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PLURALISM IN  
CONSTITUTIONS  
A RESEARCH REPORT



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## 1. EXECUTIVE SUMMARY

Political pluralism, which allows for the peaceful expression of different interests, beliefs and demands, is an essential feature of a democracy. Constitutional arrangements should guarantee a degree of pluralism. International human rights obligations include many guarantees for pluralism, however they merely define an 'outer limit' or minimum standards which protect pluralism. Within this framework, constitution drafters have numerous design choices, which are consistent with international human rights, but which may be less or more favourable to pluralism.

This report assesses which elements in a constitution typically enhance pluralism and provides numerous comparative examples. The recommendation of this report is, however, not to adopt the most 'pluralism-friendly' constitution. Constitution-makers must consider other objectives than pluralism, such as political stability. A highly pluralistic constitutional set-up could work against stability, for example, if power becomes too dispersed. Instead the study should help constitution-makers to think through which parameters are relevant for pluralism and to make an informed decision on the degree to which they want to promote guarantees for pluralism. A comprehensive view of pluralism in a constitution can also help constitutional negotiations and trade-offs. For example, if constitution-makers disagree about the electoral system, those who fear that small parties will not be represented under a given system may be accommodated if there is a degree of de-centralisation which provides for meaningful representation at the sub-national level as compensation.

The key parameters for pluralism in constitutions assessed in this study include:

- **Electoral systems** have a strong impact on the level of pluralistic political representation. It is widely accepted that by and large the more proportional an electoral system is, the more it favours pluralistic representation, in particular with regards to the representation of women. As far as minority representation is concerned it is difficult to draw general conclusions, as it depends on how minorities are spread in a given country. As far as achieving good geographic representation is concerned, plurality voting systems are generally effective.
- **Bicameralism**, i.e. the existence of a second chamber ('upper house', Senate, etc.), can enhance pluralism. In federal states the second chamber usually represents the federal states or regions and thus provides an additional level of political representation, usually based on geography. Second chambers can also enhance pluralism by providing a more deliberative policy-making process. Second chambers can, however, also undermine political pluralism, if they are controlled by the executive branch of power to restrain the directly elected first chamber.
- **Decentralisation** in principle supports pluralism, by allowing more interests to be expressed effectively in the political process and by giving minority interests more of a voice than in centralised arrangements. Decentralisation is a broad term, however, so its many layers should be examined.
- **The rights of the opposition in parliament are often overlooked** as a specific subject by constitution-makers. However, an effective and visible opposition is a critical factor in providing a pluralistic and accountable political process. The opposition can put forward opinions and ideas which are not represented in the government or the parties of the majorities. Some constitutions provide specific guarantees to the opposition in parliament.
- **Democratic Control of the Security Sector:** Elected civilian institutions must control the security sector, given that it is an essential and sensitive part of the state. An unchecked security sector can quickly undermine pluralism by imposing a particular political viewpoint and by undermining elected institutions. Constitutions need to include effective mechanisms of security sector control. Institutionalisation of administrative policies (for example on recruitment and promotion), whose principles can be enshrined in the constitution, can be useful to shield security services from takeover by one group or stratum of society.
- **Independent and diverse media** is essential to pluralism. Beyond freedom of media provisions, constitutions can provide guidance on preventing media monopolies and provide a firm legal basis for media commissions.

## 2. INTRODUCTION

The Arab rebellions have been directed against closed, authoritarian regimes in which the political-constitutional systems were designed as filters to keep the institutions free from genuine pluralism and political competition. Tunisia's electoral system was skilfully designed to keep opposition parties in a very limited minority position in parliament. Syria's armed forces are controlled by Alawites, who provided a reliable security guarantee to the regime for decades, until the uprising started in 2011. Libya's political arrangements under Ghaddafi ensured that no organised opposition could develop and organise itself.

As pluralism is a key concern for the Arab rebellions and for democracy in general, this report is written to help constitution-makers in the region and beyond to consider the manifold elements of a constitution, which have a bearing on the representation of pluralism. Democratic constitutions should guarantee the institutional representation of pluralism.

In this report, representation of pluralism means that the various facets of a nation are represented, including regional variations, ethnic diversity, language differences, gender balance as well as differing political and ideological beliefs (pluralism of ideas). Representation of pluralism means that political power is distributed in a way that gives the full spectrum of society a credible say in decision-making.<sup>1</sup> Obviously, such representation will never be perfect. It is not possible to design institutions, which guarantee that the complexity of a nation is completely mirrored in its institutions. Even if that was possible, it would not necessarily be desirable.

Some constitutions provide significant positive guarantees for pluralistic representation in the form of power-sharing arrangements, in particular in deeply divided societies. While such arrangements – mostly discussed under the label consociationalism or power-sharing regimes – can be reasonable in specific circumstances, they cannot be considered to be ideal arrangements for pluralism, because they tend to institutionalise divisions at the expense of citizens' freedom to make choices. For example, the Lebanese President must be a Maronite, the Prime Minister a Sunni Muslim and the president of parliament a Shiite. Even if the majority of Lebanese would like to make another choice, the country's constitutional conventions would not allow it.

Therefore this report's perspective is generally not to recommend institutional arrangements that guarantee specific pluralistic outcomes in the way consociationalism does. The report rather looks at a range of constitutional design parameters that provide more space for the complexity of a nation to be represented. 'Providing space' means that pluralism can express itself if voters or communities so choose. Only a few of the options covered in this report would result in a full-blown guarantee, such as gender quota in parliament, but even here our proposition is that

a quota at the level of candidature (such as quota in candidate lists) leaves more space for democratic choice than a quota that reserves seats in parliament to women.

There are a number of human rights protections which have a direct bearing on pluralism, namely freedom of expression, freedom of association and assembly and the right to vote and to take part in public affairs. These obligations under international law are not further explored in this report. Instead, the report focuses on those constitutional design parameters which address the shape of institutions, namely:

- Electoral systems;
- Decentralisation;
- Bicameralism;
- Role of parliament and its relationship to the executive;
- Rights of opposition parties in parliament;
- Civilian control of the armed forces;
- Mechanisms to prevent media concentration.

A special chapter addresses consociationalism/power-sharing regimes as a whole set of power-sharing institutions and another special chapter focuses on the transition in Myanmar, which provides a recent concrete case study of many issues being discussed here.

The report does not argue that a constitution which provides the maximum space for plural representation is the best or the most democratic. Apart from general arguments that are being raised against 'pluralistic' arrangements (see chapter 3 on power-sharing regimes), there are other, competing policy objectives that constitution-makers must consider such as the feasibility of any given constitutional choice (is it too complex? Does it take too long to put into practice? Can it be financed?) or political stability (does it result in too much diffusion of power, slowing decision-making and causing political fragmentation?). These are equally legitimate considerations for constitution-makers. Currently, many analysts in Tunisia wonder if the transitional electoral system designed in 2011 is in fact too pluralistic and has caused fragmentation, which is now slowing down policy-making and constitution-writing.

The report should help in evaluating what constitutions can do to enhance the representation of pluralism. It provides a way to think through the nexus of pluralism and constitutions.

<sup>1</sup> Arend Lijphart, *The Politics of Accommodation* (Berkeley: University of California Press, 1968), p. 3.

## METHODOLOGY

To be practically applicable, the study lays out in general terms the relevance of a constitutional design option to the question of representing pluralism and then quotes provisions from a variety of existing constitutions to illustrate in concrete constitutional wording how an option is described. Within its limited scope, the study does not evaluate constitutional provisions in detail and does not explore practice or interpretation of a given provision by constitutional courts. It is understood that similar provisions can work very differently in different contexts. The study quotes many constitutions, often on the basis of translations.

## 3. POWER-SHARING REGIMES/CONSOCIATIONALISM

Before reviewing the various constitutional parameters, which have a bearing on pluralistic representation, it is necessary to address the fundamental questions raised about constitutionally guaranteed pluralism in the debate on 'power-sharing regimes', also referred to as consociationalism.<sup>2</sup> The theory of consociationalism was developed in the 1960s and 1970s to explain the political stability of divided European nations such as Belgium and the Netherlands<sup>3</sup>. It was subsequently widened to the rest of the world.

In a narrow sense power-sharing regimes include those constitutional arrangements which give various groups a *guaranteed* role in the political decision-making process. This is the case in Belgium, where the linguistic communities have guaranteed representation, in Lebanon, where the various sects have guaranteed political positions by constitutional convention and in Bosnia-Herzegovina, where government at all levels is apportioned to the three main ethnic groups. Such arrangements are typically established in deeply divided societies, in particular in the aftermath of civil wars, in order to create incentives for all sides to agree in a settlement of the conflict. Critics of power-sharing regimes claim that such guarantees of political representation result in deepening and institutionalising divisions by identifying political citizenship primarily by belonging to a group. Often the specific arrangements of power-sharing also mean that electoral incentives favour appeals to group belonging; candidates and political parties that only compete within their own group are more likely to resort to campaigning that emphasises group identity, such as nationalism.

While occasional reference is made to constitutional provisions in power-sharing countries like Belgium, overall the power-sharing model is not used in this study as the main reference point.

Hard guarantees for representation may make sense if the alternative is continuation of war, but from the perspective of the human right to participate freely in public affairs it is not desirable that voters or candidates are boxed into specific group categories, restricting their freedom of choice.

Theories on power-sharing regimes have, however, developed beyond a narrow notion of guaranteed political representation towards a wider notion: "Power-sharing regimes are understood (...) most generally as those states which are characterized by formal institutional rules which give multiple political elites a stake in the decision-making process. (...) These institutional rules are also referred to (...) as 'constitutional arrangements'."<sup>4</sup> Lijphart over time also widened the notion of power-sharing and now contrasts 'consensus democracies' with 'majoritarian democracies' on the basis of a set of criteria, such as executive-legislative relations, plurality vs. proportional elections systems, unitary vs. federal systems and so forth. Many of these criteria are echoed in the parameters reviewed in this study.

While Lijphart tries to prove that consensus democracies generally work better, this study does not take a position on what works better and does not recommend any particular constitutional solution. It appears to be difficult to draw any general lesson that would apply equally to all cases. For example, even two neighbouring countries such as Tunisia and Libya differ to the extent that it is difficult to make comparable recommendations to them. Tunisia is a rather homogenous country with the main political division being along religious/liberal lines. Libya is a far more heterogeneous country with tribal affiliations, ethnic minorities and strong regional identities, where religion is one among many cross-cutting divides. While critics of consociationalism argue that majoritarian elections can be useful to force candidates to appeal to voters beyond a narrow ethnic or other group, thus encouraging centrist positions, in Tunisia a majoritarian electoral system would likely produce a significant majority in seats for one side in the religion/liberal debate; an outcome that could be problematic for the representation of pluralism and would do little to promote centrist positions. In Libya with its numerous divisions, it is more difficult to predict how electoral systems would impact on the overall political context, but as the first elections have already proven, the religious/liberal divide is much less pronounced than it is in Tunisia.

Thus, while this study's parameters echo many of Lijphart's categories, it does not recommend any particular choice. The purpose of reviewing these parameters and the way they are articulated in many constitutions is to provide constitution-makers with concrete examples so that they can assess them in the context of their country and its realities.

<sup>2</sup> For a more detailed overview of the history of consociationalism, its proponents and its critics, see Pippa-Norris, pages 22-31

<sup>3</sup> The leading author on consociationalism is Arend Lijphart, who published his first seminal work on the subject in 1968: *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*.

<sup>4</sup> Pippa-Norris, page 23



## 4. CASE STUDY: GUARANTEES OF PLURALISM IN THE CONSTITUTION OF THE 'REPUBLIC OF THE UNION OF MYANMAR' (2008)

### 4.1 Introduction

Myanmar is a highly diverse country comprising at least 135 different ethnic groups as laid down in the 1982 citizenship law. Ethno-linguists count 116 different spoken languages<sup>5</sup>, but the exact size of all language groups is not known. The CIA Factbook lists 68% Burman, 9% Shan, 7% Karen, 4% Rakhine, 3% Chinese, 2% Indian, 2% Mon, and 5% "other". The population estimates vary from 47 to 62 million, with 55 million people taken as an average. It is further estimated that 68% of the population are Buddhists, 4% are Christians (Baptist, Protestant, Roman-Catholic, and others), 4% are Muslim, and the remainder are Hindus or follow other religions<sup>6</sup>. None of these figures are known for certain as the last national census was conducted in 1983. Population figures have certainly changed since then, not only in terms of natural growth, but also due to the movement of refugees across borders. That the Burman population is shown in the majority should be considered an assumption until new census data is made available in 2014.

The boundaries of the modern nation state as shaped by the British Empire have brought together the Buddhist Burman majority of the central lowlands with the many minorities of the highlands/borderlands. Buddhist and Burman are understood as next to identical in emic terms while Christian, Muslim, Hindu and other communities are represented mainly in national minorities. The Constitution, in its Chapter on Citizen and Fundamental Rights, recognises Christianity, Islam, Hinduism and Animism as religions and speaks about their protection, but "recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union" (VIII.361).

The Constitution of the "Republic of the Union of Myanmar" was adopted in a controversial referendum in 2008, only weeks after cyclone Nargis had devastated the lower parts of the country. It came into force after the general elections of 2010 with the inauguration of a new government under President Thein Sein on 30 March 2011.

### 4.2 Role of the Military

Myanmar's army has a strong role in the governance of the country since General Ne Win took over power in 1962. The 2008 constitution was adopted by the military. It lays out a political framework that retains many features of an authoritarian constitution while introducing democratic-pluralistic elements.

The military's preeminent role is reflected in many articles of

the constitution. It states as a basic principle that the Defence Services are "to be able to participate in the National political leadership role of the State" (Chapter I.6.f). This role is realised among others through a close consultative relationship between the Presidential Office and the Commander-in-Chief in the appointment procedures of governmental officials, the nomination of a quarter of members of the legislatures at national and sub-national level from Defence Services personnel, and strong military powers in a state of emergency. The logic of the constitution is therefore not one of democratic control of the security sector, but rather of an inbuilt role of the security sector in governance. This role is somewhat protected by the 25% representation of the armed services in the legislature and the need to garner a 75% majority in parliament (followed by a referendum) to amend the constitution. Thus, without military support, the constitution cannot be changed. It is possible, however, that military representatives might not act as a homogenous voting bloc.

### 4.3 De-Centralisation

The Constitution establishes a five-tier state structure – at sub-national level, the territory comprises fourteen units (seven Regions and seven States). Below the Region/State level, the country is divided into districts, themselves divided into townships, which are either wards (urban) or village tracts (rural). The capital city Nay Pyi Taw is a category in itself (Union territory) under the direct administration of the President. In addition, the Constitution has established five self-administered zones and one self-administered division in areas most densely populated by recognised ethnic minorities.

The Pyidaungsu Hluttaw (National Assembly) consists of two Houses: The Pyithu Hluttaw (House of Representatives or Lower House) elected "on the basis of township as well as population" with one fourth of members appointed by the military (Article 109) and the Amyotha Hluttaw (House of Nationalities or Upper House), which is elected on the basis of on an equal number of representatives elected from Regions and States. Regions and States enjoy equal status in the Constitution.

The assumption behind the two terms (region and state) is that the seven regions are mainly populated by Burmans, while the states should mainly be populated by name-giving ethnic minorities (Rakhaine, Chin, Kachin, Shan, Mon, Kayah, Kayin) although this is debatable. For example, the Karen (Kayin) are widely dispersed and do not only live in Kayin State. In addition, the Constitution recognises five self-administered zones, one in Sagaing Division (Naga) and four in Shan State (Danu, Pa-O, Pa-Laung, Kokang), and one self-administered division in Shan State (Wa, consisting of two districts). Each region and state has a partly-elected assembly (Hluttaw): "For National races with suitable population, National races representatives are entitled to participate in legislature of Regions or States and Self-Administered Areas concerned" (Chapter I.15). Their Hluttaws have the right to enact laws relevant to their territories.

The national parliament's areas of legislation are laid out in Schedule 1 of the Constitution while Schedule 2 lists the areas (states/regions) of legislation, although the lists are partly overlapping. In the case of contradiction between higher and lower levels of the legislature, the laws enacted by the national parliament prevail over the laws enacted by the Region/State Hluttaw.

<sup>5</sup> [www.ethnologue.com/country/MM](http://www.ethnologue.com/country/MM)

<sup>6</sup> [www.cia.gov/library/publications/the-world-factbook/geos/bm.html](http://www.cia.gov/library/publications/the-world-factbook/geos/bm.html)

taw (Article 198). The Constitutional Tribunal can be called upon to rule on conflicts between the national and state/region levels and their respective rights and duties (Article 322).

While these provisions introduce a significant degree of decentralisation in comparison to the previous constitution, this is limited by a variety of factors, including: 25% of the members of state/region legislatures are appointed by the military; the fiscal basis for state/region revenue is slim (Schedule 5 of the Constitution) and importantly, the executive branch of states and regions is controlled by the president. The Chief Minister, who heads the region/state government is not elected by a region or state parliament, but appointed by the president from among the elected members of the region/state parliament. The state/region parliaments must approve the choice, but they can do so only on narrow grounds (Article 261). The Chief Minister nominates the Ministers of the Region or the Ministers of the State, but the final appointment is made by the President (Article 262).

#### 4.4 Electoral system

Myanmar inherited a first-past-the-post (FPTP) system from British rule. The Constitution does not specify the electoral system explicitly, but through its provisions for the composition of the Hluttaws and provisions on voting (Article 391). Candidates for the legislature are elected in single-member constituencies. The House of Representatives (Pyitthu Hluttaw) consists of 440 members, 330 of whom are directly elected in single member constituencies on the basis of FPTP and 110 seats are reserved for Defence Services personnel. Constituencies follow the boundaries of the country's townships, with few exceptions. Since the population of townships can vary considerably, this results in highly unequal constituencies, in contradiction with the principle of equal suffrage. The Amyotha Hluttaw (House of Nationalities) consists of 224 members, 168 of whom are directly elected (12 per Region/State), and 56 seats are reserved for Defence Services Personnel. Each Region/State is divided in 12 single-member constituencies. Where there are self-administered zones/divisions in the Region or the State, one of the 12 seats is designated to represent each of them.

In terms of pluralism, the main concern of the current electoral system is that it can result in one party entirely dominating the legislature, in particular in the context of a political transition where one party – the National League for Democracy – appears to have significantly more support than any other party. The current electoral system could thus lead to a landslide in seats for the NLD in the 2015 general elections. This is suggested by the results of the 2012 by-elections where the NLD won 2,686,633 votes (66%), while the Union Solidarity and Development Party (USDP) – the establishment's party – gained 1,122,280 votes (27%). The use of FPTP resulted in the allocation of 43 seats to the NLD, 1 to the USDP, and 1 to an ethnic party<sup>7</sup>. The electoral system is thus likely to make it difficult to generate a pluralistic parliament in the transitional context of Myanmar, even if voting results may be varied.

#### 4.5 Conclusion

The case study of selected aspects of Myanmar's constitution shows that the text includes a number of guarantees for pluralism, such as a bi-cameral national assembly and legislatures at the sub-national level. At the same time, the constitution is explicit in maintaining a significant role for the military across the civil institutions and in emergency provisions. There is no system of democratic control of the security sector, instead the constitution reserves a significant role in governing to the military. The elements of decentralisation are limited in particular by the fact that the executive branch of the sub-national units (states and regions) are controlled by the President of the country. The electoral system, based on a plurality system, may result in dominance in parliament of one party well beyond its lead in the popular vote; this has been demonstrated already in the 1990 and 2010 elections and the 2012 by-elections. These arrangements make the expression of pluralism in the political institutions difficult. The current initiative by the national parliament to discuss constitutional reforms may provide an opportunity to include more guarantees for pluralism in the constitution.

## 5. ELECTORAL SYSTEM

Numerous electoral systems are used around the world. They can be classified in three main categories: plurality systems (sometimes called majoritarian as well), proportional systems, and hybrid systems, which combine elements of the former two.<sup>8</sup>

Under plurality systems, the candidate with the most votes in a constituency wins a seat<sup>9</sup>. The most wide-spread variations of this system include First-Past the Post (FPTP), in which the candidate with a relative majority wins a seat; and two-round systems, whereby a candidate only wins in the first round with an absolute majority of votes, or else the two highest-winning candidates compete in a second round<sup>10</sup>. The seat allocation resulting from majoritarian elections are often not proportional to the voting results. The system usually favours the strongest parties. In the United Kingdom, which has FPTP, a two-party structure has emerged. A third party, the Liberal-Democrats has significant electoral support, but because of the electoral system its percentage of seats in parliament is consistently lower than its percentage of votes. Occasionally, FPTP can result in a party winning a majority of seats even when another party wins more votes<sup>11</sup>.

<sup>8</sup> For a detailed overview of electoral system design questions, see IDEA, *Electoral System Design – The New International IDEA Handbook* (2005), and the Office for Promotion of Parliamentary Democracy <[www.europarl.europa.eu/aboutparliament/en/008407cea1/Office-for-Promotion-of-Parliamentary-Democracy.html](http://www.europarl.europa.eu/aboutparliament/en/008407cea1/Office-for-Promotion-of-Parliamentary-Democracy.html)>

<sup>9</sup> Sometimes the principle is also applied to several candidates ('block vote').

<sup>10</sup> As a variation, France admits the three highest scoring candidates compete in the second round.

<sup>11</sup> In the UK general elections of 1951 Labour won almost 49% of the votes but only 295 seats against the Conservatives who won 302 seats with 44% of the vote. In the UK's 1974 general elections the Conservatives won more votes, but fewer seats than Labour.

<sup>7</sup> Data are from Richard Horsey, *Shifting to a Proportional Representation Electoral System in Myanmar?*, Conflict Prevention and Peace Forum, 31 January 2013.

In contrast to plurality systems, proportional electoral systems generally seek to ensure that the distribution of seats in parliament resembles the distribution of votes more closely. Put simply: a party that won 10% of the votes should have around 10% of the seats. There are a few countries which have a “perfect” proportional system with members of parliament elected from nationwide lists (Netherlands and Israel).<sup>12</sup> However, most proportional systems do not lead to “quasi-perfect” proportionality for various reasons. For example, they may have several electoral districts<sup>13</sup> or they may have a threshold of representation. In Germany, for instance, parties are only eligible for parliamentary representation if they have gained 5% or more of the votes, while Turkey requires a party to gain 10 % of the votes to enter parliament<sup>14</sup>.

Electoral systems are designed with many objectives in mind, amongst them guaranteeing pluralism by ensuring representation of different groups and views in parliaments. Other legitimate objectives include forming stable governments and opposition blocks and ensuring that MPs have a close relationship with their constituencies. The latter objectives are typically used by proponents of plurality systems. The ‘bonus’ for stronger parties which is inherent in plurality systems often leads to a stable political party landscape with few parties, while proportional systems carry a greater risk of resulting in fragmented parliaments which necessitate unstable coalition arrangements.

Importantly, the political, social and cultural realities in a given country can create unexpected outcomes of electoral system design choices. For example, in Morocco the lower house of parliament is mostly elected on the basis of proportional representation, however, the electoral districts are very small (2-5 seats per district). In theory, only major parties have a chance to win seats in such small districts. In practice, Morocco’s parliament is quite fragmented with nine parties represented. The main reason is that in Morocco local notables play a strong political role. As they are confident that they can win in their constituencies, they usually join whichever party suits them best in a given election, including smaller parties<sup>15</sup>.

Nevertheless, from the perspective of pluralism, proportional systems are usually more likely to enhance pluralistic representation than plurality systems, which is explained further in the following sub-chapters. However, this chapter should not be understood as promoting proportional electoral systems. Rather, it should serve to help those looking at constitutional provisions from the point of view of pluralism to understand which choices

are more likely to support this particular policy objective. Elements of election systems with particular relevance for pluralism include:

- Representation of political parties: which election system promotes representation of a diversity of parties?
- Representation of women and minorities: which election system promotes representation of women and minorities?
- Political Transitions: which election system promotes pluralism best in a transitional period, when pluralism is fragile?

Many constitutions do not stipulate an electoral system and some indicate the system to be used only in general terms, such as the Swiss Constitution: “The House of Representatives is composed of 200 representatives of the People. (2) The representatives are elected directly by the People according to the system of proportional representation (...)” (Article 149). The South African Constitution states that elections in parliament should result “in general in proportionality,” (article 46.1d) limiting electoral system options to PR-systems. Pakistan’s Constitution (article 51.6a) foresees a plurality system: “For the purpose of election to the National Assembly, (a) the constituencies for the general seats shall be single member territorial consistencies and the members to fill such seats shall be elected by direct and free vote in accordance with law”.

More often, however, the details of the electoral system are found in the election legislation, which can be usually changed by a parliamentary majority.

## 5.1 Pluralistic Representation

Pluralistic representation through elections has several layers. A legislature should ideally represent political-programmatic, geographical, ethnic, religious and gender diversity in a country. In short, it should be a ‘mirror of the nation’<sup>16</sup>, but no electoral system can come close to fulfilling this ideal. Not only are other objectives relevant in electoral system design (as mentioned above), these layers of representation can compete with each other. A fully-proportional electoral system in which the whole country is one district would be likely to result in a rather accurate representation of political-programmatic diversity, but it could easily undermine geographic representation if most candidates came from the capital or major cities. An electoral system with many electoral districts based on regions or provinces is likely to enhance geographic representation, but it makes it more difficult for smaller parties to win seats, thereby reducing the representation of political-programmatic diversity.

Designers of electoral systems therefore must consider which policy objectives are most important before making their choice. It is no coincidence that fully proportional systems with a single electoral district are found in relatively small countries (such as the Netherlands and Israel) where geographical representation is less of an issue.

<sup>12</sup> This “perfection” is achieved through the use of these nationwide lists and low electoral thresholds, 2% in Israel, and at least 0.67% of the nationwide vote in the Netherlands.

<sup>13</sup> The more electoral districts there are the less proportional a system becomes, because fewer seats per district usually require higher vote percentages to win a seat. A different but related problem is the equality of the vote: Where the population or the electorate of an electoral district varies significantly from other districts, the votes have unequal weight. According to international law, votes should have an equal weight.

<sup>14</sup> Data for thresholds retrieved at the PARLINE Database on National Parliaments, compiled by the Inter-Parliamentary Union: <http://www.ipu.org/parline-e/parlinesearch.asp>

<sup>15</sup> For more, see Democracy Reporting International, “Limited Assessment of the 7 September Elections to the House of Representatives Morocco 2007” (in French and Arabic), at [www.democracy-reporting.org/programmes/middle-east-and-north-africa/morocco.html](http://www.democracy-reporting.org/programmes/middle-east-and-north-africa/morocco.html)

It is clear, however, that most proportional electoral systems are more likely to enhance pluralistic representation than plurality systems. Plurality systems tend to do well in terms of geographical representation, in particular where they are based on single member constituencies (one seat per constituency). Indeed, the close link of MPs to their constituency is considered one of the main benefits of plurality systems. This benefit comes, however, at a high price in terms of representation of political-programmatic, ethnic, religious and gender diversity, as will be illustrated in the following sections.

## 5.2 Representation of Independent Candidates

Independent candidates can be an important element of pluralism. They may challenge the views of mainstream parties and in many cases are not subjected to intra-party discipline, giving them more autonomy. Electoral system arrangements should provide for the possibility of independent candidature. The UN Human Rights Committee, in its authoritative interpretation of article 25 ICCPR, notes that: “The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.”<sup>17</sup>

It is sometimes argued that it is not possible to provide the right for independent candidature in party-list based electoral systems. However, in these cases it is possible to allow independents to set up ‘lists of independent candidates’. Given that the right to stand in elections is a human right, it is useful for constitutions to be specific on the issue of independent candidatures.

## 5.3 Representation of Women

Representation of women naturally enhances pluralism. It is generally accepted that proportional representation is more conducive to the participation of women in the political process. In plurality systems, political parties tend to look for the most widely-acceptable candidate in a given constituency, which unfortunately is most often perceived to be not a woman. The statistics on the correlation between electoral systems and women representation speak a clear language in favour of proportional systems<sup>18</sup>.

In proportional systems, where several seats are distributed in an electoral district, it is more likely that parties will add women to their candidate list. List-based systems also make it possible to oblige political parties to nominate a certain percentage of women to their candidate list(s). Some electoral systems include a requirement to have alternating male/female candidates (‘zipper system’) on parties’ candidate lists, or to have a percentage of women on lists.

Such provisions related to candidature are less direct than reserved seats for women in parliament. Quota requirements in candidate lists still leave some freedom for voters while reserved

seats for women restrict choice significantly. Reserved seats for women more often exist in plurality electoral systems and they are often enshrined in constitutions. In Uganda, for example, the constitution (article 78.1b) states that parliament should include “one woman representative for every district.” The Tanzanian Constitution (article 66.1b) also reserves seats for women, stipulating that “women members” must not be “less than thirty percentum of all the members” of parliament. The 2010 Constitution of Kenya states that the National Assembly should include: “forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency” (Article 97.1b).

In Pakistan’s Constitution (article 51) parliamentary seats are reserved for two minority groups, women and non-Muslims, with these seats allocated to political parties proportionally in the basis of election results in each province. The constitution also establishes that four women and four non-Muslims be elected to serve in the Senate (article 59). While this system of reserved seats provides for more women in elected institutions, it is argued by some that it creates ‘second-class’ mandates. Without having been directly elected in constituencies or on lists, women on reserved seats may not be seen as having a genuine popular mandate, and are dependent on the will of their party. There has therefore been call for review of the electoral system with a view to strengthening meaningful representation.

## 5.4 Representation of Minorities

Minority representation in parliament is an important element of pluralism. Minority quotas are commonly used mechanisms to increase minority representation. They exist in a number of constitutions, such as Belgium’s, where representation in both houses is based on linguistic groups (article 43). In Nepal the constitution obliges political parties to “ensure proportional representation of women, Dalit, oppressed tribes/indigenous tribes, backwards, Madhesi and other groups, in accordance as provided for in the law” (article 63.4d)<sup>19</sup>. The constitution thus attempts to integrate pluralism at the party level.

There are other mechanisms, which also affect minority representation. They include low electoral thresholds in proportional systems, which allow small, minority parties and candidates a better chance at gaining representation in parliament. Large district magnitudes (many seats per district) can also encourage political parties to put forth a balanced ticket, because they may include minorities in their platforms to gain more votes.<sup>20</sup> While these mechanisms are likely to produce more pluralistic outcomes in a PR system, it is important to keep in mind that the representation of minorities is a more complex matter than women’s representation. While men and women are usually evenly spread across the population, minorities are distributed across a country in different ways. Where minorities are spread evenly, they can benefit from pure proportional systems (one electoral district), but geographically concentrated minorities may benefit

17 General Comment 25 (1996), point 17

18 See Pippa Norris, “The Impact of Electoral Reform on Women’s Representation,” *Acta Politica* (2006) 41: 197–213, and Reynolds, et al., *Electoral System Design: The New International IDEA Handbook*, International IDEA, Stockholm (2005): 61.

19 The term ‘backwards’ is clarified in other articles of the constitution as meaning socially and economically backward classes.

20 IDEA, *Electoral System Design*, p. 122

more from FPTP. Therefore, it is difficult to derive general lessons.

Another factor for pluralism, typically found in power-sharing regimes/consociationalism can be requirements for cross-community representation in the executive to prevent the dominance of one group in the executive, such as article 99 of the Belgian constitution, which requires that the Council of Ministers be composed of an equal number of Dutch- and French-speaking members.

Some constitutions also require that the President has a degree of pluralistic support to be elected. Indonesia's Constitution stipulates that a candidate can only be elected president if he/she polls "a vote of more than fifty percent of the total number of votes during the general election and in addition polls at least twenty percent of the votes in more than half of the total number of provinces" (article 6A).<sup>21</sup> Kenya's Constitution (article 138.4a-b) stipulates that a candidate is elected as president if he/she receives (a) "more than half of all the votes cast in the election; and (b) at least twenty-five percent of the votes cast in each of more than half of the counties."

### 5.5 Electoral Systems and Political Transitions

An important aspect of a transition to democracy is to ensure that the electoral system does not stifle or hinder the political energies and initiatives, which typically emerge in such a situation. For this reason, plurality systems are often ill-suited, because smaller, new parties may not gain any representation

After the fall of the Ben-Ali regime in January 2011, many influential Tunisians advocated for a plurality system (FPTP) in parliamentary elections. The transitional authority then suggested a PR system with small electoral districts of a maximum four seats. However, it quickly became clear that the necessary districting exercise would be too time-consuming to allow for fast elections. Eventually, it was agreed to have a PR system with small to medium-sized districts (4-10 seats per district) largely based on the existing boundaries of governorates. This was a feasible option in the given timeframe and it also ensured that newly emerging parties, which may not yet have established significant electoral support, would have a chance of representation.

More than anything, the PR system produces proportionality and diverse representation, which are essential to a democracy in transition. It promotes pluralism by encouraging all parties, even small ones, to participate in the electoral process. The principle of proportionality provides a better chance for minority representation in the legislature, creating an environment of inclusion.

Obviously there are many additional factors, which play a role in pluralistic representation in parliament. For example, the way political parties are structured and managed has an impact on how pluralism is expressed in parliament, the electoral system notwithstanding.

## 6. DECENTRALISATION

Decentralisation disperses governmental authority from the central government, empowering sub-national authorities to implement national decisions or to determine policies in their own right<sup>22</sup>. Decentralisation is a territorial concept, which allocates powers to various geographically defined areas at national, regional or local levels. Depending on the definition, decentralisation can also include the transfer of powers from a nation state to an international organisation. This chapter focuses on the internal dimension, as this is – in contrast to the international dimension – largely part of a constitution.

Decentralisation involves a degree of autonomy of subunits and decision-making shared between the central government and regional subunits. In decentralised systems, subunits regulate and/or administer specific policy fields autonomously. Shared decision-making entails that sub-national entities are involved in national decision-making, often through a second chamber in the national legislature.<sup>23</sup> Very often, decentralised countries combine autonomy and shared decision-making.

Almost all states have a degree of decentralisation. With the exception of the Vatican State or other micro-states, there is no purely centralised government; once the central government creates substructures or shifts any powers or resources to existing substructures, a form of decentralisation occurs.<sup>24</sup> Although some degree of decentralisation exists in almost all states, the scale of decentralisation varies considerably. Depending on the degree of decentralisation countries are termed federal, unitary, or hybrid systems. Federal constitutions usually establish a central government and sub-national authorities, with both levels having some degree of autonomy. A purely *unitary* constitution has only a national governmental authority with no autonomous sub-national authorities (except local government). A *hybrid* model is where the national government in principal enjoys full authority, but some authority is guaranteed constitutionally for sub-national units as well.

In principle, decentralisation can be an effective method for promoting political pluralism:

- Decentralisation involves regional subunits in the decision-making and thereby creates alternative sources of governing authority. Decentralisation empowers more political actors to become involved in decision-making, thereby promoting – in principle – policy competition, policy experimentation, and policy innovation and pluralism<sup>25</sup>.

<sup>22</sup> This definition of decentralisation, and many of the themes covered in this paper, follows from the "Decentralised Forms of Government," in *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance (IDEA), December 2011.

<sup>23</sup> IDEA, *Practical Guide to Constitution Building*, p. 4

<sup>24</sup> IDEA, *Practical Guide to Constitution Building*, p. 5

<sup>25</sup> IDEA, *Practical Guide to Constitution Building*, p. 10

<sup>21</sup> Does not apply in the second round if there no ticket of candidates that achieves this.

- Commonly, decentralisation entails better representation and participation of minorities. For example, decentralisation can help safeguard against authoritarianism by diffusing executive decision-making, preventing an autocrat from consolidating power.<sup>26</sup>

Mechanisms of decentralisation are often categorized into political, administrative, and fiscal decentralisation and include in broad terms, among others:

#### Political decentralisation:

- **Allocation responsibilities and functions:** Which policy field and which functions are allocated to regional subunits? Should regional subunits regulate, for example, police, education or natural resources?
- **Regional and local government:** Is the regional government appointed by the national government or elected? Does the national government or other national entities have the power to dismiss regional entities?
- **Regional legislation and legislator:** Do subunits exercise legislative powers or not. If yes, to what extent? Does the national level have the power to dissolve regional parliaments?
- **Shared legislation:** To what degree may national legislation regulate details in the framework of laws? In case of conflict between national and regional legislation, which laws prevail – national or regional?

#### Administrative decentralisation:

- Does the regional or local government have narrow or wide discretion to implement laws?
- Does the central government have the mandate to supervise subunits? If yes, can the central government interfere in daily operations, such as granting a building permit, or does the supervision only include general political decisions?

#### Fiscal decentralisation:

- Can the regional subunit raise taxes? If yes, to what extent? Does raising taxation require central government approval or consultation?
- Is the local government solely responsible for expenditure?

## 6.1 Decentralisation and Pluralism: Specific Issues

### 6.1.1 Regional and local government: appointment, election, dismissal

There are many different methods of appointing or electing regional or local governments. In some countries, the executives of regional or local governments are directly elected by the people; in other countries, elected parliaments elect and dismiss the head of government or the entire government, including ministers. Other countries allow national governments or other national entities to appoint and/or dismiss regional or local governments. There are numerous variations of electing, appointing, and dismissing regional and local governments.

These variations often differ according to the level of decentralisation in a specific country. In many federations, the rights of regional or local governance are left to subunits. In the United States, for example, the rights of local governance are not found in the federal constitution. However, because this power is not granted to the federal government, nor prohibited to states, this right – along with others – is reserved for the states under a constitutional amendment (Tenth Amendment of the U.S. Constitution). In absence of federal competency, many state constitutions establish and regulate local government in the form of counties and municipalities<sup>27</sup>; these governments are directly elected and serve out specific terms according to regional legislature.

Similarly, the Constitution of Switzerland notes that “the Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation.” (article 3)

In Germany, another federal system, local as well as ‘regional’ (Länder) government is recognised in the constitution. Article 28 requires that each Land has a constitutional order which is in line with the principles of the “republican, democratic, social, rule-of-law state in the sense of the constitution”. The “autonomy of municipalities” (sub-regional units) is also guaranteed. The federal states (Länder) and the municipalities must be represented by a body that is directly elected by the people. The federal government ensures that the constitutional order of the sub-national units respects human rights and the provisions of Article 28 (para. 3). However, the national government has no legal power to dismiss regional or local governments. This right, if it exists, is left to the subunits, which themselves have varying constitutional provisions regulating the composition, election, and function of local governments. The German case shows how minorities can gain representation in a de-centralised system. The Danish minority in Northern Germany is too small to win seats at the national level, but being concentrated in the state of Schleswig-Holstein it enjoys privileges in the electoral law<sup>28</sup> which usually result in the representation of a Danish party in that state’s parliament.

<sup>27</sup> The U.S. Supreme Court, ruling in *Hunter v. Pittsburgh*, 207 US 161 (1907), called local government “convenient agencies” of the state, whose powers rest in the “absolute discretion of the State,” which “at its pleasure may modify or withdraw all such powers.”

<sup>28</sup> While the electoral law requires that parties must have a minimum of 5% of votes to be represented in parliament, the threshold does not apply to the party of the Danish minority.

<sup>26</sup> Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (Cambridge, U.K.: Cambridge University Press, 2008), pp. 160–2.

A number of Muslim majority democracies have similar provisions. The Constitution of Indonesia notes:

“(1) The Unitary State of the Republic of Indonesia is divided into provinces and those provinces are divided into regencies (*kabupaten*) and municipalities (*kota*), each of which has regional authorities which are regulated by law. (2) The regional authorities of the provinces, regencies and municipalities shall administer and manage their own affairs according to the principles of regional autonomy and the duty of assistance (*tugas pembantuan*). (3) The authorities of provinces, regencies and municipalities include for each a Regional People’s House of Representatives (DPRD) whose members shall be elected through general elections. (4) Governors, Regents (*bupati*) and Mayors (*walikota*), respectively as heads of regional government of the provinces, regencies and municipalities, must be elected democratically. (5) The regional authorities exercise wide-ranging autonomy, except in matters specified by law to be the affairs of the central government...” (article 18).

In Albania’s Constitution (article 108.1-2), the representatives of municipalities or communes, and their executive body (the Chairmen) are directly elected. Regional Councils represent regions (article 110.3); chairmen of municipalities or communes are members of the regional council by virtue of their office. Other members are indirectly elected. According to article 115, any “directly elected organ of a local government unit may be dissolved or discharged by the Council of Ministers for serious violations of the Constitution or the laws.” Under the same provision, this organ can make a complaint with the Constitutional Court for review, and the decision will be suspended until the review is complete.

In other countries, the central government has the power to appoint and dismiss governors. Examples include Pakistan, Ghana, Belarus and Russia (between 2005–2012). In Belarus, the “heads of local executive and administrative bodies shall be appointed and dismissed by the President of the Republic of Belarus or under the procedure determined by him” (article 119). In Ghana, while the constitution calls for a system of local governance and decentralisation (article 240.1), the president has the power to appoint and dismiss members of the District Assemblies (articles 242d, 249), the District Executive (article 243.1), and the Common Fund Administrator (article 252.4). Between 2005 and 2012, the President of Russia had the sole power to appoint regional governors, which were previously selected through direct election<sup>29</sup>. The president also had the power to dismiss mayors (amendments to article 74 of Law 131-FZ).

### 6.1.2 Regional legislation and legislator

In many countries, regional subunits have the power to pass legislation. The subject matter of regional legislation is usually defined in the constitution, often through a catalogue of mat-

ters that fall under national legislation and those which are left to subunits. It is also common practice that national legislators adopt framework laws which are filled in via regional laws. Other constitutions use more flexible mechanisms to determine legislative powers. Residual clauses are another mechanism to define the competencies to legislate; residual clauses are in fact a default clause, which defines legislative powers in cases of uncertainty. Many constitutions contain provisions to determine whether national or regional laws prevail in case of conflict. There are, naturally, many variations and combinations of the various mechanisms to determine the relationship between national and regional legislation.

Germany is an example that combines many of these mechanisms. Article 70 of the German Constitution stipulates that the *Länder* have in principle the right to legislate “insofar as the Constitution does not confer legislative power on the Federation.” According to the articles 71–74, the federal level has legislative powers either *exclusively*, where the *Länder* are principally not allowed to legislate, or *concurrently*, where the *Länder* only have the power to legislate to the extent that the federation has not exercised its legislative power and where national legislation is necessary for the “establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity.”<sup>30</sup> Articles 73 and 74 contain detailed and extensive lists of subject matters that fall either into the exclusive or concurrent legislative competencies of the federal level. Article 72.3 grants the *Länder* the right to deviate from federal laws in narrowly defined areas of concurrent legislation.

The Constitution of Pakistan (article 141) grants Provincial Assemblies the right to pass legislation for their provinces. Article 143 goes on to determine the subject matter of this legislation. It grants the national parliament the right to legislate in matters on the Federal Legislative List, while provincial assemblies have the right to legislate on anything that is not included in the Federal Legislative List (residual powers).

### 6.1.3 Fiscal autonomy

Fiscal autonomy includes the right to raise taxes, to spend public funds, and to sign loans. A level of fiscal autonomy is usually required for a degree of decentralisation if subunits are to properly carry out their tasks. Extensive decentralisation becomes effectively meaningless if it is not accompanied by a degree of fiscal autonomy. Over-dominant fiscal rights at the national level can be a tool to undermine decentralisation and pluralism. There are many different ways to ensure fiscal autonomy, including the constitutional right of regional governments to raise taxes or to have significant spending discretion.

In the German Constitution (article 106), some types of tax revenue are allocated to the federal government (for example cus-

30 Article 72: “[Concurrent legislative powers] (1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. (2) The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

29 The constitutionality of Law 159-FZ was contested, but not enough votes were gathered for a review by the Constitutional Court. For a brief overview of the constitutionality of this law, see J. Paul Goode, “The Puzzle of Putin’s Gubernatorial Appointments,” *Europe-Asia Studies*, Vol. 59, No. 3 (May, 2007), p. 369

toms duties), others are allocated to the *Länder* - (such as corporate taxes) while some are shared by the two levels (for example income tax, VAT) and some are reserved for the municipalities (such as the land tax). Most countries, either in statutory law or in constitutional provisions (Germany, Switzerland, Austria, France, Italy, Poland, etc.), allow local authorities to levy taxes, set rates, and sometimes collect revenues.

Albania's Constitution (article 113) grants local government generous discretion in the administration of income and economic activity, "including the right to establish local taxes as well as their level." Egypt's 2012 constitution stipulates that "local units support their operations with original and supplementary taxes and fees that are of local nature"; the law regulates details (article 185).

The Swiss constitution states that the Confederation (the national level) "shall leave the Cantons sufficient tasks of their own and respect their organisational autonomy. It shall leave the Cantons with sufficient sources of finance and contribute towards ensuring that they have the financial resources required to fulfil their tasks." (article 47).

#### 6.1.4 Judicial safeguards

Another important consideration in designing a decentralised system is determining how to resolve conflicts that sub-national governments have with the national government or between each other. In almost all federal constitutions, the national legislation takes precedence over sub-national legislation.

The Constitution of South Africa distinguishes between different types of law in determining superiority; it gives the Supreme Court and the (indirectly elected) upper chamber the responsibility of determining whether particular legislation is the domain of provinces or Parliament. The Supreme Court of the United States has original jurisdiction over any disputes between one or more states. In Switzerland, the Federal Supreme Court resolves disputes between the Cantons and the national government, violations of Cantonal constitutional rights, and the autonomy of "communes and other Cantonal guarantees" (article 189.1-2).

In the German Constitution "municipalities or municipal associations" can file complaints with the federal Constitutional Court "on the ground that their right to self-government under Article 28 has been infringed by a law" (article 93.1.4b). There are also a number of other countries in which municipalities can apply directly or jointly to constitutional courts. They include Austria (article 137), Spain (article 161), and the Czech Republic (article 87), among others.

#### 6.2 Conclusions

Decentralisation is often used to accommodate plural societies. Decentralised systems can empower sub-national political communities, which can be coterminous with social groups such as ethnic or linguistic minorities. Devolving decision-making in this way can promote pluralism. Decentralisation provides multiple, more local points of access into the decision-making process for citizens, encouraging public participation and pluralism. The degree and shape of decentralisation is determined by factors such

as the appointment, election and dismissal of local and regional government, regional legislation, fiscal autonomy and effective judicial safeguards. Constitutional provisions can play a critical role. The benefits of decentralisation must be weighed against the potential costs, which include the dispersal of public authority, which can make policy coordination more difficult and create political enclaves<sup>31</sup>.

## 7. THE ROLE OF THE LEGISLATURE AND ITS RELATION TO THE EXECUTIVE BRANCH

Legislatures are the most pluralistic branch of government, representing different political currents, interests and ideologies. While the degree of pluralism represented in parliament depends on many factors, including the electoral system, by nature of being a body composed of a significant number of elected representatives, parliament can best represent the diversity of a nation. Legislatures play a different role in different systems of government (parliamentary, presidential or semi-presidential systems) but whatever the system of government may be, from a point of view of pluralism, as from a broader democracy perspective, it is essential that parliaments play a significant role in their core functions of legislating, holding the government accountable and representation.

By virtue of their pluralistic composition, legislatures can reflect a multitude of perspectives in their work. To do so, however, the constitutional framework must be conducive to a strong role for parliament.<sup>32</sup> Constitutional provisions can safeguard the central role of a pluralistic, parliamentary process at two levels: First by creating an overall institutional framework in which parliamentary prerogatives are protected and second by including guarantees aimed at the law-making and consultation process within parliament. While the first is the classical domain of constitutions, in the second area constitutions tend to be less articulate.

### 7.1 Parliament's Role in the Constitutional System of Power

#### 7.1.1 General principles

While most constitutions list the rights and powers of the legislature, some constitutions highlight in general language the principle role of the legislature. The South African constitution notes: "The National Assembly is elected by the people to represent the people and to ensure government by the people under the constitution. It does so by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by overseeing and scrutinizing executive action." (Article 43 III)

31 Dennis C. Mueller, "Federalism: A Constitutional Perspective," in *Democratic Constitutional Design and Public Policy* (Cambridge, Mass.: MIT Press), p. 212.

32 The word parliament and legislature are used interchangeably in this report.



The Polish constitution notes in article 95:

“1. Legislative power in the Republic of Poland shall be exercised by the Sejm and the Senate. The Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.”

The US constitution's first article states unambiguously that “all legislative powers herein granted shall be vested with a Congress (...)”.

## 7.1.2 Law-making

The law-making of parliament is essential to ensure that the pluralism of parliament's composition comes to bear on the elaboration and consultation of laws. The most sensitive aspect in this regard is a competing law-making role of the executive through decrees.

It is important to distinguish whether the right to legislate by decree stems from an empowering act of parliament or whether the constitution entitles the executive to legislate by decree. If parliament grants the executive the power to legislate by decree, the duration and scope of these powers become critical. If the executive has a constitutional right to legislate by decree, the potential impact depends on whether the constitution circumscribes the executive mandate in vague or narrow terms. Vague terminology can serve as a *carte blanche* which can be used to sideline parliament and its opposing views and interests, at the expense of pluralism. Commonly, constitutions allow legislating by decree only in exceptional circumstances, such as state of emergency<sup>33</sup> or periods when the legislature is not in session. However, vaguely drafted provisions potentially open the door to an extensive form of legislative power by the executive and is prone to misuse, as can be seen for example in Egypt, Armenia, Belarus and Russia.

In Russia, the president may adopt decrees. While decrees should not contravene the constitution and federal laws, there are no further restriction or specifications (article 90). The constitution of Armenia includes a similar provision (article 56). The constitution of Belarus allows the President to adopt edicts and executive orders, which are binding as well as decrees in instances which are provided by the constitution (article 85). It has been argued that the weak democratisation in Armenia and authoritarianism in Belarus can be traced back to the respective presidents using these excessive decree powers and overruling parliament.<sup>34</sup>

In another example, Venezuela, President Chavez had a long history of using legislative power, much of it granted by parliament.<sup>35</sup> These “enabling laws”, while temporary, often included vague language that gives the president broad mandates. In the Venezu-

elan example, in December 2010, the president was granted powers (for the fourth time) to legislate by decree for 18 months. This law was ostensibly adopted in order to aid the presidency in addressing the consequences of storms and floods, which occurred at the end of 2010. However, the law also allowed the president to legislate on issues unrelated to the floods such as “international cooperation” and modification of “rules regarding media content and controls.”<sup>36</sup>

## 7.1.3 Dissolution of parliament

Various constitutions grant **the executive** the power to dissolve parliament. In some cases, these powers are broad and unrestricted, for example in Jordan and Kuwait, both are monarchies where the King/Amir have regularly dissolved parliament. The executive power to dissolve parliament on a discretionary basis exists sometimes in semi-presidential systems, such as Portugal and France, where it has very rarely been used.

Other constitutions also grant this right, but restrict the scope of the executive power for a specific time, require repeated (unsuccessful) votes of no confidence in the government, or the refusal to adopt legislation. For example, in Turkey, the president may call for new elections in the Grand National Assembly only when the Council of Ministers fails to receive a vote of confidence, is compelled to resign by no confidence, and if a new Council of Ministers cannot be formed within forty-five days (article 116). In Germany, according to article 65, the President may dissolve the *Bundestag* if a motion by the federal chancellor for a vote of confidence is not supported by the majority of parliamentarians. The right of dissolution lapses as soon as the *Bundestag* elects another federal chancellor by a majority vote.

In Latvia, the president faces a different sort of restriction. While the president may submit a proposal to dissolve the *Saeima* (article 48), this is done so at the peril of the president's own term. Should the initiative fail in a national referendum, the president is removed from office and parliament elects a replacement to serve out the term (article 50).

In contrast to dissolution by the president, many constitutions grant parliament the right to **dissolve itself**. Some constitutions allow self-dissolution by simple majority at any time during the term. In view of the instability of Germany's Weimar constitutional arrangements with frequent dissolutions of parliament, in the post-World War II constitution, parliament cannot dissolve itself. Only if a chancellor calls and loses a vote of confidence can the President dissolve the parliament (article 68).

The power of dissolving parliament is a critical element in the balance of power. Executive powers to dissolve parliament can undermine the role of parliament, in particular in cases where the executive has no democratic legitimation as is the case in monarchies.

In France, a semi-presidential system of government, the president can also have parliament reconsider a law (article 10). Rus-

33 This is the case in France, where a state of emergency allows the president to rule by decree for thirty days, after which the matter may be referred to the Constitutional Council (article 16).

34 Robert Elgie, “Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies,” in *Taiwan Journal of Democracy*, Vol 3.2: p. 69.

35 Between 1999-2007 the President obtained legislative powers three times, allowing rule by decree for at least six months and up to 18. See, Inter-American Commission on Human Rights, “Democracy and Human Rights in Venezuela,” paras. 325-26.

36 Human Rights Watch, “Tightening the Grip: Concentration and Abuse of Power in Chavez's Venezuela,” July 2012: p. 23.

sia grants the executive broader powers in the legislative process. The President of Russia, for example, has the power to initiate, sign (article 84), and veto legislation (article 107); and the right to suspend laws and acts of “executive government bodies of constituent entities” of the country should they conflict with the constitution or violate human and civil rights (article 85.2). These extensive powers in the legislative process have led some scholars to refer to the Russian system as “superpresidentialism”.<sup>37</sup>

## 7.2 Constitutional Safeguards for a Pluralistic Parliamentary Process

Beyond the question of the relation of parliament to other branches of power, constitutions also include protections to ensure that the parliamentary process can effectively express political pluralism. Such guarantees are related to the rights of the opposition (see below). Others relate to the general conditions of parliamentary work including:

### 7.2.1 Autonomy

Legislatures should be autonomous in setting their own rules, agendas and timetables. A directly elected institution, parliament should not rely on other branches of power to determine its own affairs. The South African constitution provides: “The National Assembly may a.) determine and control its internal arrangements, proceedings and procedures. b.) make rules and orders concerning its own business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.” (article 57.1) It is noteworthy that the South African constitution includes principles that should guide the elaboration of the internal rules. In contrast, the Jordanian constitution gives the King significant privileges in summoning and adjourning parliament’s session (articles 78 and 81 constitution). These are inconsistent with the concept of an autonomous legislature.

### 7.2.2 Transparency

Legislatures should work transparently, in order to allow the media, interest groups and the broader public to monitor its work and to become engaged through consultative processes. A usual requirement in constitutions is that parliament sessions are public. As far as committee sessions are concerned, there is no uniform practice but some constitutions promote transparency here as well, for example, the South African constitution stipulates that “the National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society” (article 59.2). It is sometimes argued that complete transparency of committee work will impede political negotiations, which are an inherent part of parliamentary work, because MPs would rather use public sessions to enhance their partisan profiles.

The South African constitution includes further guarantees for

transparency by noting: “The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees” (article 59.1a.). The article points at requirements to publish in a timely manner parliamentary documents, such as agendas, reports and legislative proposals.

### 7.2.3 Law making

Constitutions usually include essential features of the law-making process, such as areas of competencies and majority requirements. Less common are constitutional provisions related to a consultative constitution-making process. One exception is the South African constitution which states: “The National Assembly must a.) facilitate public involvement in the legislative and other processes of the Assembly and its committees, b.) conduct its business in an open manner (...)” (Article 59 I).

## 7.3 Conclusions

As the legislature is the key pluralistic forum in a democracy, it is important that constitutional provisions ensure that the legislature has a significant role, enjoying guarantees that prevent the domination of parliament by the executive branch of power at different levels, such as dissolution or law-making by executive decree.

While less common in constitutions, it is worthwhile considering examples of constitutions which also include guarantees and principles for a legislature’s internal organisation, including autonomy in determining rules, procedure and timetables, as well as provisions on transparency of the parliamentary process and consultative law-making.

## 8. RIGHTS OF THE OPPOSITION PARTIES IN PARLIAMENT

A functioning and effective opposition — e.g. individual Members of Parliament (MPs) or a parliamentary group that offers alternatives to the government position — is an essential element of any democracy. The opposition offers people an alternative to the incumbent government. Without such an alternative, people cannot effectively choose their government.

A functioning opposition is also indispensable for pluralism because it offers views and policies different from those of the government; it provides a wider range of voices, which are essential for the “competition of ideas.” Portugal’s Constitution, for example, emphasises these principles, requiring that every constitutional amendment respect plural expression and the right to democratic opposition (article 289). In Portugal, pluralism and opposition rights are part of a constitutional eternity clause — they cannot be changed.

The importance of a functioning opposition and pluralism is widely recognised around the world. NGOs, governments, and international organisations have stressed, on various occasions,

<sup>37</sup> Stephen Holmes, “Superpresidentialism and its Problems,” *East European Constitutional Review* 2/3 (1993/1994), 123-26.

the importance of a functioning opposition for pluralism. Delegations from Arab, African, and Asian countries have all agreed to strengthen pluralism so that their parliamentary bodies “represent popular will,” “ensuring the fair representation of all sectors of society.”<sup>38</sup> In April 2012, the UN Human Rights Council adopted a resolution that emphasised “the crucial role played by the political opposition and civil society in the proper functioning of a democracy.”<sup>39</sup> At the European Conference of Presidents of Parliament (June 2010) it was recognised that the “defining difference between democracies and authoritarian systems” is that the former recognises political opposition on equal terms.<sup>40</sup>

However, recognition of the opposition as such is only one part. According to the Parliamentary Assembly of the Council of Europe, the quality of that democracy must be “measured by the means available to the opposition or the parliamentary minority to accomplish its tasks.”<sup>41</sup> An opposition must enjoy a number of concrete rights to function effectively and offer an alternative to the majority. In general, these rights include the equal treatment of parliamentarians and freedom of expression. More specifically, opposition rights include the right to supervise government, the right to speak in parliament, and the right to fully participate in the legislative processes.

### 8.1 Oppositional Rights: A Constitutional Matter

With a few exceptions, constitutions and laws of States do not *define* the role of the opposition,<sup>42</sup> but *acknowledge* their rights. In one way or another, the constitutions of many states acknowledge opposition rights either by granting specific rights to all parliamentarians (implicit rights) or by explicit reference to the “opposition” (explicit rights). Even if not always constitutionally protected, the Member States of the Council of Europe grant rights to the parliamentary minority, whether organised around political groups or individual parliamentarians.<sup>43</sup> Similarly, the constitutions of several Member States of the Arab League and the African Union guarantee a number of rights to parliamentarians.

38 Sana'a Declaration on Democracy, Human Rights, and the Role of the International Criminal Court (2004).

39 U.N. Human Rights Council, 19<sup>th</sup> Session. “Human rights, democracy and the rule of law” (2012) (A/HRC/RES/19/36). 19 April 2012.

40 European Conference of Presidents of Parliament, “Rights and Responsibilities of the Opposition in a Parliament: Background document prepared by the Secretariat upon the instruction of the President of the Parliamentary Assembly of the Council of Europe” (2010): p.1.

41 Parliamentary Assembly of the Council of Europe (PACE), 6<sup>th</sup> Seating. “Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament” (2008) (Resolution 1601): para. 2. 23 January 2008.

42 Bhutan is such an exception, where article 18 of the Constitution defines the role of the opposition party. According to this provision, the opposition parties play “a constructive role” to ensure that the Government and the ruling party function in accordance with the provisions of the Constitution. Opposition parties also promote national integrity, unity and harmony, and cooperation among all sections of society. The constitution of the German state of Schleswig-Holstein states: “The parliamentary opposition is an essential element of parliamentary democracy. The opposition has the task to criticise and to control the government’s programme and its decisions. The opposition represents an alternative to those factions and members of parliament who support the government. In this sense the opposition enjoys the right to political equality.” (Article 12 I)

43 PACE Resolution 1601 (2008), para. 8.

Granting rights to all MPs, thus providing implicit opposition rights, has been more common than granting explicit rights to the opposition. A right usually found in constitutions is parliamentary immunity, which is a right that applies to all MPs of a given parliament, and also benefits the opposition. Supermajorities, such as two-third majorities required for constitutional amendments, or low thresholds required to conduct a constitutional review of legislative acts, are examples of implicit rights which are particularly geared toward the opposition. In the former case, the parliamentary opposition in effect has a veto (provided that the parliamentary majority does not have a two-third majority); in the latter, it has the power to initiate a court review or delay legislation. While these rights are available to all MPs, the qualified majority-minority provisions make them useful in preventing misuse by the majority.

Explicit rights are rarer, but there are some countries which protect opposition rights by explicitly referring to the term “opposition” in the constitution. In Europe, Portugal and France<sup>44</sup> for example, lay down specific opposition rights. Portugal’s Constitution determines that “minorities have the right to democratic opposition, as laid down by this Constitution and the law” (article 114.2). Political parties that hold seats in the parliament, but are not part of the government, are “particularly” entitled “to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest” (article 114.3).

Similarly, most Arab countries do not generally mention explicit opposition rights in their constitutions. As an exception, Morocco included article 10 in its revised 2011 Constitution. This provision contains a detailed catalogue of explicit opposition rights, ranging from effective participation in the legislative process to contributions on the selection of the constitutional court. These far-reaching rights exceed the rights of the opposition in many other parliaments.<sup>45</sup>

While some implicit or explicit opposition rights are found in many constitutions, the details of opposition rights in parliament are usually laid out in a parliament’s Rules of Procedure. Rules of Procedure carry less legal weight – in case of conflicting norms, constitutions prevail. Rules of Procedure contain specific and practical rules on issues, such as calling parliamentary sessions, hearing members of the government, or the legislative process. Given their level of detail, proper Rules of Procedure are crucial for protecting opposition rights. In some countries, the constitution specifically mentions that the Rules of Procedure should spell out the rights of MPs and political groups.<sup>46</sup>

44 In the Constitution of France, articles 48 and 51.1.

45 The modalities of the rights of the opposition in Morocco’s parliament, including rights of the opposition as a whole and rights of individual opposition members, will be further defined by the parliament’s Rules of Procedure and the organic law on the opposition, which will likely be adopted in 2013.

46 For example, article 95 of the Turkish Constitution grants no specific rights to the opposition, but leaves this to the Rules of Procedure: “The Grand National Assembly of Turkey shall carry out its activities in accordance with the provisions of the Rules of Procedure drawn up by itself. The provisions of the Rules of Procedure shall be drawn up in such a way as to ensure the participation of each political party group in all the activities of the Assembly in proportion to its number of members.” The Constitution of Malaysia simply states: “Subject to the provisions of this Constitution and of federal law, each House of Parliament shall regulate its own procedure” (article 62).

Despite the importance of Rules of Procedure, constitutional protection of the status and rights of the opposition has several advantages. Enshrining this status in the constitution guarantees that the opposition's existence and its role in a democratic system of government are unquestionable. As for the rights of the opposition, explicitly outlining these in the constitution affords a constitutional protection, which is more difficult to undermine than rights established in Rules of Procedure. Unlike amending the Rules of Procedure,<sup>47</sup> amending constitutions in most states requires a qualified majority. Usually a government is not supported by a qualified majority, and depends on opposition support to amend the constitution. In addition, constitutional amendments receive greater public attention. For these reasons, constitutional protection of opposition rights provides better protection than Rules of Procedure or other legislation.

The decision to include opposition rights as constitutional provisions requires careful consideration and is a unique process for every state. Protection of opposition rights could also be found in other legislation, such as the Rules of Procedure. However, explicit constitutional protection of opposition rights may in particular be good practice in countries with new democracies and a history of oppressing opposing voices and where constitutional recognition of the opposition's status can safeguard against the re-emergence of a one-party system. In addition, such constitutional protection can institutionalise political majority-minority relations and give a strong signal that losing elections does not necessarily mean exclusion from the political scene.

This is not to suggest that constitutions should regulate every detail of the functioning of parliament. Details of opposition rights are usually left to the Rules of Procedure or other legislation. On the one hand, there is a need for flexibility – some provisions should remain adaptable to changing circumstance and are therefore not suitable for enshrining in a constitution. On the other hand, the core of opposition rights should not be subject to changes in a parliament's majority.

## 8.2 The Scope and Content of Opposition Rights

Explicit or implicit opposition rights are enshrined in a number of constitutions. Equal treatment, effective government control, free access to media, full participation in the legislative processes and access to constitutional courts are among these constitutional rights. This section presents the content and scope of these opposition rights as enshrined in various constitutions.

<sup>47</sup> The Rules of Procedure of many parliaments are often subject to changes through simple majority. In some countries, such as Austria, constitutional provisions exist that require a qualified majority to change the Rules of Procedure. In Austria's Constitution, "federal law on the National Council's Standing Orders can only be passed in the presence of half the members and by a two-third majority of the votes cast" (article 30). In Sweden, the Rules of Procedure can only be changed via a constitutional amendment or a three-quarter majority (article 8.6). However, these countries are the exception and not the rule. The Venice Commission considers that Rules of Procedure should „preferably be regulated so as to make it difficult for a simple majority to set aside the legitimate interests of the political minority groups.“ (Venice Commission, "Report on the Role of the Opposition in a Democratic Parliament," Study no. 497/2008, 2010). This seems particularly important in states where opposition rights are neither explicitly nor implicitly protected in the constitution.

## INTERNATIONAL LAW

**International law recognises a number of parliamentary and opposition rights – at least to some extent. Human rights treaties guarantee the freedom of speech, the freedom of assembly, or grant those elected with effective government powers. In addition, there are political commitments that secure opposition rights. Resolution 1601 (2008) of the Parliamentary Assembly of the Council of Europe, for example, provides detailed guidelines on opposition rights. This resolution constitutes a political, legally non-binding commitment.**

### 8.2.1 Equal treatment and proportionality

Equal treatment of all MPs is a fundamental principle from which most opposition rights derive. According to this principle, opposition members should be able to exercise their mandate under the same conditions granted to those MPs in the majority. Furthermore, all MPs should have a number of equal rights whether they are part of a big group, a small group, or not aligned with any group. Equal treatment of MPs must be ensured in all their activities and privileges.<sup>48</sup> Although the principle of equal treatment is generally not explicitly part of constitutions,<sup>49</sup> the principle is expressed in specific, often technical provisions in Rules of Procedure. Resolution 1601 (2008) of the Council of Europe recommends that political groups or individual members of the opposition receive appropriate financial, material and technical resources.<sup>50</sup>

The principle of equal treatment must be weighed against the principle of proportionality. According to the principle of proportionality, differentiation between parliamentary groups is justified to reflect their size. The composition of committees, for example, must reflect the strengths of political party groups in parliament and speaking time should be allocated according to the weight of parliamentary groups. The Constitution of Turkey, for instance, states that "the provisions of the Rules of Procedure shall be drawn up in such a way as to ensure the participation of each political party group in all the activities of the Assembly in proportion to its number of members" (article 95.2). Similarly, the Constitution of Denmark states that "the election by the *Folketing* of members to sit on committees and of members to perform special duties shall be according to proportional representation" (article 52).

There is obviously no formula that would strike the balance between equal treatment and proportionality in every single instance. There are, however, a number of criteria that help balance proportionality and equal treatment. Accordingly, proportionality consideration may not bar MPs from performing their duties,

<sup>48</sup> PACE Resolution 1601 (2008), para. 5.

<sup>49</sup> As a relevant exception in this context, Angola's Constitution (article 17.4) determines that "political parties shall be entitled to equal treatment by entities exercising political power, impartial treatment by the state press and the right to exercise democratic opposition, under the terms of the Constitution and the law."

<sup>50</sup> PACE Resolution 1601 (2008), "Guidelines on the rights and responsibilities of the opposition in a democratic parliament," para. 3.

e.g. MPs from small parties should be able to fully participate in parliament's work. Individual MPs should not receive fewer resources or staff simply because they represent a smaller party. Differentiation is only legitimate to reflect election results, e.g. committee composition or speaking time of political groups. The following cases and issues illustrate these general requirements in more detail:

- **Speaking time:** In principle, all MPs should have equal speaking time. However, practice is often different. Rules of Procedure contain detailed rules on allocating speaking time in parliament, often giving majority parties more speaking time than minority parties. Resolution 1601 (2008) of the Council of Europe states that “speaking time in plenary sittings shall be allotted at least according to the respective weight of political groups; allocation of an equal speaking time between majority and opposition, irrespective of their strength, should be privileged under certain circumstances” (para. 2.2.9).
- **Question time:** Resolution 1601 (2008) also calls for privileged question time of the opposition with the government. In particular, the opposition “shall have the right to open question time and to ask more questions to the government than members of the majority” (para. 2.2.2-3).
- **Participation in the administration of parliament:** The election of parliament's president and vice-presidents is an important aspect of the administration of parliament. Most constitutions leave the election of presidents to a majority decision, not explicitly reserving a vice-president to the opposition. The constitutions of Lebanon (article 44) and Pakistan (article 53) are examples of such an arrangement. However, Rules of Procedure can include the right of a vice-president for the opposition or there may be parliamentary practice to this effect. According to Resolution 1601 (2008), opposition members should “have the right to participate in the management of parliamentary business; they shall have access to posts of vice-president and other positions of responsibility in parliament” (para. 2.3.1).

### 8.2.2 Access to and coverage in the media

Access to and coverage of the opposition in the media are not only an essential element of effective government scrutiny by parliament, but also crucial for pluralism. Many constitutions grant the opposition the right of access to the media and the right of coverage in the media. Constitutions generally include different rules for public and private media: while private media is rarely the subject of constitutional provisions, state media usually is. Constitutions often contain different rules for election campaigns.

Article 10 of Morocco's Constitution, for example, grants the opposition “air time at the level of the official media, proportional to its representation.” According to article 35 of Peru's Constitution, political parties have – under the conditions of the law – “free access to the state-owned social media in a proportional manner to the last general election results.” Portugal's Constitution also entitles the opposition (as well as “political parties, trade unions, professional and business organisations and other organisations with a national scope”) to broadcasting time on public radio and television, in accordance with their size and other objective crite-

ria defined by law (article 40.1). Remarkably, Portugal's Constitution gives the opposition the right to respond via public radio or television to “political statements” of the government. The Constitution determines that the “opposition air time” must be of the same length and prominence as the government's broadcasts and statements (article 40.2). Article 112 of the Constitution of Columbia grants opposition the right to the “use of public mass communications media in accordance with the representation obtained in the elections for Congress immediately beforehand.” The same provision entitles the opposition to respond in “the public media to grave and obvious distortions of fact or public attacks levelled by senior officials.”

### 8.2.3 Effective government scrutiny and control

Oversight by parliament is a crucial check-and-balance of the democratic process, but it is particularly important for the opposition, which often does not support the government and has a greater incentive to investigate misconduct. There are many different ways to conduct oversight, including the right to debate government programmes and pose questions to the government and receive answers within certain time limits. It also includes the right to investigate government activities and table a motion of no confidence, which leaves the government dependent on support of parliament to a large degree.

Many constitutions grant parliament the right to government oversight in a general fashion, whereas other constitutions introduce requirements for questioning, inquiries, or motions of no confidence. The Turkish Constitution, for example, empowers the Turkish Grand National Assembly “to exercise its supervisory power by means of questions, parliamentary inquiries, general debates, motions of censure and parliamentary investigations” (article 98). Turkey's Constitution leaves it to the Rules of Procedure to determine the form of presentation, content, and scope of the motions. Indonesia's Constitution stipulates that parliament has “the right of interpellation (*interpelasi*), the right of investigation (*angket*), and the right to declare an opinion” (article 20A.2).

However, while it may be in the interest of opposition parties to conduct oversight, MPs of the governing party may try to block questions or investigations by simple majority. Such a system would not only undermine effective oversight of the government, but would also disenfranchise the opposition. For these reasons, some constitutions grant the minority in parliament or single MPs a number of rights that cannot be blocked by the majority. This is done either by explicitly granting the right to individual MPs or constitutional provisions for *qualified minority* rights. This means that a certain minority percentage of MPs may call for inquiries or adopt other initiatives.

Examples of constitutional provisions that safeguard oversight and scrutiny:

- **Questions to government and interpellation:** MPs, either individually or as a group, may submit questions to government, which must be answered within specific deadlines. According to article 20A.3 of Indonesia's Constitution, every MP has the “right to submit questions, the right to propose suggestions and opinions.” Portugal's and Egypt's Constitution grants individual MPs the same rights (article 156d, and 123 respectively). In an illustration of qualified minority

rights, in Lithuania a group constituting one-fifth of MPs may direct an interpellation to the prime minister or a minister (article 61); in the Czech Republic, “a group of at least twenty” MPs is required (article 43); and in Macedonia, a minimum of five (article 72).

- **Calling of parliament sessions:** Although not exclusively a tool of government oversight, the calling of a parliamentary session is nevertheless an essential instrument should the opposition need to address parliament urgently. Many constitutions grant parliament the right to call (regular and extraordinary) sessions. Again, qualified minority rights are available: in the South Korean Constitution (article 47), one quarter of the MPs can convene an extraordinary session, while in Armenia (article 70) one third can. Resolution 1601 (2008) recommends that a qualified minority of one quarter of MPs should have the legal right to call for an extraordinary session (para. 2.3.2).<sup>51</sup>
- **Setting the agenda:** Setting parliament’s agenda is another important tool for effective government oversight, which becomes less effective if the agenda is set by majority vote only. The French Constitution (article 48) grants the opposition the right to set the agenda on one day of sitting per month.
- **Committees of inquiry:** Ad hoc or permanent committees to investigate specific issues are a particularly important tool for parliamentary supervision of the government. To render this tool effective, the establishment of committees should be with qualified minority. At the same time, there is a strong argument to require a minimum number of MPs for the establishment of an ad hoc committee. The functioning of parliament would be undermined if individual MPs could force the establishment of committees. For this reason, various constitutions grant members of parliament the right to set up committees only if they represent a quorum. According to article 44.1 of the German Constitution, a committee of inquiry must be established if requested by one quarter of parliament. Similarly, the Defence Committee of the German parliament – which also has the powers of a committee of inquiry – must inquire about a specific matter if requested by one quarter of its members (article 45a). In Turkey, at least 10% of all members of parliament are required to request an investigation concerning the prime minister or other ministers; this request is decided by simple majority, which is problematic because it undermines in effect an essential opposition right.<sup>52</sup> Portugal, where each MP may request the formation of parliamentary committees of inquiry, is an exception to the rule (article 156). According to good practice elements, recommended at the European Conference of Presidents of Parliament,<sup>53</sup> a fixed quorum of less than one-half of MPs should be entitled to set up an inquiry committee; furthermore, the chair or rapporteur of an inquiry committee should be an opposition member.

#### 8.2.4 Appeal to the constitutional court

The constitutional courts are a potentially powerful tool for oversight and to safeguard the constitutional order. Where strong constitutional courts exist and parliament is entitled to appeal to the court, opposition members should have the right to request a constitutional review of laws. In Germany, one quarter of the members of the *Bundestag* (the lower house), can lodge a case with the Federal Constitutional Court to rule on the constitutionality of federal and regional (*Länder*) laws. According to Resolution 1601 (2008) of the Council of Europe, opposition members should be entitled to submit adopted laws and draft laws for review to the constitutional court (para. 2.7.1-2).

Germany’s Constitutional Court also rules on appeals by individual MPs who allege that their constitutional rights as parliamentarians have been violated (article 92). These opposition rights have played a very important role in German politics. A number of laws have been annulled by the Constitutional Court following an application from the opposition.

In Turkey, the “main opposition party” or one-fifth of the total number of MPs in parliament have the right to appeal to the Constitutional Court for the annulment of laws, decrees, and parliament’s Rules of Procedure (article 150).

#### 8.2.5 Motions of no confidence

A successful motion of no confidence demonstrates that government no longer has the support of parliament’s majority. A motion of no confidence can lead to the dissolution of parliament and new elections. In some countries, a vote of no confidence requires that the opposition propose a successor candidate. The motion of no confidence is only successful if the successor candidate is elected.

There is no common practice for whether individual MPs or parliamentary groups have the right to propose a motion of no confidence. While some constitutions grant individual MPs such rights, others require a specific number of MPs. In article 37 of Lebanon’s Constitution, every MP has “the absolute right to raise the question of no confidence in the government during ordinary or extraordinary sessions.” According to article 99 of Turkey’s Constitution, “a motion of censure may be tabled either on behalf of a political party group, or by the signature of at least twenty deputies.” In Lithuania, one-fifth of the members of parliament may direct an interpellation to the prime minister or a minister, which is a necessary first step for a no confidence motion. In Egypt, 10% of the members of parliament can request a motion of no confidence; the lower house can withdraw confidence from the prime minister, ministers or deputies, provided that the matter of no confidence has not been decided in the current legislative session (article 126).

#### 8.2.6 Propose legislation

One of parliament’s primary functions is to legislate. Constitutions usually give MPs or parliamentary groups the right to table legislative proposals and the right to comment on proposals by the government. While some constitutions require the support of a specific number of MPs to table draft legislation, others give

<sup>51</sup> On the other hand, the Venice Commission, in “On the Role of the Opposition in a Democratic Parliament,” Study no. 497/2008 (2010), finds that “such rules are still relatively rare, and that the threshold of one-quarter recommended by the Assembly in most political systems would be regarded as rather low” (p. 26).

<sup>52</sup> Article 100 (as amended on 17 October 2001)

<sup>53</sup> European Conference of Presidents of Parliament, p.10

individual MPs such rights. Jordan is an example of the former, where ten or more MPs are required to propose draft laws (article 95). Turkey, Egypt, Indonesia, Albania, and Portugal are examples of the latter. The European Conference of Presidents of Parliament recommends that good practice includes that a low quorum of MPs (5% or less) may table draft legislation; a certain percentage of these drafts should be discussed in committees and submitted to vote in plenary.<sup>54</sup>

### 8.2.7 Participation in committee work

Committees discuss and prepare legislation, the budget, and other acts. They are an essential part of a functioning parliament. For this reason, the effective participation of the opposition in committees is indispensable. At the same time, the composition of committees must reflect the strengths of political parties. Various constitutions stipulate explicitly that committee membership be proportional to the composition of parliament as a whole. Examples include Portugal (article 178.2) and Greece (article 68.3). Some constitutions also provide provisions for other types of committee membership. This is the case in Belgium's parliamentary consultation committee (article 82), Germany's joint committee (article 53a), and France's mediation committee (article 42.2).

However, similar to the work in inquiry committees, the general principle of proportional representation should not prevent the opposition from participating effectively in the parliament's committee work. There are various ways to strike a balance between proportional representation on the one hand, and effective opposition participation on the other. Some constitutions stipulate that a certain number of committees should be chaired by a member of the opposition. In France, for example, traditionally the opposition chairs the finance committee. Morocco's revised 2011 Constitution grants the opposition the right to effective participation in the legislative procedure. Resolution 1601 (2008) of the Council of Europe recommends that "the chairmanship of committees responsible for monitoring government action, such as the committee on budget and finance, the committee on audit, or the committee supervising security and intelligence services, should be granted to a member of the opposition" (para. 2.5.1).

### 8.2.8 Participation in the election/appointment of senior officials

The election or appointment of senior officials is politically sensitive. These can include media commissioners, ombudsmen, heads of court of auditors, central bankers, high-ranking judges, and high-ranking military officers. There are many different arrangements to elect or appoint such officials. Often, the president, government, prime minister, or MPs have the right to select these officials. However, it is also common for the opposition to be consulted and/or approve the appointment. In Morocco, the Constitution (article 10) allows the opposition to make "contribution to the proposing of candidates and to the election of members of the Constitutional Court." In Montenegro, two members

of the Judicial Council, which elects judges, are selected from parliament, including one from the majority party and one from the opposition (article 127). The Constitution of Barbados (chapter VII, article 81) determines that the appointment of Chief Justice of the Supreme Court can occur only "after consultation with the leader of the Opposition". South Africa's Constitution requires that three members of the Judicial Service Commission be members of parliament's opposition parties (article 178.1h). In Argentina, the chair of the General Auditing Office is "appointed under the proposal of the Opposition with the largest number of legislators in Congress" (article 85).

### 8.2.9 Validity of term

It is of particular importance for opposition members that parliament cannot remove individual MPs by simple majority and/or on vague grounds. If the term of a Member of Parliament simply depends on a decision by Parliament's majority, the opposition works constantly under a Damocles sword. It is equally problematic if MPs can be removed on vague grounds, such as moral conduct.

The Constitution of Pakistan, for example, contains an extensive list of grounds for removing MPs, some of which are vague. Grounds for removal, for instance, include convictions by a court of law for offences such as "propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order" (article 63g). Vague criteria can be exploited to remove numerous MPs from office. For this reason, criteria for removing MPs should be narrowly defined and should avoid vague language open to subjective interpretation by parliament's majority.

## 8.3 Conclusions

A functioning opposition, able to offer a viable and credible alternative to the incumbent government, is an essential element of democracy, indispensable for full pluralism. A functioning opposition offers ideas and policies different than those of the government, thereby contributing to a diversity of debate. A functioning opposition is also an essential mechanism of holding the government to account, for example by committees of inquiry or questioning of the government. For these reasons, many constitutions guarantee a number of opposition rights. These include equal treatment of all parliamentarians, effective government scrutiny, and full participation of the opposition in parliament's work, including the legislative process.

To make opposition rights effective, it is essential that parliament's majority cannot block the opposition from exercising its rights by simple majority. It is common practice in many countries for oppositions to be able to raise questions to the government, launch investigations into government activities, or table draft laws without the consent of parliament's majority. Opposition access to media, including airtime in public radio or television, is another opposition right that is enshrined in various constitutions. Bringing cases or lodging appeals to constitutional courts should also not depend on the approval of parliament's majority.

There is the need to recognise the mandate enjoyed by major-

54 European Conference of Presidents of Parliament, *Ibid.*

ity parties, which govern by popular consent, and the rights of the opposition to fully function as an integral part of government oversight and the legislative process. A balance must be struck between rights that do not restrict or hinder the opposition from working effectively, and those that are not so broad as to infringe on the mandate of the majority.

In many countries, Rules of Procedure regulate most practically relevant details of the parliament's work, including opposition rights. However, even if Rules of Procedure can grant extensive opposition rights, due to different amendment procedures for Rules of Procedure (often by simple majority) and constitutions (often by qualified majority), constitutionalising the status and rights of the opposition may be a better guarantee for the existence and acceptance of the opposition in a political system.

In one way or another, many constitutions protect opposition rights, either implicitly by granting rights to all parliamentarians, or explicitly by referring to the term "opposition." In new democracies, where the protection of opposition rights is essential to guarantee a multi-party system for political pluralism, explicit constitutional protection of opposition rights may be more appropriate. Where the democratic culture is still nascent, there is a need for legal protection at the highest level to ensure the quality of democracy and the pluralism of multiple parties at work.

## 9. DEMOCRATIC CONTROL OF THE SECURITY SECTOR

The security sector can pose a particular challenge to pluralism for several reasons: First, many aspects of the security sector, the army and secret services in particular, are confidential and therefore not conducive to a transparent, public debate that would involve stakeholders at all levels. Second, the security sector wields the state's monopoly of coercive power and can develop a strong sense of autonomy from society or the political system, underpinned by the logic of hierarchy and discipline in the army in particular. Third, parts of the security sector, police and domestic intelligence in particular, can play a sensitive role in the realm of human rights as they are the instrument of limiting such rights; one only needs to think of the police preventing a demonstration. Lastly, the executive branch of power tends to see security as its very own domain, trying to exclude parliamentary involvement or public scrutiny in this area.<sup>55</sup> All these concerns are pronounced in formerly authoritarian regimes, where security services were the main instrument of suppressing pluralism.

For these reasons, establishing effective democratic control of the security sector is essential for full pluralism<sup>56</sup>. Where an elected civilian government and a representative parliament

cannot control the security sector, they cannot fulfil an important part of their overall public mandate. They would be responsible to voters for all state institutions without having authority over an important sector of the state.

An effective system of civilian controls results in full supremacy of the democratically elected civilian authorities, during times of peace and conflict. Civilian supremacy is generally implemented through constitutions or laws that regulate the chain of command, the defence budget, access to (confidential) information, political comments by senior officers, or economic activities of the armed forces. Generally, laws regulate the details of the issues, while constitutions set the fundamental principles of full civilian supremacy and supervision at all times. The following sections illustrate how constitutional mechanisms can provide for full civilian supremacy and supervision.

### 9.1 Civilian Supremacy: Chain of Command, Decision Making Bodies

The chain of command is crucial for civilian control of the armed forces. For this reason, the Commander-in-Chief or Supreme Commander is an elected civilian at all times. Many constitutions stipulate as much: The constitutions of the U.S. (Section 2. Clause 1.), France (article 15), Turkey (article 117), Indonesia (article 10), Albania (article 168.2) and Malaysia (article 41) are some examples.

As Commander-in-Chief, the elected civilian has the exclusive right to declare war, i.e. to make the decision to go to war. Accordingly, many constitutions grant the president or the prime minister the right to declare war. Very often, parliament must approve the declaration of war or, at the very least, be consulted. In France, a declaration of war is authorised only by parliament (article 35), whereas in Albania, the president – upon a request by the Council of Ministers – declares the state of war (article 171.1). In Indonesia, article 11 stipulates that the "President, with the approval of [parliament], may declare war" and "make peace."

In many countries, the coordination of national security is left to commissions, which are often composed of senior officers from the military and civilians — senior-level cabinet officials, intelligence analysts, foreign policy experts, and other officials of the state. Such bodies are typically called National Defence Committees or National Security Councils. For full civilian control of the armed forces, civilians are able to make the final decision; if necessary, even without the consent of senior officers. For this reason, the majority of these bodies must be civilians and/or a civilian must be entitled to make the final decisions. This authority is often invested in the president, prime minister, or minister of defence.

The mandate of these bodies should be clearly defined and restricted to defence matters (in a narrow sense). In Albania, the constitution (article 168.3) designates the National Security Council as an "advisory organ" of the president, but it is not explicit enough about the powers or makeup of this body. In Malaysia, the constitution is more specific, (article 137) establishing the Armed Forces Council, its powers, and a membership of three civilians and four military officers. In Turkey – following recent constitutional reform – civilian rule has been strengthened in a similar manner (see box).

<sup>55</sup> See Teodora Futior, *Parliamentary Powers in Security Sector Governance*, DCAF 2011.

<sup>56</sup> Venice Commission, "Study on the Democratic Control of Armed Forces, Civilian Control of the Military: Why and What?" (2007). Retrieved at: <http://www.venice.coe.int/docs/2007/CDL-DEM%282007%29005-e.pdf>



## TURKEY: NATIONAL SECURITY COUNCIL (NSC)

On 3 October 2001 Turkey amended various constitutional provisions. The changes to the NSC were particularly important (article 118). In an effort to strengthen civilian control, the number of civilian members of the NSC was increased from five to nine, while the number of the military representatives remained at five. Article 118 clarified the NSC's advisory role. The new article narrows the NSC's mandate by limiting it to recommendations; the government is only required to "evaluate" recommendations instead of giving them „priority consideration“, as determined before. The law on the NSC implements the new article 118. The amended law also regulates other important privileges of the NSC: the representative of the NSC in the Supervision Board of Cinema, Video and Music was removed. The regulation also abrogates the far-reaching executive powers of the Secretariat of the National Security Council to follow up, on behalf of the president and the prime minister, any recommendation made by this body. In particular, the regulation implements the provision which abrogated the following: "the Ministries, public institutions and organizations and private legal persons shall submit regularly, or when requested, non-classified and classified information and documents needed by the Secretariat General of the NSC".

The Brazilian Constitution (article 91), on the other hand, specifies that its National Defence Council be made up entirely of civilians. It includes the vice-president, the presidents of both chambers of Congress, and the Minister of Justice, among others. Another example is the Constitution of Lithuania (article 140), where a National Defence Council is designated only to consider and coordinate matters of state security; it is also composed of civilians, such as the president, the prime minister, and the speaker of the *Seimas*.

### 9.2 Defence Budget

The defence budget and military spending should be part of the general budget and subject to the same budgeting practices as the rest of the public sector: the defence budget should be adopted by parliament, following a pluralistic, public and transparent debate.<sup>57</sup> Control of the defence budget and military spending is a crucial element of effective civilian supervision. Most constitutions do not include specific provisions for the adoption of the defence budget; parliament exercises control over all public funds.

Proper debate in parliament and civilian supervision require a degree of disaggregation in budgets. Budget lines for specific expenditures allow for an informed debate in parliament and the public, while aggregated budget lines conceal spending, especially when military spending is covered under misleading budget lines such as the presidency, infrastructure, or research and development.<sup>58</sup>

Especially problematic is off-budget military spending. In Latin America, for example, Chile, Ecuador, Peru and Venezuela funded the military in part through revenues from copper, gas or oil exports. According to a SIPRI report, a main deficiency in military spending transparency in Latin America and the Caribbean is the prevalence of off-budget spending—spending from sources of revenue outside the regular state budget, such as natural resource sales. This represents a serious gap, which seriously undermines transparent and pluralistic processes for resource allocation.

Even more problematic is the fact that a few countries exclude the defence budget from the general budget in essential parts or altogether. In these countries the government or the armed forces adopt the defence budget, with no or very limited parliamentary supervision. Funds exist that are entirely in the discretion of the armed forces. Turkey is an example.

## TURKEY: THE DEFENCE BUDGET

Today, the general and secondary budgets, including the defence budget, are submitted by the Council of Ministers to parliament (article 162 of the constitution). However, parliament is not consulted regarding the preparation of the budget. Indeed, the Ministry of National Defence does not ask the opinion of the parliament's National Defence Commission while drafting its budget. Parliamentary mechanisms to control the defence budget, such as general inquiries, debate, and interpellation have had little success.

The 2004 amendments to the constitution mandated the Court of Auditors to audit defence expenditures on behalf of Parliament. Enabling legislation was adopted in 2010, six years later. As per Law no. 6085, the Court of Accounts has the right to conduct oversight on the military not only on the financial level, but also as regards performance.<sup>4</sup> However, important exemptions apply, as secret information on defence, security and intelligence issues are not included in activity reports. Furthermore, the Foundation for Strengthening the Armed Forces, which controls significant financial expenditure, remains excluded from the audit mandate. According to the 2006 EU progress report, the Parliamentary Planning and Budget Committee reviews the military budget only in a general manner but does not examine programmes and projects.

Furthermore, extra-budgetary funds are excluded from parliamentary scrutiny. Despite some improvements, media reports suggest that parliamentary supervision of defence expenditures remains weak. Parliamentarians often lack the knowledge to discuss the defence budget in detail.<sup>5</sup> Funds earmarked for the Under-secretariat for the Defence Industry (SSM) in the 2012 budget for the Gendarmerie and for the Coast Guard are extra budgetary items and were not reflected in the Defence Ministry's budget.

Naturally, some parts of a country's defence budget remain confidential. Expenditures related to military intelligence and other programmes are examples of information that is highly sensitive. Confidentiality is generally acceptable, but democratic, civilian oversight should, in some form, regulate these secret expendi-

57 Mark Bromley and Carina Solmirano, "Transparency in Military Spending and arms Acquisitions in Latin America and the Caribbean," *SIPRI Policy Paper 31* (January 2012): p. 6

58 *Ibid.*, p. 23

tures. In Germany, such expenditures must be approved before the Defence Committee, whose setup is outlined in the constitution (article 45a). The committee works in confidence due to the sensitive nature of proceedings, but it is made up entirely of parliamentarians. These members, coupled with reports by the Parliamentary Commissioner of the Armed Forces (instituted by article 45b), ensure oversight of confidential expenditures. The categorisation of the budget, based on the level of confidentiality, is another mechanism for oversight. The South Korean government divides the budget into three categories: budget items A, which are aggregated and presented to the entire National Assembly; budget items B, which are disaggregated and “revealed without restrictions” to parliamentary members of the National Assembly Committee of National Defence; and budget items C, which are further disaggregated and revealed “with certain restrictions” to the Committee of National Defence.

### 9.3 Civilian vs. Military Courts

Broad civilian supervision over the Armed Forces also requires that civilian courts have jurisdiction over the military and its staff. Military courts should have only limited jurisdiction and should be bound by civilian laws or equivalents. The German Constitution (article 96.2) does just that, limiting the government in its establishment of military criminal courts, which can “exercise criminal jurisdiction *only* during a state of defence or over members of the Armed Forces serving abroad or on board warships.” In Turkey, following constitutional amendments in 2010, military courts were similarly limited in their jurisdiction to “military service and military duties.” Under the new constitution, crimes against state security, the constitutional order and the functioning of this order, will be dealt with by civilian courts. The amendments also allow appeals against expulsion decisions by the Supreme Military Council to be brought before civilian courts. The Chief of General Staff and the commanders of the Army, Air Force, Navy and Gendarmerie will be tried before a high tribunal for any offences committed in the course of their official duties. The constitutional provision providing immunity for the perpetrators of the 1980 coup d’état was also deleted from the constitution.

### 9.4 The Composition of Security Forces

From a perspective of pluralism it is important also to look at the composition of security forces. In some cases security forces are manifestly not representative in their composition. A DCAF study noted in relation to the Syrian army “while Alawites make up only around 12 per cent of the Syrian population, they account for 70 per cent of career soldiers in the Syrian armed forces. The imbalance is even more pronounced in the officer corps, where 80–90 per cent are estimated to be Alawites.” Looking at the Arab uprisings the study came to the conclusion that armed forces were most likely to be open to political reforms if they had a high level of institutionalisation in the form of a clear set of rules which enshrine meritocratic principles and established career paths, as opposed to systems based on personal, tribal or sectarian loyalties.

Such institutionalisation of security forces should be anchored in constitutional provisions. In this sense, the German constitution, for example, not only lays out the role of the armed forces (article 87a), it also includes principles for the organisation of the armed

forces (article 87c).

In Portugal the parliament has the exclusive legislative power for the “Organization of the national defence, determination of the duties to which it gives rise, as well as general foundations of the organization, functioning, and discipline of the Armed Forces” (article 167d.). The constitution also notes that “The Armed Forces are at the service of the Portuguese people. They are strictly non-partisan and their members may not take advantage of their weapons, posts, or functions for any political intervention.” (Article 275 V).

### 9.5 Conclusions

A constitution which promotes political pluralism cannot ignore the question of the democratic control of the armed forces. There is a particular risk that the key state functions in the area of public order and security are excluded from proper, democratic deliberation taking into account plural points of view. More damaging still, an uncontrolled security sector can develop a political role of its own, using its coercive powers to impose political views on society and the political system. Only a robust system of democratic control can avoid such an outcome. Constitutional provisions should be explicit in terms of civilian supremacy of military and other security decision-making, of democratic control of the military and other security budget items. Constitutions should also delineate the role of military courts in a clear and narrow manner. Lastly, from a point of view of pluralism it is worthwhile to consider including in constitutional texts basic principles for the meritocratic recruitment and promotion of security personnel; such institutionalisation reduces the risk of security services being established to serve one part of society. It is also worthwhile considering parliament’s approval of promoting senior positions.

## 10. FREEDOM OF MEDIA: CONSTITUTIONAL OPTIONS TO AVOID OVER-CONCENTRATION OF OWNERSHIP

Independent and diverse media is an essential element of pluralism. Independent and diverse media provide a forum for wider public debate. It is essential to secure a diversity of voices and to expose the public to a wide variety of views and ideas. Access to a diverse range of views and opinions is crucial for society to make an informed choice on public matters. Empirically, independent media has played a decisive role in the transition from authoritarianism to democracy.

Freedom of media and speech is the backbone to guaranteeing the independence of media: freedom of media as enshrined in most constitutions and international law sets limits on state censorship, prohibits harassment of journalists and other forms of state interference. However, direct state interference is not the only threat to the independence of the media; monopolies and concentration in media can be equally dangerous. Although concentration of media ownership is not automatically a threat

to pluralism – for instance, in the monopolies granted to public sector broadcasters in the pre 1980s period in Western Europe provided pluralistic programming; and likewise, a highly competitive market can produce a narrow range of programmes – there are fears that media mergers have concentrated excessive control in the hands of a few individuals or corporations. There are a number of cases where media concentration has impeded the access of small groups to media, has eliminated commercially unviable views and has favoured the political views of owners. Media concentration can also be a decisive tool in election campaigns.

There is a global trend towards consolidation or over-concentration in media. The Venice Commission, for example, noted that media concentration is increasing in Europe. Television concentration across Europe has grown at a rapid rate since the introduction of commercial television and the break-up of the public service monopolies in the majority of West European countries in the 1980s. Also, more channels have not led to a more diverse ownership in media outlets but have simply increased the market shares of a few corporations. In a recent report by Freedom House, North African and Middle Eastern countries continue to have the world’s poorest ratings in freedom of press, considering, among other factors, state ownership of the media. In these countries 5% were rated as Free, 26% as Partly Free, and 69% as Not Free. In sub-Saharan Africa, 10% were Free, 47% Partly Free, and 43% Not Free.

Countries have dealt with the issue of concentration in media ownership in various ways. Anti-trust or competition laws have been a particularly important instruments to avoid media monopolies and the ensure “diversity”. Competition rules employed in Europe range from ceilings for market share that a broadcaster is allowed and diversity in terms of shareholders, to less media-specific rules that are built on the concept of retaining fair competition in markets. Some countries, such as the UK, have special provisions for mergers or acquisitions involving media companies.

The US has set ceilings for individuals or corporations in media ownership. It has also enacted cross-ownership rules such as a prohibition against corporations owning newspapers and broadcast outlets in the same market.

## SOCIAL MEDIA

**The emergence of social media bears mention in relation to the concentration of media ownership. In areas where pluralism is not as diverse, social media has helped to mitigate the negative impacts of media monopolies. It has shifted the balance of power, allowing blogs, social networking, and citizens to collect, create, and disseminate news and information.**

The importance of social media for pluralism has even been recognised by the Council of Europe Commissioner for Human Rights, who stressed the need to “protect media pluralism, including on the internet” (OSCE Supplementary Human Dimension Meeting, July 2011).

Another common trend is that over the past decade most European countries, if not all, have liberalised and relaxed their ownership restrictions that pertain to television or are in the process of doing so.<sup>59</sup> This relaxation is a result of added competition following international trends in media expansion. At the same time, the emergence of multinational media companies makes national regulations all but ineffective. To complicate matters even further, ownership restrictions are often unique to each country’s media environment.

International law – although in more general terms – also addresses the issue of media concentration. General comment 34, an authoritative interpretation of article 19 of the ICCPR says that states should not have monopoly control of the media and should take action to prevent media dominance or concentration:

*“The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”<sup>60</sup>*

Although these rules are an important tool to safeguard pluralism – media and competition laws being in practice particularly relevant – constitutional provisions can also play a significant role in preventing media monopolies. Relevant constitutional provisions include, in particular, the prohibition of media monopolies and the establishment of media commissions. About 8% of the world’s constitutions prohibit media monopolies or oligopolies; around 15% of the world’s constitutions establish media commissions, which can be explicitly tasked to ensure pluralistic media. Constitutional provisions on a competitive, pluralistic or balanced media markets are rare; only 1-2 % the world’s constitutions include such provisions.

### 10.1 Prohibition of Over-Concentration

Some constitutions prohibit the overconcentration of media ownership, either explicitly or implicitly. Portugal’s constitution stipulates that the state “shall ensure the media’s freedom and independence from political power and economic power by imposing the principle of specialisation on businesses that own general information media, treating and supporting them in a non-discriminatory manner and preventing their concentration, particularly by means of multiple or interlocking interests” (article 38.IV; emphasis added). In the Greek constitution (article 14.9), “the concentration of the control of more than one information media of the same type or different types is prohibited”, with additional specific requirements. The Lithuanian constitution (article 44) explicitly states that “the State, political parties, political and public organisations, and other institutions or persons may not monopolise means of mass media”. In Chile, the constitution (article 19.12) also prohibits a state monopoly over the mass media.

59 Ward, p.4

60 Human Rights Committee, 102nd session, General comment No. 34, Article 19: “Freedoms of opinion and expression,” para. 40

## OVERVIEW

	MEDIA COMMISSION	NO MONOPOLY OR OLIGOPOLY	REFERENCE TO COMPETITIVE MEDIA MARKET	REFERENCE TO PLURALISTIC MEDIA MARKET	REFERENCE TO BALANCED MEDIA MARKET
YES	15,76%	8,15%	1,09%	2,17%	1,63%
NO	83,70%	91,85%	98,91%	97,83%	98,37%
OTHER	0,54%	0%			

These constitutional provisions require implementation through secondary legislation. Nevertheless, this does not make them irrelevant. The constitutional provisions establish the framework for lawmakers and courts. Although they are vague and broad, they introduce a crucial constitutional benchmark.

### 10.2 Media Commissions

Some constitutions mandate commissions or other agencies to regulate the ownership of media companies. Examples include Portugal, South Africa, Poland, and Greece. According to article 39 of Portugal's constitution, an independent administrative body is responsible for ensuring – among others – “the non-concentration of ownership of the media”. Secondary law defines the composition, responsibilities, organisation and modus operandi of the agency, as well as the status and role of its members, who are appointed by parliament. South Africa's Constitution requires that national legislation establishes an independent authority to regulate broadcasting. The broadcasting authority is mandated “to ensure fairness and a diversity of views broadly representing South African society” (article 192). Tunisia's constitution makers discuss an independent constitutional body whose role will be *inter alia* ‘to ensure freedom of expression and information, the right to access information, and the creation of a pluralistic and honest media landscape.’

In Poland, the constitution established a similar authority, The National Council of Radio Broadcasting and Television, under “Organs of State Control and Defence of Rights”. Article 213.1 states that this body will “safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television”; as well as (2) “issue regulations and, in individual cases, adopt resolutions”. Enshrined in the Greek constitution (article 15.2) is the National Radio and Television Council, responsible for “the control and imposition of administrative sanctions... [and] which is an independent authority, as specified by law”.

In principle, independent regulatory authorities can have a positive impact on pluralism. However, to perform this function effectively, these bodies must be able to operate independently, similar to courts or electoral commissions. They should be composed

of independent persons, who are appointed through a transparent process.<sup>61</sup> Representation of various stakeholders, such as journalists or owners, can also help ensure independence. Constitutional guarantees of independence are an important legal protection for regulatory authorities.

### 10.3 Conclusions

Independent and diverse media is an essential element of pluralism. Monopolies and concentration in media can have the potential to undermine independence and diversity of media. Countries address media concentration in various ways, often through media and competition laws. Although these laws are particularly relevant, constitutional provisions can also play a role in preventing media monopolies, thereby promoting pluralism.

Constitutional provisions prohibiting media concentration can establish a crucial constitutional benchmark for lawmakers and courts, which require implementation through secondary legislation. Constitutionally mandated Media commissions can be instrumental in promoting independent media, provided they are able to perform their functions independently, similar to courts or electoral commissions. This requires a transparent selection process of committee members and broad and diverse representation of stakeholders.

61 Kariithi, p. 2. Along similar lines, the Council of Europe adopted a recommendation on the independence and functions of broadcasting regulatory authorities, aimed at protecting them against interference by political forces or economic interests. This recommendation stresses the importance of transparent appointment procedures for appointing: it also calls for precise rules to prevent conflict of interests, and on protecting the members from dismissal through political pressure.



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