procedure than a concurrent or representative procedure. Indeed, Fijian opposition leaders, being frustrated by the lack of genuine consultation and consensus-seeking, have boycotted the Constitutional Offices Commission (Narayan 2017). If this mode of appointment is to be effective at enabling the opposition to moderate the government, it

requires parity between government and opposition members, possibly with a genuinely independent chair. In Seychelles, in contrast, the president and the leader of the opposition have parity of representation on the Constitutional Appointments Authority, appointing two members each; these then appoint an impartial chair (Constitution of Seychelles, chapter IX). This arrangement, unlike the one in Fiji with its inbuilt government majority, provides for a genuine opposition check on constitutional appointments.

- Exclusive opposition appointments. In some exceptional cases, the opposition is not merely given a right to participate in the making of these appointments but can actually make appointments. In Argentina, for example, the auditor-general is appointed on the proposal of the largest opposition party in the National Congress. Such procedures provide a more rigorous counterbalance against majoritarian power but perhaps at the risk of making these institutions less politically neutral.
- Supermajority appointment procedure. The supermajority procedure enables the opposition or legislative minority to have a voice in appointments to single-member institutions. In Bulgaria, half the members of the Supreme Judicial Council are elected by the National Assembly by a majority of two-thirds of its members (Constitution of Bulgaria, article 130). In Portugal, a two-thirds majority of those voting is required for Parliament to elect 10 judges to the Constitutional Court, the ombudsman, the president of the Economic and Social Council, seven members of the Supreme Judicial Council and the members of the media regulatory body (Constitution of Portugal, article 163).

Appointment of ceremonial presidents

The opposition may also have a role in the appointment of the president in those parliamentary republics where the president is supposed to be a non-executive and non-partisan ceremonial figurehead. In Dominica, for example, the president can be appointed jointly by the prime minister and the Leader of the Opposition (Constitution of Dominica, section 19); if they both concur in the selection of the same candidate, that candidate is appointed without even the formality of a parliamentary vote. If they disagree, then Parliament votes to elect either the nominee of the prime minister or the nominee of the leader of the opposition. The result of such a vote, of course, is likely to be a foregone conclusion, with the government's nominee being chosen. In practice, this mechanism amounts to a consultative procedure, and it has failed to prevent the partisan politicization of the presidency. In contrast, when Australia considered becoming a republic in 1999, the proposed model of bipartisan appointment for the president more

closely resembled a concurrent procedure: the resolution appointing the president would have had to be proposed by the prime minister, seconded by the leader of the opposition and approved by a two-thirds majority in Parliament. A similar rule now (since 2020) applies in Malta, where the President must be appointed by a two-thirds majority vote of the House of Representatives (Constitution of Malta, art. 48).⁷

Appointment of opposition senators

In many Caribbean Commonwealth countries, an additional function of the leader of the opposition is to appoint a certain number of senators. These senators ensure an opposition presence in the upper house to take part in debates, questions and committee functions. The number, both in absolute terms and as a percentage of the senate, varies. In Barbados, only 2 (of 21) senators are chosen by the leader of the opposition, 12 are chosen by the prime minister, and 7 are independents appointed by the governor-general to represent ‘religious, economic or social interests’ (Constitution of Barbados, section 36). In Trinidad and Tobago, 6 senators (of 31) are chosen by the leader of the opposition, 16 are chosen by the prime minister and 9 are appointed by the president on a non-partisan basis ‘from outstanding persons from economic or social or community organizations and other major fields of endeavour’ (Constitution of Trinidad and Tobago, section 40). The principle, in these cases, is that while the government senators have a narrow majority to pass ordinary laws, the opposition senators, together with the independent senators, have a veto over amendments to the constitution. This means that constitutional changes, at least to certain entrenched provisions, have to be negotiated with the opposition and with independents if they are to pass; the government can determine policy but cannot unilaterally change the fundamentals of the constitution. Crucially, because the number of these opposition (and independent) senators is fixed by the constitution and does not depend on election results, even an overwhelming landslide electoral mandate for the government does not eliminate the need to negotiate and compromise with opposition and independent senators.

5.3. Other roles and privileges of the leader of the opposition

Right to be consulted on ‘Privy Council terms’

In the United Kingdom, the leader of the opposition is by convention sworn in as a privy councillor. The Privy Council rarely meets as a full body, and its normal executive functions are performed only by ministers. However, Privy Council membership enables the leader of the opposition to receive private briefings on what are known as ‘Privy Council terms’—that is, on condition that the information received not be leaked. The Queen’s Privy Council for Canada, modelled on British practice, performs similar functions in Canada. Elsewhere,

privy councils are either not constitutionally established or are intended—as in Jamaica—to perform specific functions (concerning, for example, advising on pardons or appealing decisions of the Public Service Commission). Nevertheless, it is an established practice in many Westminster-model democracies for opposition leaders to be ‘regularly briefed on matters of national security, military deployment or foreign affairs; that is, core affairs of state which are not usually the subject of partisan politics’ (Rhodes, Wanna and Weller 2009: 209). This practice can provide a useful backchannel of communication between the government and the opposition, both to build consensus on issues of national importance and to ensure policy stability through electoral cycles. It is also a widespread (although not universal) practice for the opposition to be consulted on decisions made during a caretaker period—such as between the dissolution of parliament and the next election. This recognizes the possibility that the opposition could form the next government, and that irrevocable decisions should not be taken during this period unless the opposition has concurred.

Funding, resources and status

In addition to the formal powers of leaders of the opposition, many countries also give such leaders certain financial and other privileges. These enhance the standing, status and visibility of the leader of the opposition and increase the leader’s ability to perform his or her duties. Most importantly, the leader of the opposition is typically paid a salary from the public treasury. That salary is usually less than that paid to the prime minister but equivalent to that of a senior cabinet minister. The Constitution of Seychelles (article 84) gives formal recognition to this principle, providing that ‘The salary, allowances, gratuity or pension payable to the Leader of the Opposition shall be not less than those payable to a Minister and shall be a charge on the Consolidated Fund.’

Other benefits may include ‘election funding, funding as “recognised parties” for such items as offices, staff, travel, cars, IT and communication and equipment, and library and research facilities’ (Rhodes, Wanna and Weller, 2009: 208). In the British House of Commons, opposition parties have since 1975 received so-called Short money from the public purse. Only the leader of the opposition receives a fixed sum to cover the expenses of their office, but all opposition parties (not only the official opposition) receive funds to support their parliamentary activities and travel, calculated using a formula which considers the number of seats and number of votes won at the last general election (Kelly 2020). The Constitution of Morocco is one of the most far-reaching in providing for the status and financial resources of opposition parties. It guarantees (article 10) not only public funding for opposition parties but also a fair share of public broadcasting airtime ‘proportional to its representation’—although the details of how these and other rights and privileges of opposition parties are to be realized in practice depends on organic laws.

In addition to these material resources, the leader of the opposition will often have access to prestige. This includes ‘ceremonial presence at events of state’, such as state funerals and state visits of foreign leaders (Waldron 2011: 10). They will usually have a high place on the official order of precedence. In Jamaica, for example, the leader of the opposition ranks fourth on the order of precedence, below the deputy prime minister but above other cabinet ministers (Jamaica Information Service 2020), the speaker and the chief justice. Presence at such formal events of state may also provide opportunities for the leader of the opposition to meet with foreign dignitaries, who may be interested in cultivating relationships with a potential future prime minister (Waldron 2011: 10).

Parliamentary leadership and administration

The opposition may have guaranteed representation and participation in the leadership and internal administration of parliament. Control over not only the organization of the legislature’s proceedings and order of business but also over its physical assets—its buildings, office space, libraries, archives and even parking spaces—can be a political tool. Having an opposition voice in such matters is vital to ensuring that parliament works for the benefit of its members as a whole, and that the proper institutional balance between the government and opposition is maintained.

- In Canada, under the Parliament of Canada Act 1985 (section 50), there is a Board of Internal Economy established to manage the financial administrative matters of the House of Commons, its premises, its services and its staff. The leader of the opposition, or his or her nominee, is entitled to be a member of this Board (alongside government nominees). Where there are two or more opposition parties with at least 12 members of the House, each is entitled to designate one member of the Board (House of Commons of Canada 2020). Again, these rules are not usually included in the constitution, but they could be if there were a contextual need to protect the opposition’s rights.
- Armenia provides one example of constitutional inclusion of such rules: the internal administration of Parliament is directed by a chairperson and three deputies, and one of the deputies must be elected from the opposition (Constitution of Armenia, article 104).
- In Zimbabwe, the parliamentary Committee on Standing Rules and Orders, which is responsible for ‘supervising the administration of Parliament’, includes the leaders of the opposition in each house (Constitution of Zimbabwe, article 151).

- In Germany, a Council of Elders has been established, consisting of representatives from all the parliamentary parties according to their respective number of members. The largest party provides the president of the Council (who is also president of the Bundestag, or lower house), while each of the other parties provides a vice-president (Bundestag of the Federal Republic of Germany).
- The Constitution of the Republic of Georgia (article 41) states that, ‘To organise the work of Parliament, a Parliamentary Bureau shall be established and shall be composed of the chairperson and deputy chairpersons of Parliament and the chairpersons of the parliamentary committees and parliamentary factions.’

6. Veto and referral powers of legislative minorities

6.1. Supermajority or minority-veto rules

All supermajority rules for enacting legislation (e.g. rules requiring a two-thirds majority for the approval of constitutional amendments) are potentially minority-veto rules, since they allow the legislative minority to prevent the passage of legislation. The effectiveness of the veto depends on the size of the minority that can exercise the veto, and on its consequences (whether it is permanent or only causes a delay, and how easily the veto can be overridden).

This section focuses on two types of minority-veto rules that are designed not to prevent majoritarian decision-making but to provide the minority with opportunities to scrutinize proposals, to voice their opposition to them and to mobilize public opinion: minority delay mechanisms (where the veto is limited to a delay) and minority referendum mechanisms (where the veto can be overridden by an appeal from the parliamentary minority to the general public).

Minority delay mechanisms

Some constitutions allow the legislative minority to delay legislation pending further review and scrutiny. In Sweden, for example (Instrument of Government, chapter 2, article 22), legislation affecting fundamental rights can be delayed for one year at the insistence of as few as 10 (of 349) MPs. This delay can be overturned by the votes of five-sixths (83%) of the MPs. In effect, any party or group of parties having one-sixth of the seats can force a delay.

It is important to note that they cannot ultimately stop such laws from being passed: a simple majority vote, in the end, is decisive. What they can do, however,

is force a period of parliamentary, media and public debate on such legislation, which requires that the majority justify its actions more carefully.

The fact that this mechanism exists, even if it is not triggered, may also have a moderating effect. Governments, being aware of the potential for the opposition to inflict delays, may seek to modify their proposals in advance to accommodate any specific objections or concerns the opposition may have. The rule also discourages hasty, reactive, knee-jerk legislation. If there is a chance that a year's delay may be imposed, it makes sense for the government to respond more carefully and deliberately to events, with some attempt to build consensus before legislating, rather than rushing ahead and encountering resistance from the opposition.

A similar rule is found in Denmark (Constitution of Denmark, article 41.3), although the scope of the provision is broader while the threshold for triggering the delay is higher. Whereas in Sweden the delay mechanism applies only to legislation affecting fundamental rights, in Denmark two-fifths of the legislature can delay any bill—except money bills, naturalization bills and emergency legislation—for 12 days. This is a considerably less potent provision. Nevertheless, it prevents legislation being rushed through by the majority without at least an opportunity for the opposition to scrutinize it, and it may still serve to bring public and media attention to contentious legislation that might otherwise have escaped public scrutiny.

Minority-veto referendums

In addition to the delay mechanism described above, the Constitution of Denmark (article 42) also makes provision for minority-veto referendums. This rule enables one-third of the MPs to suspend a bill that has been passed by Parliament but that has not yet received royal assent, pending approval by the people in a referendum. Ordinarily, a petition signed by one-third of the MPs must be submitted to the speaker of Parliament within three working days after the bill was passed, and the referendum must then be held no sooner than 12, and no later than 18, working days after the publication of the bill (this, it should be noted, is a very short time in which to prepare a referendum campaign). There is scope for the government to avoid a potentially embarrassing referendum defeat by withdrawing the bill. If the referendum goes ahead, if a majority of the votes cast in the referendum are against the bill, and if those voting against it account for at least 30 per cent of all those eligible to vote, then the bill will not receive royal assent. There is also an emergency provision that enables a bill to receive royal assent immediately after it has been passed by Parliament (without waiting for three days) but then to be repealed if voted against in a referendum. This minority-veto referendum procedure cannot be invoked for money bills, naturalization bills, bills giving effect to existing treaty obligations or bills concerning succession to the throne.

On the surface, it might seem that such a mechanism would paralyse government, making it nearly impossible to pass legislation, because there is no limit on the ability of the opposition to demand a referendum. In practice, it has not worked that way. Only two referendums have been held under this procedure since it was introduced in 1953. The real effect is to act as a moderating, rather than contestatory, mechanism, for two reasons. Firstly, the fact that the referendum process exists gives the governing majority an incentive to cooperate in order to dissuade the opposition from invoking it. Secondly, the final decision is majoritarian: there is no absolute minority veto, merely a route by which the opposition may appeal to the popular majority rather than the parliamentary majority (Bulmer 2011). If the opposition invokes the referendum provision too lightly or too often, it could backfire, as the opposition's credibility as a sensible and responsible participant in political life would be tarnished.

The Constitution of Latvia (article 72) also has a minority-veto referendum rule. The president on his or her own initiative, or as demanded by at least one-third of the MPs, may within 10 days of the adoption of a bill by Parliament suspend the bill for a period of two months. A referendum is held if, during those two months, a public petition is received that has been signed by 10 per cent of the voters. Ten per cent is a high threshold. In a large country, it would be almost impossible to gather that many signatures in two months, and if it could be done at all it would require a massive and expensive operation that would unduly favour the interests of the rich (on the oligarchic effects of referendum signature-drives in California, see: Smith 2010: 121-122). In a small country like Latvia, however, it is not unmanageable, and in fact several referendums have been held under these rules, including on citizenship laws (1998), on security laws (2007) and on pensions (1999 and 2010).

6.2. Right of the legislative minority to appeal to the constitutional court

Some countries allow a legislative minority to refer a bill to the constitutional court (or equivalent) for a ruling on its constitutionality. For example, the Constitution of France (article 61) enables any 60 members of the National Assembly or of the Senate (as well as the president of the republic, the prime minister or the president of either chamber of the legislature) to refer legislation to the Constitutional Council. This process must take place after a bill has been passed but before it is promulgated. Similar provisions are found in most constitutions of francophone Africa, including, for example, the Constitution of Tunisia, which stipulates that bills may be referred to the Constitutional Court by any 30 members of the Assembly of Representatives within seven days after the Assembly's ratification of the draft law (Constitution of Tunisia, article 120).

Note that, in principle, this rule does not allow the minority to veto a bill purely on policy grounds; rather, it may only seek a ruling on whether a bill is permissible under the terms of the constitution—a legal, rather than a political, question. In practice, this rule gives legislative minorities access to an alternative forum in which to attempt to defeat a bill. Even if a constitutional challenge is not successful, the legislative minority can use the threat of this procedure to draw public attention to a bill, to highlight issues of controversy and perhaps to encourage the government to accept amendments to the bill.

7. Decision-making questions

1. Given the country's context and history, what might the benefits and draw-backs be of recognizing the opposition or legislative minority in the constitution?
2. If there is to be a constitutionally recognized leader of the opposition or leader of the legislative minority, how should they be chosen or designated? Should they be formally elected by all opposition MPs? Should they be appointed, based on the nomination of the largest opposition party, by the head of state or by the speaker of the lower house of parliament?
3. In a presidential system, is it preferable to designate a leader of the legislative minority (the leader of the non-majority party in the legislature) or a leader of the opposition (the leader of the largest party opposed to the president in the legislature)? How might the choice between these two basic options shape the overall distribution of powers in the political system?
4. How much detail should a constitution prescribe in terms of the roles and powers of that office? What rules, procedures or privileges have to be constitutionalized in order to protect them from being set aside by the majority? Should there be constitutional provisions for the salary, office funding, rank in order of precedence etc., of the leader of the opposition or leader of the legislative minority? What can safely be left to subconstitutional rules, such as ordinary laws or legislative standing orders?
5. In countries with more than one opposition party, what provision, if any, should be made for leaders of opposition parties other than the official

opposition – or for the leader of legislative parties other than the largest minority party? Should provision also be made for a leader of the third-largest party or a leader of independent members?

6. Is the overriding aim of any proposed constitutional reform to streamline and simplify political decision-making to produce more responsive and responsible government, or is it to constrain and restrain the government and prevent the recurrence of abuses of power? If the former, how can the opposition or legislative minority be empowered to more effectively scrutinize those additional powers of government and to make sure they are exercised in the light of public scrutiny, without hindering the decision-making process? If the latter, how can the opposition or legislative minority be empowered to restrain decision-making in certain specific areas (e.g. in appointments to fourth-branch institutions) without reducing the system to gridlock?
7. How does the constitution as a whole relate to the existence and operation of political opposition? Do the other provisions of the constitution—freedoms of association, assembly and expression; due process of law; the independence of the judiciary and the neutrality of the civil service; media access rights and freedom of information—help or hinder the opposition in the performance of its functions?
8. To what extent is constitutional borrowing appropriate? Are minority-suspension and minority-veto mechanisms, such as those noted in Denmark and Sweden, workable in a very different context? If so, what alterations will be required to fit to the country's context?

8. Examples

Table 8.1. Systems with a recognized leader of the opposition

	Appointment of the leader of the opposition	Legislative and scrutiny powers	Appointment powers outside the legislature	Other provisions
Barbados (parliamentary system)	Appointed by the governor-general as the person 'best able to command the support of a majority of those members who do not support the Government, or if there is no such person, the member of that House who, in his judgment, commands the support of the largest single group of such members who are prepared to support one leader'		Consulted in the appointment of the chair and two members of the Electoral Commission. Nominates the deputy chair of the Electoral Commission. Consulted on the appointment of the chief justice and justices of the Supreme Court	Appoints two (of 21) senators

	Appointment of the leader of the opposition	Legislative and scrutiny powers	Appointment powers outside the legislature	Other provisions
Malta (parliamentary system)	The president appoints the leader of the largest opposition party in the House of Representatives as leader of the Opposition.		Consulted in the appointment of the Electoral Commission, the Public Service Commission and the Broadcasting Authority. Nominates one member of the Commission for the Administration of Justice and two members of the Employment Commission	
Pakistan (parliamentary system)	[Not constitutionally specified]		The opposition comprises half the members of parliamentary committees established to review the appointments of the Supreme Court and High Courts (article 175A) and chief election commissioner (article 213)	A caretaker prime minister appointed after consultation with the leader of the opposition (article 224)
Trinidad and Tobago (parliamentary system)	Appointed by the president as 'the member of the House of Representatives who, in his judgment is best able to command the support of the greatest number of members of the House of Representatives who do not support the Government'	Appoints the chair of the Public Accounts Committee	Consulted in the appointment of the chair and members of the Electoral and Boundaries Commission, the ombudsman, the chief justice, members of the Judicial and Legal Services Commission and the auditor-general	Appoints six (of 31) senators

	Appointment of the leader of the opposition	Legislative and scrutiny powers	Appointment powers outside the legislature	Other provisions
Seychelles (presidential system)	Elected by the National Assembly from among opposition members, with only opposition members being allowed to vote	Right to be consulted by the speaker in deciding the parliamentary order of business	Right to appoint two members (alongside two appointed by the president and an independent chair) of the Constitutional Appointments Authority. Right to appoint one member (alongside one appointed by the president and an independent chair) of the Public Service Appeal Board	The salary, allowances, gratuity or pension payable to the Leader of the Opposition shall be not less than those payable to a Minister and shall be a charge on the Consolidated Fund
Zambia (presidential system)	The opposition political party with the largest number of seats in the National Assembly shall elect a leader of the opposition from among the Members of Parliament who are from the opposition.			

Table 8.2. Systems without a recognised leader of the opposition

	Right to appeal to the constitutional court (or equivalent)	Minority inclusion in appointments	Minority inclusion in legislative leadership, committees and procedures	Minority-veto procedures
Tunisia (semi-presidential system)	Bills can be referred to the Constitutional Court by any 30 members of the Assembly of Representatives within seven days after the Assembly's ratification of the draft law (article 120).	Independent constitutional bodies (including the Electoral Commission and the Human Rights Commission) are elected by a qualified majority.	The composition of parliamentary committees and the sharing of responsibilities within the committees is determined by proportional representation (article 59). 'The opposition is an essential component of the Assembly of the Representatives of the People. It shall enjoy the rights that enable it to undertake its parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the Assembly, as well as in its internal and external activities' (article 60).	
Denmark (parliamentary system)			Members of parliament are elected to committees by proportional representation (article 52).	One-third of MPs can demand a referendum on a bill passed by parliament (article 42). One-third of MPs can demand that a bill for expropriating property be delayed until after the next general election (article 73).

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Annex

About the author

Elliot Bulmer is a Lecturer in Politics and International Relations at Dundee University's School of Social Sciences. He holds a PhD from the University of Glasgow and an MA from the University of Edinburgh. He is the editor of International IDEA's Constitution-Building Primer series and specializes in comparative approaches to constitutional and institutional design.

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