

# **TOWARD THE DEVELOPMENT OF INTERNATIONAL STANDARDS FOR DEMOCRATIC LEGISLATURES**

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**A Discussion Document for Review  
by Interested Legislatures, Donors and  
International Organizations**

**January 2007**



## NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS

The National Democratic Institute for International Affairs (NDI) is a nonprofit organization working to strengthen and expand democracy worldwide. Calling on a global network of volunteer experts, NDI provides practical assistance to civic and political leaders advancing democratic values, practices and institutions. NDI works with democrats in every region of the world to build political and civic organizations, safeguard elections, and promote citizen participation, openness and accountability in government.

Democracy depends on legislatures that represent citizens and oversee the executive, independent judiciaries that safeguard the rule of law, political parties that are open and accountable, and elections in which voters freely choose their representatives in government. Acting as a catalyst for democratic development, NDI bolsters the institutions and processes that allow democracy to flourish.

***Build Political and Civic Organizations:*** NDI helps build the stable, broad-based and well-organized institutions that form the foundation of a strong civic culture. Democracy depends on these mediating institutions—the voice of an informed citizenry, which link citizens to their government and to one another by providing avenues for participation in public policy.

***Safeguard Elections:*** NDI promotes open and democratic elections. Political parties and governments have asked NDI to study electoral codes and to recommend improvements. The Institute also provides technical assistance for political parties and civic groups to conduct voter education campaigns and to organize election monitoring programs. NDI is a world leader in election monitoring, having organized international delegations to monitor elections in dozens of countries, helping to ensure that polling results reflect the will of the people.

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International cooperation is key to promoting democracy effectively and efficiently. It also conveys a deeper message to new and emerging democracies that while autocracies are inherently isolated and fearful of the outside world, democracies can count on international allies and an active support system. Headquartered in Washington D.C., with field offices in every region of the world, NDI complements the skills of its staff by enlisting volunteer experts from around the world, many of whom are veterans of democratic struggles in their own countries and share valuable perspectives on democratic development.



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This document is intended to advance a discussion within the international community that is already well underway. It has been made possible by a broad range of international actors that recognize the importance of building an international consensus on key aspects of democratic governance and have taken important initial steps in defining standards for democratic legislatures. The work of other organizations is heavily footnoted through out this paper—however, a few in particular merit special notice. Founded in 1889, the Inter-Parliamentary Union (IPU) continues to be a center of inter-parliamentary dialogue. The IPU has recently taken a key role in collecting international best practice by parliaments. NDI’s engagement in their expert group has facilitated the collection of information for this discussion document. Similarly, the Association of Secretaries General of Parliament (ASGP) and the studies published in their journal, *Constitutional and Parliamentary Information*, has been an important source of information on international practice.

The Commonwealth Parliamentary Association (CPA) has also been at the forefront of efforts in this area, through the adoption of their *Commonwealth Principles on the Separation of the Three Branches of Government* and through the adoption of a host of other documents making recommendations on a range of parliamentary practice. To advance the process of establishing standards for parliamentary practice, the CPA organized a parliamentary study group on benchmarks for democratic legislatures that met in Bermuda from October 30 through November 3, 2006. A condensed version of this document served a discussion paper for the study group.<sup>1</sup> The study group was chaired by the secretary-general of the CPA, Hon. Denis Marshall and facilitated by the CPA’s director of development and planning, Niall Johnston, and concluded with agreement on its own set of *Recommended Benchmarks for Democratic Legislatures*. The CPA’s *Benchmarks* included a number of the standards developed in this document and strengthened others. The CPA has since published these *Benchmarks*, which are available on its website, [www.cpahq.org](http://www.cpahq.org).

A host of other regional organizations, including the Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, the Organization of American States, the Southern Africa Development Community’s Parliamentary Forum, have also advanced international dialogue on these issues.

In addition to the organizations that have made this discussion possible, a number of individuals must be cited for their contributions to the research, compilation and review of these standards. Within NDI, I would particularly like to thank K. Scott Hubli, the former director of governance whose idea it was to formulate these standards and who guided their development until his departure to become the Parliamentary Development Advisor to the Democracy Governance Group at the United Nations Development Program (UNDP), Barry Driscoll for the many hours he spent conducting research and writing drafts of this document, as well as Matt Rojansky, Nicholas Olmstead, Arlen Spiro and Abby Wood who assisted in the research for this project. Mr. Driscoll also served as one of two NDI resource persons at the Bermuda study group, and updated the original compilation of standards following the deliberations of the group. Dr. David

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<sup>1</sup> The CPA study group consisted of 14 members including seven members from five Commonwealth parliaments (Bermuda, Canada, Ghana, Pakistan and Scotland,), five resource experts provided by the CPA, the European Union, NDI, UNDP and the World Bank Institute and the secretary-general of the Commonwealth Parliamentary Association.

Olson, the Chair of the Research Committee of Legislative Specialists of the International Political Science Association reviewed this draft and provided invaluable commentary. Dr. Joel D. Barkan, interim senior advisor for governance at NDI, carried the project forward by providing his own commentary and representing NDI at the CPA study group in Bermuda. The document was made possible by a grant from the National Endowment for Democracy, and we are grateful for the Endowment's support.

—Kenneth Wollack,  
President, National Democratic Institute

## INTRODUCTION

Democracy requires that those who are freely elected have the power to effectively fulfill their constitutional responsibilities. There is growing recognition that elections cannot be meaningful if the national legislature that emerges from elections does not function democratically or lacks the authority to effectively represent the citizenry. As Professor M. Steven Fish notes in the January, 2006 issue of the *Journal of Democracy*, “The strength of the national legislature may be a—or even *the*—institutional key to democratization.”

Although there have been many international initiatives to define and monitor the democratic character of elections, there have been fewer efforts to define standards for institutions that result from a democratic electoral process. While elections provide the basis for rule by the people, they do not guarantee that citizens are effectively represented. As Fish points out, “...if politicians fail to establish a national legislature with far-reaching powers, the people will soon find themselves in a polity where their votes do not count (or are not counted properly) and their voices are not heard.” Legislative bodies that fail to perform their representative and oversight functions breed public cynicism and ultimately erode popular support for the democratic system itself.

Prepared by the National Democratic Institute (NDI), this document is intended as a basis for discussion within the international community regarding standards for the functioning of democratic legislatures. Just as there is no single, international body that certifies the democratic nature of a given electoral process, there can be no one arbiter of whether a legislature functions properly. It is hoped, however, that, through the discussion of standards, an international consensus on the functioning of democratic legislatures will emerge, thereby helping legislatures become more open, independent, accountable and responsive.

The standards set out in this discussion document do not represent all elements of a democratic legislature. At the same time, to be considered democratic, a legislature must demonstrably adhere to standards across the entire spectrum of legislative life, specifically with respect to the organization, procedures, functions and values of the legislature as enumerated herein. Selective adherence to or “cherry picking” standards does not assure the emergence of a democratic legislature, and may in fact serve as a façade or cover for non-democratic practice. Of course, there is no magic formula for creating a functioning, democratic legislature. Different countries evolve their legislatures and legislative practice in different ways, and there is no single institutional form through which the standards presented in this report can be met. The true measure of a legislature is how well it makes public policy on behalf of the citizens its members represent, and the quality of its oversight of the executive.

Certain questions of terminology inevitably arise in an effort such as this. In the interest of clarity, certain key words are used uniformly in the document. Chief among these is the choice of the term “legislature.” It is used in this document as the generic term for the national, elected representative body. It was chosen as a more inclusive term than “parliament” which, while more commonly used, is typically associated with parliamentary systems. In addition, it seems most appropriate that the preferred term is reflective of the legislative function of the legislature, a core power as described throughout this document. Hence, the standards set forth in this

document are intended to apply to all national legislatures, whether they are known as a parliament, a congress or a national assembly.

Secondly, this document uses the terms “executive” or “executive branch,” rather than “government.” The purpose here is to retain the notion that these standards shall apply to all forms of representative government—not just parliamentary systems. While the use of the term “executive branch” is clear in the case of presidential or mixed systems of government, it may be confusing when one is referencing a parliamentary system. When referring to a parliamentary regime specifically, this document will occasionally use the term “government.” Lastly, the term “presiding officer” is the chosen term for the directing authority of the legislature; this person is variously known as the “president,” “speaker,” or “chairman.” This directing authority is typically responsible for conducting debates impartially, observing adherence to the rules of procedure, and usually has a role in the ordering of the legislative agenda. In many countries, the directing authority is supported by a collective body which shares these responsibilities; this body is commonly known as the bureau or presidium and is usually headed by the presiding officer (the president, speaker, chairman, etc.). Where necessary, this document will refer to this body as “the collegiate body.” The presiding officer and the collegiate body are distinct in all cases from the clerk or secretary-general, who generally heads the non-partisan staff service of the legislature.

Finally, this document should be read as a “work in progress” in that it is both a compilation of existing standards and a document designed to serve as input for further discussion, amendment and elaboration. Ongoing discussions of this document, both within NDI, and especially by forums outside the Institute suggest the need to rephrase or expand upon some of the standards presented in this document. There may also be a need to examine additional standards for practices that are becoming the norm in some legislatures in several new democracies. These include the right of the legislature to ratify treaties, trade agreements and loans negotiated by the executive. It is therefore the intention of NDI to periodically update this list of standards as warranted by further discussion and agreement across the international community, especially by members of the legislature in nascent democracies. Until then, we hope this document serves as a useful point of departure. Duplication, circulation and “borrowing” from this report is thus encouraged so long as acknowledgement is made to NDI.

## **PART I ELECTION AND STATUS OF LEGISLATORS**

### **1. Election and Status of Legislators**

#### **1.1 THE ELECTION OF LEGISLATORS**

##### **1.1.1 *Members of the popularly elected or only house shall be directly elected through universal and equal suffrage in a free and secret ballot.***

The direct, popular election of a legislator is a fundamental tenet of a representative democracy, and underpins the legitimacy of the legislature. While members of the upper house may occasionally arrive at their seats via various routes of appointment or selection, it is accepted that the work of this chamber is of diminished legislative import, as described in §§ 6.1.3 and 7.5.2, and that it is the popularly elected house which represents the citizenry and, hence, is empowered to legislate on its behalf. This baseline principle is one that has found voice in the *Warsaw Declaration* of 2000 to which more than 100 countries were signatories: “The will of the people shall be the basis of the authority of government, as expressed by the exercise of the right and civic duties of citizens to choose their representatives through regular, free and fair elections with universal and equal suffrage.”<sup>2</sup> Indeed, the direct election of legislators is of such paramount importance for a representative democracy that it is ever-more accepted as not just a governance principle, but a fundamental civic right. This much is made expressly clear in the declaration of the *Charter of Fundamental Rights of the European Union* that members of the European Parliament “be elected by direct universal suffrage in a free and secret ballot.”<sup>3</sup>

Global recognition of the right of the citizens to directly elect their representatives is demonstrated by the fact that the vast majority of countries, at least 199—including many non-democratic systems with strong executive branch dominance—provide for the direct election of legislators. The trend continues to be in this direction. The experience of Indonesia is indicative in this regard, as it moved in 2004 to amend the constitution and eliminate the legislative seats reserved for the military. The 550-member *Dewan Perwakilan Rakyat* is now directly elected. In addition, some legislatures may decide to enact discriminatory measures to remedy the exclusion of women or marginalized ethnicities from political participation. Such actions shall not be considered undemocratic so long as they are in conformity with a country’s obligations under international law and are drawn by lawmakers precisely to accomplish narrowly defined objectives, as described in § 1.2.2.

##### **1.1.2 *Legislative elections shall meet international standards for genuine and transparent elections.***

In order for the legislature to enjoy democratic legitimacy, it shall first be constituted by an election process that adheres to accepted international standards for genuine and transparent

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<sup>2</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*. See also the *Universal Declaration on Democracy* of the Inter-Parliamentary Union: “... elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency...” Art. 12.

<sup>3</sup> European Union [hereinafter, “EU”]. *Charter of Fundamental Rights of the European Union*, Art. 39.

elections. These standards have been defined and endorsed both globally and regionally by governments, intergovernmental and international organizations, including the Organization of American States,<sup>4</sup> the Economic Community of West African States,<sup>5</sup> the Inter-Parliamentary Union,<sup>6</sup> the United Nations,<sup>7</sup> and the Southern African Development Community (SADC) Parliamentary Forum.<sup>8</sup> Most recently, the right to genuine and transparent elections has received further endorsement from a rich array of governmental and non-governmental bodies in the *Declaration of Principles for International Election Observation*, including, among many others, the African Union, the European Commission, the Inter-Parliamentary Union, the Organization of American States and the United Nations.<sup>9</sup>

**1.1.3 Term lengths for members of the popular house shall reflect the need for accountability through regular and periodic legislative elections.**

Term lengths in the popular house shall be of such length as to allow for frequent elections so that the legislature reflects the opinions of the electorate, but not so frequently that they might present obstacles, political or procedural, to efficient legislating. The need for elections to be both regular and periodic is strongly supported internationally by both governmental and non-governmental bodies, as described in § 1.1.2.

The tension between the legislator's need to legislate and the citizen's right to regularly change their representative is illustrated by the different lengths in the parliamentary terms which exist across nations. Yet, while some popular houses sit for as little as two years, such as House of Representatives in the United States, the Skupstina in Serbia and Montenegro and the Majlis Watani Itihad in the United Arab Emirates, and some sit for as long as six years, such as Yemen's Majlis Annwab and the legislature of Sri Lanka, the overwhelming trend is for popular houses to sit for either four or five years. This time frame is the period which appears to provide the legislator with an opportunity to become accustomed to life in the legislature and to immerse her/himself in substantive issues, while also providing the citizen with a reasonable window in which to assess the performance of his/her elected representative.

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<sup>4</sup> "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people." Organization of American States [hereinafter, "OAS"]. *Inter-American Democratic Charter*, Art. 3.

<sup>5</sup> "Every accession to power shall be made through free, fair and transparent elections." Economic Community of West African States [hereinafter "ECOWAS"]. *Protocol A/SP1/12/01 on Democracy and Good Governance. Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security*, Art. 1(a).

<sup>6</sup> "In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage." Inter-Parliamentary Union [hereinafter, "IPU"]. *Declaration on Criteria for Free and Fair Elections*, Art. 1.

<sup>7</sup> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Art. 2 and without unreasonable restrictions... [to] vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." *International Covenant of Civil and Political Rights* [hereinafter, "ICCPR"], Art. 25

<sup>8</sup> Southern African Development Community (SADC) Parliamentary Forum. *Norms and Standards for Elections in the SADC Region*.

<sup>9</sup> *Declaration of Principles for International Election Observation*. Commemorated October 27, 2005, at the United Nations, New York.

## 1.2 CANDIDATE ELIGIBILITY<sup>10</sup>

### 1.2.1 ***Restrictions on candidate eligibility shall not be based on religion, gender, ethnicity, race or physical ability.***

In keeping with the principles of equality and non-discrimination as the central tenets of any democratic state, candidacy for the legislature shall not be subject to restrictions on the basis of religion, gender, ethnicity, race or physical ability. Consistent with Article 25 of the *International Covenant of Civil and Political Rights*, the basic principle governing candidacy for the legislature shall be that every elector shall be eligible for election.<sup>11</sup> Therefore, except in the few instances noted below, the eligibility criteria for candidates cannot discriminate against any citizen who would otherwise be eligible to vote.<sup>12</sup> The Community of Democracies' Warsaw Declaration summarizes this principle as "the right of every person to equal access to public service and to take part in the conduct of public affairs, directly or through freely chosen representatives."<sup>13</sup> Similarly, the African Union has declared that "every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."<sup>14</sup> In the language of the European Union, "[e]very citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State."<sup>15</sup>

Some key restrictions on candidacy frequently apply and are generally seen as non-controversial. These include restrictions based on age, residence or citizenship. According to the Organization for Security and Cooperation in Europe, "no additional qualification requirements, beyond those applicable to voters, may be imposed on candidates, except for certain offices, concerning age and duration of citizenship and/or residence."<sup>16</sup> Restrictions on age usually consist of a minimum threshold of 18 to 25 years for the lower house, or as high as 30 for the upper house.<sup>17</sup> In Namibia, for example, every citizen over the age of 21 is eligible to be elected to the legislature, with the exception of convicted criminals, those already serving in the paid public service, or

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<sup>10</sup> Eligibility criteria are distinct from the incompatibility criteria described in § 1.3.

<sup>11</sup> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Art. 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." ICCPR, Art. 25. See also the *Convention on the Elimination of All Forms of Discrimination Against Women*: "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right... to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies." Art. 7(a). December 18, 1979.

<sup>12</sup> *Universal Declaration on Human Rights* [hereinafter, "UDHR"], Art. 21; IPU, *Universal Declaration on Democracy*, Art. 12.

<sup>13</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>14</sup> African Union [hereinafter, "AU"]. *African (Banjul) Charter on Human and Peoples' Rights*, Art. 13.

<sup>15</sup> EU. *Charter of Fundamental Rights of the European Union*, Art. 39.

<sup>16</sup> Organization for Security and Co-operation in Europe [hereinafter, "OSCE"], *Existing Commitments for Democratic Elections in OSCE Participating States*, Art. 6.3.

<sup>17</sup> Thirty years is the minimum eligibility age for the US Senate. *Constitution of the United States of America*, Art. I, §3.

those declared “unsound of mind.”<sup>18</sup> Globally, 90 legislative chambers in 82 countries list “insanity” as grounds for ineligibility.<sup>19</sup> Bulgaria’s law describes these individuals as “insane, incompetent, or not responsible.” In such cases, it is essential that the standards used to determine mental incapacity conform to widely accepted international human rights principles, and that any citizen denied the right to run for election also has the right to appeal to an independent judicial body or electoral commission.<sup>20</sup>

Eligibility restrictions may also exist on citizens currently in prison. This type of restriction exists, for example, in the United Kingdom, Turkey, India (for prison terms of two years or more), the United States and Namibia as noted above. In Canada, citizens are prohibited from candidacy if they have been convicted of electoral fraud, corrupt or illegal practices connected with elections (for five years), or failure to file election finance reports for candidacy in the previous election. This is also true in the case of the Philippines.

Lastly, it is not uncommon for democratic countries to render ineligible for election persons who, either directly or through their membership or affiliation with a group, advocate the use of violence or use violence as a political tool. This practice is found especially in countries with a history of social fracture, violent racism, or ethnic conflict. Indeed, this is broadly consistent with the tenor of Art. 20, § 2 of the *International Covenant on Civil and Political Rights*.<sup>21</sup> However, the prohibition of a candidate or party is and always must be exercised with the utmost restraint. An application to ban a candidate must be referred to a competent, independent judicial body who must decide on the constitutionality of the prohibition, as explained in § 4.1.2.

**1.2.2 Measures of positive discrimination used to encourage the political participation of marginalized groups shall be narrowly drawn to accomplish precisely defined and limited objectives.**

Given the history of gender inequality in societies around the world, democratic countries may need to actively encourage women’s participation in the political process, in order for their legislatures to be truly representative. The need to guarantee opportunities for women’s political participation is actively supported by governmental and international bodies across the world including, among others, the Economic Community of West African States,<sup>22</sup> the Organization of American States,<sup>23</sup> the South Asian Association for Regional Cooperation,<sup>24</sup> and the European

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<sup>18</sup> “The parliamentary system of Namibia,” *Constitutional and Parliamentary Information*, No. 176, 2<sup>nd</sup> Half-year, 1998, p. 142.

<sup>19</sup> Website of the IPU. [www.ipu.org](http://www.ipu.org). Accessed 9/15/05.

<sup>20</sup> United Nations General Assembly. *Principles for the protection of persons with mental illness and the improvement of mental health care*, 17 December 1991, Principle 4.

<sup>21</sup> “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” *International Covenant on Civil and Political Rights*, Art. 20, § 2.

<sup>22</sup> “Member states shall take all appropriate measures to ensure that women have equal rights to [those of] men to vote and be voted for in elections, to participate in the formulation of government policies and the implementation thereof and to hold public offices and perform public functions at all levels of governance.” ECOWAS. *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, Art. 2.

<sup>23</sup> “States shall promote the full and equal participation of women in the political structures of their countries as a fundamental element in the promotion and exercise of a democratic culture.” OAS. *Inter-American Democratic Charter*, Art. 28.

Union.<sup>25</sup> Restrictions on candidacy based on gender are being increasingly consigned to the past, with nearly every state allowing for the participation of men and women in legislative elections. This trend has recently expanded, with women receiving the right to vote and stand in elections in Bahrain, Jordan, Kuwait and Qatar.

Because of the long history of women's oppression in much of the world, some steps may be necessary to encourage and guarantee women's participation in the legislature. At least 41 countries already use a system of quotas for the involvement of women in the legislature. Many countries do this through the use of constitutional quotas, including Afghanistan, Argentina, Bangladesh, France, Guyana, Iraq, Kenya, Nepal, Philippines, Rwanda, Taiwan, Tanzania and Uganda, while at least 37 countries do this through various election laws.<sup>26</sup> A preferred way to promote the involvement of women is the "zipper" quota system, which presents a 50-50 distribution of women and men on party lists. Zipper systems are used voluntarily in political parties in Austria, Belgium, Denmark, Finland, Germany, Iceland, Moldova, Mozambique, the Netherlands, Norway, Sweden and South Africa. All of these countries have achieved 30 percent women's participation or higher through the use of "zipper" quotas. In Sweden, party use of "zipper" quotas has been successful in ensuring that women constitute more than 40 percent of the legislature, and with it a stronger voice for women in national life.<sup>27</sup> Zipper systems are legally mandated, and therefore parties can suffer sanctions for not following them, as in Argentina, Belgium and Rwanda. These countries have also achieved at least 30 percent women's participation through the use of quotas.

As in the struggle against gender discrimination, it may be necessary in some cases to institute rules and procedures designed to protect and encourage the participation of members of religious, ethnic and racial minorities in national political life. The Inter-Parliamentary Union has spoken of the need for "special procedures to ensure gender diversity and the representation of marginalized and excluded groups."<sup>28</sup> Ethnically targeted political preferences are acceptable and even necessary when their fundamental aim is to ensure equality of all persons and groups before the law through the full and proportional participation of all groups in the political system.

Provisions may occasionally be made to ensure the representation of minority ethnic or religious groups by "setting aside" seats in the legislature. However, there is a need for periodic review of any such provisions. In Lebanon, for example, seats in the 128-member Majlis Al-Nuwwab are split along 11 cleavages. India reserves 79 of its 543 seats in the Lok Sabha for scheduled castes and 41 for scheduled tribes. The Pakistani Constitution calls for 10 seats to be reserved for non-Muslims. The Slovenian Drzavni Zbor reserves seats for members of ethnic Italian and

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<sup>24</sup> "Strengthen policies and programs that improve, broaden and ensure the participation of women in all spheres of political, economic, social and cultural life, as equal partners, and improve their access to all resources needed for the full enjoyment of their fundamental freedoms and other entitlements." South Asian Association for Regional Cooperation [hereinafter "SAARC"]. *Social Charter*, Art. II(2xxi).

<sup>25</sup> "Equality between men and women shall be ensured in all areas... The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex." EU. *Charter of Fundamental Rights of the European Union*, Art. 23.

<sup>26</sup> International Institute for Democracy and Electoral Assistance (IDEA). *Global Database of Quotas for Women*. <http://www.quotaproject.org/system.cfm#constnational>. Accessed 9/15/05.

<sup>27</sup> *The Legislator*, 2001/Iss. 4, p. 342.

<sup>28</sup> Inter-Parliamentary Union. *The Contribution of Parliament to Democracy: A Framework*. IPU, p. 2.

Hungarian communities, and the Kosovo Central Assembly sets aside 20 of its 120 seats for minorities. While such provisions may help to ensure greater political inclusion, especially in post-conflict environments or environments where minority rights are under-protected and their political participation has historically been weak, such allowances are generally used only to the extent that they seek to remedy past or current injustices. They are thus “need based” as opposed to “rights based” and should be reviewed to ensure their continued relevance, particularly in light of demographic changes.

**1.2.3 No elected member shall be required to take a religious oath against his/her conscience in order to take his/her seat in the legislature.**

Political participation shall be equally open to members of all religious groups, even where one religion is elevated as a state religion. As a corollary, to require a legislator to renounce his or her religion—or in any other way swear against his or her principles—is to condition participation in the legislature on the surrender of basic civil liberties. This is consistent with the call of the Economic Community of West African States for “neutrality of the State in all matters relating to religion,”<sup>29</sup> as well as Art. 25 of the *International Covenant on Civil and Political Rights*.<sup>30</sup> It is also consistent with explicit call of the Commonwealth Parliamentary Association, which has endorsed precisely this standard.<sup>31</sup> Democratic governance requires the protection of both political participation and full civil liberties. The experience of Greece, New Zealand and the United Kingdom is instructive in this regard. Despite the existence of an oath with religious references, the legislator has the option of either omitting the reference, or simply substituting it by swearing allegiance to a political body.<sup>32</sup>

### **1.3 INCOMPATIBILITY OF OFFICE**

**1.3.1 In a bicameral legislature, a legislator may not be a member of both houses.**

The separation of powers of the executive, legislative and judicial branches is a fundamental tenet of representative democracy. To ensure the sound functioning of institutions within each branch, bodies that are intended to be separate must have clear rules that give meaning to this separation. As a result, legislators may not have dual membership in a bicameral legislature. This form of incompatibility is distinct from the eligibility criteria detailed in § 1.2, as it does not affect the validity of an election outcome. Issues of incompatibility arise upon successful election to the legislature, and may be resolved by resigning from one of the conflicting positions. Issues of incompatibility may be addressed through any number of legal codes, such as the electoral law as in Austria, Belgium, Croatia the Czech Republic, Ireland, Japan, Kazakhstan, Romania and Spain. This minimum standard only applies to legislators who enjoy membership in two houses

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<sup>29</sup> ECOWAS. *Protocol A/SPI/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, Art. 1(f).

<sup>30</sup> “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.” *International Covenant on Civil and Political Rights*, Art. 25.

<sup>31</sup> “No elected member shall be required to take a religious oath against his/her conscience in order to take his/her seat in the legislature.” Commonwealth Parliamentary Association [hereinafter “CPA”] *Recommended Benchmarks for Democratic Legislatures*, § 1.3.1.

<sup>32</sup> United Kingdom, *Oaths Act 1978*; Greece, *The Constitution of Greece*, Art. 59; New Zealand: *Oaths and Declarations Act 1957*, § 4(1).

of the *same* legislature. It does not apply to membership in houses of *different* legislatures. For example, a member of the Scottish Parliament may also sit in the British House of Lords. This minimum standard does not preclude such a practice.

**1.3.2 A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch, except in limited instances involving front-line delivery of public services.**

In order to guarantee the independence and integrity of the legislative branch, it is essential that legislators choose between potentially conflicting offices before taking their seats in the legislature. The Commonwealth Parliamentary Association has explicitly supported a minimum standard banning the simultaneous service of legislators in the judicial branch or civil service.<sup>33</sup>

Consistent with the internationally accepted need for a clear demarcation between the judiciary and the legislature,<sup>34</sup> the majority of countries prohibit a person from simultaneously holding a judicial post and a legislative seat. In Finland, for example, neither the chancellor of justice nor a justice of the Supreme Court may serve as a legislator. This restriction often extends also to maintaining the separation between the legislature and other constitutional bodies, such as the comptroller and auditor general, as in Ireland,<sup>35</sup> or the president and vice-president of the Public Audit Office, as in Austria.<sup>36</sup>

In addition to restrictions on juridical posts, persons entering the legislature shall not retain any civil service positions. In countries as diverse as Argentina, Australia, Costa Rica, Fiji, Germany [Bundestag], Japan, Kuwait, Mexico, New Zealand and the United Kingdom, legislators may not hold a civil service post during their term of office. This is also the case for Swiss federal officials, and federal officials of the United States. This often also includes restrictions on work in the legislature and in the security sector. Explicit prohibitions on legislators simultaneously serving in the armed services exist in many countries—such as Turkey, Greece, Mexico, Spain, Netherlands, Colombia, Greece, Luxembourg, Hungary, Estonia, Honduras, Slovakia and Guatemala. Others specifically prohibit legislators from serving on the police force—such as Spain, Mexico, Hungary, Poland and Slovakia. This criterion of incompatibility may also be extended to encompass employment in a state-owned company. Such restrictions exist for management staff in Cameroon, Egypt and France and, for example, and for employees of (semi-) state companies in Japan, Republic of Korea and Tunisia.<sup>37</sup>

There may be some limited exceptions to this standard for “front-line delivery of public services,” particularly in countries where legislatures may not be full-time. In these countries, it may not be necessary to prohibit a part-time legislator from also working, for example, as a doctor or a teacher in a state institution. In Chile, Germany and Senegal, teachers constitute an exception to the rule of incompatibility.<sup>38</sup> Also, in some countries with a common law tradition,

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<sup>33</sup> CPA. “A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch.” *Recommended Benchmarks for Democratic Legislatures*, § 1.3.3.

<sup>34</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>35</sup> *Constitution of the Republic of Ireland*, Art. 33.

<sup>36</sup> *Constitution of Austria*, Art. 121.

<sup>37</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*, Geneva, 2000, pp. 45-47.

<sup>38</sup> *Id.*

the attorney general is an *ex officio* legislator. This is the case in Kenya, for example. But a legislator who is unelected and closely connected to the executive would appear to be an overtly undemocratic practice. However, in countries with such practices the Attorney General is not a legislator in the true sense, as he/she cannot vote. So it is in Pakistan, where the attorney general has a right to speak and take part in parliamentary proceedings, but cannot vote.<sup>39</sup> In such cases, the presence of an *ex officio* attorney general should not be considered undemocratic.

## **1.4 IMMUNITY**

### **1.4.1 Legislators shall have immunity for speech conducted during the exercise of their duties; former legislators shall never be liable for speech conducted during the exercise of their duties as a legislator.<sup>40</sup>**

It is essential that in any democracy, political participation and civil liberties receive full and equal protection. The inviolability of the right to freedom of expression is by now uncontested, and it finds its clearest expression in the *International Covenant on Civil and Political Rights*.<sup>41</sup> Although the general right to freedom of expression is often qualified to protect people from slander or defamation, the freedom of expression of legislators is viewed as so paramount that they are often granted immunity for all speech conducted in the exercise of their duties. At a minimum, the constitution or other basic law shall protect legislators from any liability for words spoken in assembly or committee, in private members' bills or draft resolutions, votes, written or oral questions and other speech clearly within the purview of the legislators' duties. It shall also be a minimum standard that a former legislator shall never be liable for written or spoken speech conducted during the exercise of their duties as a legislator. This minimum standard has been expressly supported by the Commonwealth Parliamentary Association: "a former legislator shall continue to enjoy protection for his or her term of office."<sup>42</sup>

The importance of parliamentary immunity is evidenced in the specific support it enjoys internationally. The Inter-Parliamentary Union, for instance, has resolved that the "[p]rotection of the rights of parliamentarians is the necessary prerequisite to enable them to protect human rights and fundamental freedoms in their respective countries; in addition, the representative nature of a Parliament closely depends on the respect of the rights of the members of that Parliament."<sup>43</sup>

The principle of parliamentary privilege relating to freedom of speech is already constitutionally guaranteed in the great majority of parliaments.<sup>44</sup> At least 72 assemblies in 58 countries currently

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<sup>39</sup> *Constitution of Pakistan*, Art. 57.

<sup>40</sup> This freedom of speech is occasionally referred to as "parliamentary immunity" or "parliamentary privilege." Still, these terms are often more broadly understood to include all of the privileges enjoyed by the legislator, not just freedom of speech. Freedom of speech is simply the most fundamental example of such a parliamentary privilege. See Kenneth Bradshaw and David Pring, *Parliament and Congress: 2<sup>nd</sup> edition*. Quartet Books, London, 1981, pp. 83-97.

<sup>41</sup> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." ICCPR, Art. 19(2).

<sup>42</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 1.4.2.

<sup>43</sup> IPU Council Resolution. Mexico City, 1976.

<sup>44</sup> "The immunities of members of parliament," *Constitutional and Parliamentary Information*, No. 175, 1<sup>st</sup> Half-year, 1998, p. 102.

provide for freedom of speech for words spoken from the parliamentary platform, assembly, or committee.<sup>45</sup> Many countries constrict the privilege to apply only within the building itself, although they are in the minority internationally. Such a narrow definition of parliamentary immunity is found in countries as historically and geographically diverse as Germany, Bangladesh, Cyprus, Egypt, Estonia, Finland, India, Kenya, Malaysia, Namibia, Norway, Philippines, United Kingdom and Zambia.<sup>46</sup> The privilege is also defined more broadly in other countries, such as protection for a legislator who repeats, in the press or in writing, words spoken in the assembly. Such a provision is found in countries such as Austria, Burkina Faso, Croatia, Greece, Guinea, Hungary, Italy, Mali, Mozambique, Portugal, Romania, Slovenia and Uruguay.<sup>47</sup> It is also the case in most countries that former legislators continue to enjoy immunity for all words spoken or written and votes cast while serving as a legislator, as in Belgium, Ireland, Portugal and the United Kingdom.

An exception to the requirement of immunity for all speech may be made in cases of *flagrante delicto*, when a legislator is apprehended in the course of committing illegal acts. In such rare cases, although the speech itself is not actionable, speech may be used as evidence against the accused legislator.<sup>48</sup>

**1.4.2 Parliamentary immunity shall not be used to place legislators above the law and shall not extend beyond their term of office, though a former legislator shall continue to enjoy protection for his/her term of office.**

The equality of all citizens before the law is an inviolable civil liberty that stands at the heart of democratic participation. As expressed in the *International Covenant on Civil and Political Rights*, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>49</sup> It may be necessary, however, to afford legislators extra protection against politically motivated prosecutions. Yet, a delicate balance should be struck between, on the one hand, the need to protect legislators from such politically motivated prosecutions and, on the other, the need to ensure that the privilege of parliamentary immunity is not abused and that every citizen ultimately remains equal before the law. As declared by the African Union, “any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials.”<sup>50</sup> A legislator’s immunity shall not, therefore, extend beyond his/her term of office, nor shall the immunity afforded to the legislator be so exhaustive as to place him/her above the law.<sup>51</sup> A former legislator, however, shall continue to enjoy protection for his/her term of office. This aspect of immunity performs an important function in a democratic legislature, as the threat of potential prosecution *after the term of office* could have a chilling effect on the actions of currently serving legislators. This is consistent with the view of the Commonwealth Parliamentary Association

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<sup>45</sup> *Id.*, p. 108.

<sup>46</sup> *Id.*, p. 107.

<sup>47</sup> *Id.*

<sup>48</sup> Immunity from criminal prosecution does not prevent legislators from being censured under the rules of parliament for the use of unparliamentary language or for violating time limitations or other procedural restrictions on debate. See § 10.1.3

<sup>49</sup> *ICCPR*, Art. 26.

<sup>50</sup> *AU. Convention on Preventing and Combating Corruption*, Art. 7.

<sup>51</sup> Kenneth Bradshaw and David Pring, *Parliament and Congress: 2<sup>nd</sup> edition*. Quartet Books. London, 1981, pp. 97-102.

that “parliamentary immunity shall not extend beyond the term of office; but a former legislator shall continue to enjoy protection for his or her term of office.”<sup>52</sup>

In most legislatures, members enjoy some degree of protection against civil or criminal proceedings for acts undertaken outside the exercise of their parliamentary function, except in cases of *flagrante delicto*; however, this immunity is rarely unlimited.<sup>53</sup> The articulation of immunity, nevertheless, differs greatly across the spectrum of legislatures.<sup>54</sup> In South Africa, Canada and New Zealand, for example, immunity exempts a legislator from appearing as a witness in a civil case, but the immunity enjoyed goes little further than this.<sup>55</sup> In Kenya and Thailand, legislators accused of criminal acts do not enjoy the protection of parliamentary immunity; while in Egypt, Greece, Portugal and Romania, legislators investigated in civil matters do not enjoy the protection of parliamentary immunity.<sup>56</sup> Some countries make a distinction on the basis of the number of years of imprisonment for which the offence is punishable. Thus, no protection is offered for offences punishable by more than six years of imprisonment in the Philippines, and protection is offered in Sweden only if the offence is punishable by less than two years.

Although the use of parliamentary immunity is widespread and may serve a clear function in a representative democracy, the global trend clearly points to the refinement of the concept. There have been concerns about the abuse of parliamentary immunity and, in countries with the broadest grants of immunity, perverse incentives have sometimes been created for some individuals to run for office primarily to use the grant of immunity as a shelter from criminal accusations. This effectively places them above the law. In some countries, such as the Netherlands and Malaysia, ordinary law is deemed appropriate enough to protect all citizens including the legislators, thus negating the need for special provisions. The trend thus points toward the provision of relative, but not absolute, immunity for legislators.<sup>57</sup>

**1.4.3 Only an act or vote of the legislature can lift parliamentary privilege and the immunity of a legislator. The executive branch shall have no right or power to lift the immunity of a legislator.**

The separation of the functions of the legislative, executive and judicial branches in a representative democracy is intended to guarantee the independence of each institution and to ensure that political power is not easily captured by one branch. It follows that the legislature should have meaningful control over its own members and should have its own mechanisms to protect parliamentary privileges, such as immunity. Because parliamentary immunity is not a right but a privilege which must be limited, as detailed in § 1.4.2, mechanisms shall exist for the

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<sup>52</sup> CPA, *Recommended Benchmarks for Democratic Legislatures*, § 1.4.2.

<sup>53</sup> *Flagrante delicto* refers to any offence in the process of being committed or one that has been committed in the very recent past.

<sup>54</sup> “The immunities of members of parliament,” *Constitutional and Parliamentary Information*, No. 175, 1<sup>st</sup> Half-year, 1998, p. 116.

<sup>55</sup> *Id.*, pp. 116-7.

<sup>56</sup> *Id.*, p. 123.

<sup>57</sup> *Id.*, p. 116. See also, African Union, *Convention on Preventing and Combating Corruption*, Art. 7 (“Subject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials”).

lifting of this privilege, and this power shall be exclusively reserved for the legislature. This minimum standard has already received international support from inter-parliamentary bodies.<sup>58</sup>

This minimum standard is met by the majority of legislatures today. Differences across the spectrum are essentially procedural, such as the number of legislators required to lift immunity. In Finland, for example, a five-sixths majority is required to authorize proceedings against a member, though the privilege does not apply to civil proceedings, while proceedings against a legislator accused of a crime or civil infraction in Switzerland are possible after federal chamber authorization through a simple majority.<sup>59</sup> In other legislatures, meanwhile, judicial proceedings cannot be pursued without the explicit approval of the assembly. This is the case in countries such as Denmark, Egypt, Greece, Mozambique, Spain, Czech Republic and Hungary.

**1.4.4 After the legislature votes to lift the immunity of a legislator, it has no power to mandate changes to or otherwise affect proceedings involving the legislator before other branches of government.**

It is a grounding principle of any representative democracy that all citizens are equal before the law. It follows that the legislature which is solely empowered to offer the privilege of immunity is also solely empowered to take it away. When this occurs, the legislator in question loses the legal privileges offered by the legislature and returns to the enjoyment of the same human, civil, political and social rights as all other citizens. As the immunity of a legislator is lifted, therefore, the principle of the separation of powers takes effect and the judiciary enjoys the same quality of independence in its dealings with the legislator as it does with any other citizen.<sup>60</sup> This is consistent with Article 7 of the *Universal Declaration of Human Rights*,<sup>61</sup> as well as the declaration of the *International Covenant on Civil and Political Rights* that “[a]ll persons shall be equal before the courts and tribunals,” and that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>62</sup> It is common practice internationally, even where the separation of powers is only loosely established, that the legislature has no power to mandate changes to or otherwise affect proceedings involving the legislator before other branches of government.

## **1.5 REMUNERATION AND BENEFITS**

**1.5.1 The legislature shall provide all legislators with fair remuneration and adequate physical infrastructure, and all forms of remuneration and infrastructure shall be allocated on a non-partisan basis.**

Legislators as workers also enjoy all workers’ rights afforded to them nationally as well as internationally, through relevant United Nations and International Labor Organization conventions, and relevant treaties.<sup>63</sup> Like any other public servant, legislators shall be fairly

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<sup>58</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*. See § 1.4.3.

<sup>59</sup> “The immunities of members of parliament,” *Constitutional and Parliamentary Information*, No. 175, 1<sup>st</sup> Half-year, 1998, p. 113.

<sup>60</sup> IPU. *The Parliamentary Mandate: A Global Comparative Study*. Inter-Parliamentary Union. Geneva, 2000, p. 92.

<sup>61</sup> “All are equal before the law and are entitled without any discrimination to equal protection of the law.” *UDHR*, Art. 7.

<sup>62</sup> *ICCPR*, Art.s 14(1), 26.

<sup>63</sup> *UDHR*, Art. 23(3). See also International Labour Organization, *C131 Minimum Wage Fixing Convention 1970*.

remunerated for their service, and all forms of remuneration shall be allocated on a non-partisan basis. Legislators shall also be given adequate physical infrastructure in which to work. From the standpoint of democratic governance, fair remuneration and adequate infrastructure is essential to opening political participation to all segments of society. If legislators are unable to live or support families on their salaries, only the independently wealthy or those sponsored by wealthy interests will be able to afford to participate in national political life. From the standpoint of separation of powers, it also follows that salary and remuneration levels in the legislative and executive branches should be set at levels so as not to unduly weaken one branch of government.

Remuneration in most legislatures takes the form of a regular salary, the aim being to allow any member of the public, regardless of means, to enter the legislature. In most countries, a legislators' pay is often approximate to that of a senior civil servant. In Algeria, Latvia, Czech Republic and Mali, for example, legislators are paid on the basis of the most favorable index of the highest offices of the State.<sup>64</sup> In Turkey, legislators' monthly salary does not exceed that of the top civil servant, a principle of such importance that it is even mentioned in the constitution.<sup>65</sup> Such linking of pay to general civil service pay is also followed in Finland, Senegal and France. It is important that this pay be supplemented by allowances sufficient to allow legislators to fulfill their responsibilities outside of the legislature, such as travel to and from their constituencies, as set out in § 8.2.1.

Pension benefits, often tied to the length of service, are offered by the majority of legislatures today. In many countries, including Australia, Canada, Croatia, Denmark, Fiji, France, India, Israel, Senegal and the United Kingdom, legislators have their own pension scheme, based on legally established principles.<sup>66</sup>

## **1.6 RESIGNATION**

### **1.6.1 Legislators shall have the right to resign their positions.**

As service in the legislature begins with the voluntary decision of a citizen to run for election, the elected legislator, as a worker, shall also enjoy the right to leave his/her position. Many instruments of international law include restrictions on labor rights for work relating to obligatory civic duty, such as *International Labour Organization Convention No. 29*, which has been ratified by 169 countries.<sup>67</sup> Since service in the legislature is premised on the free participation of a citizen in the public assembly, and is not obligatory civic duty, it follows that legislators shall have the right to resign their position.

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<sup>64</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*. Inter-Parliamentary Union. Geneva, 2000, p. 30.

<sup>65</sup> *The Constitution of the Republic of Turkey*, Art. 86.

<sup>66</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*. Inter-Parliamentary Union. Geneva, 2000, p. 36.

<sup>67</sup> "Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include... b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country." International Labour Organization [hereinafter, "ILO"], ILO Convention No. 29, *Convention Concerning Forced Labour*, Art. 2(2).

The right of a legislator to resign his/her position is already found in the overwhelming majority of legislatures. Most frequently, the legislator simply informs the presiding officer of the legislature of his/her intention to resign, and this is automatically accepted on behalf of the house. In some countries, such as Sri Lanka, a simple letter of resignation is required. In many other cases, the tendering of resignations is to be addressed to the Speaker, as in Greece, India, Israel, Mali and the Philippines.<sup>68</sup> Even in the United Kingdom where a legislator cannot resign, he or she may apply for certain nominal offices which have been retained for purposes of resignation. Appointment of a Member of Parliament to a “paid office under the crown” automatically disqualifies the Member from retaining his or her seat.

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<sup>68</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*, Geneva, 2000, p. 17.

## **PART II ORGANIZATION OF THE LEGISLATURE**

### **2. Procedure**

#### **2.1 RULES OF PROCEDURE<sup>69</sup>**

##### **2.1.1 *Only the legislature may adopt and amend its rules of procedure.***

The authority enjoyed by the legislative, judicial and executive branches over their own procedures and personnel is a core tenet of a representative democracy. With respect to the legislature, it is of paramount importance that only it may devise, institute, implement and amend the rules of procedure that govern its functioning. This power over its own rules of procedure is one of the tools that give meaning to the autonomous existence of the legislature, something that the Organization for Security and Cooperation in Europe has defined as a “key standard” of democratic governance.<sup>70</sup> In addition, the Commonwealth Parliamentary Association has expressly endorsed this minimum standard.<sup>71</sup> This exclusive authority shall also extend to control of the legislature’s staff and budget, as detailed in §§ 5.1.1 and 6.3.3, respectively.

That legislatures autonomously set and modify their own procedures is already evidenced in most legislatures today. Differences across the spectrum largely pertain to amending procedures. In Italy and Tunisia, for instance, the legislature can amend the rules of procedure with an absolute majority, while a two-thirds majority is required in the legislatures of Austria and Costa Rica. In most other countries, however, only a simple majority is required. This procedural autonomy is also explicitly provided for in the constitutions of a few countries, such as Australia,<sup>72</sup> Cyprus,<sup>73</sup> Germany,<sup>74</sup> Netherlands,<sup>75</sup> India,<sup>76</sup> Philippines,<sup>77</sup> Zambia<sup>78</sup> and Spain.<sup>79</sup> The United States House of Representatives, meanwhile, provides its members with an opportunity to ensure the relevance of its rules by re-adopting them at the beginning of each Congress. In France, the centrality of the rules to legislative life is revealed by the fact that the Constitutional Council must approve rule amendments after they are voted upon by both chambers of the Assemblée Nationale.<sup>80</sup>

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<sup>69</sup> Rules of procedure may also be known as the standing orders.

<sup>70</sup> OSCE Office for Democratic Institutions and Human Rights. *OSCE Dimension Seminar on Democratic Institutions and Democratic Governance*, Warsaw. 12-14 May, 2004.

<sup>71</sup> CPA. “Only the legislature may adopt and amend its rules of procedure.” *Recommended Benchmarks for Democratic Legislatures*, § 2.1.1.

<sup>72</sup> *Constitution of Commonwealth of Australia*, Art. 50.

<sup>73</sup> *Constitution of the Republic of Cyprus*, Art. 73.

<sup>74</sup> *Constitution of the Federal Republic of Germany*, Art. 40(1).

<sup>75</sup> *Constitution of the Kingdom of the Netherlands*, Art. 72.

<sup>76</sup> *Constitution of the Republic of India*, Art. 118.

<sup>77</sup> *Constitution of the Republic of the Philippines*, VI, § 15(3).

<sup>78</sup> *Constitution of Zambia*, Art. 86.

<sup>79</sup> *Constitution of the Kingdom of Spain*, Art. 72(1).

<sup>80</sup> *Constitution of the French Fifth Republic*, Title VII, Art. 63.

## **2.2 SESSIONS**

### **2.2.1 *The legislature shall meet regularly, at intervals sufficient to fulfill its responsibilities.***

In a representative democracy, the workload of the legislator will necessarily be heavy with constituency relations, consideration and drafting of bills and the supervision of the executive. To give appropriate time to these tasks, the legislative assembly shall meet regularly and for lengths of time sufficient for each legislator and for each organizational unit of the legislature to engage in their responsibilities, while ensuring that the length of the session is not so long as to unnecessarily prolong the legislative process.

The need for the legislature to sit regularly is widely recognized, not least by the Commonwealth Parliamentary Association.<sup>81</sup> In almost all countries, moreover, the holding of the legislative session is constitutionally mandated, which has the effect of binding the legislature, and by default the executive, to work expeditiously. In Japan, for instance, the Diet is constitutionally bound to meet in one ordinary session beginning in January and lasting 150 days,<sup>82</sup> while in Pakistan the constitution calls for three sessions each year with no more than 120 days between sessions.<sup>83</sup> In what are sometimes termed “permanent assembly” systems, such as those in the Czech Republic, Italy, the Netherlands, Slovakia and Russia there are, legally, no sessions. Instead, the duration of the legislature corresponds to the lifetime for which the legislature is elected. When functioning well, this system allows the legislature to devote as much time as it chooses to the effective performance of its duties and at the same time ensures its independence from the executive. However, if the legislature does not limit its own session, it may give rise to an unproductive legislative term. Ideally, to encourage expeditious legislating and to provide time for committee work and constituency relations, a legislature would sit for between 100 and 200 days per year.<sup>84</sup> Typically, authoritarian and inactive legislatures have met for fewer than 50 days a year.<sup>85</sup>

### **2.2.2 *The legislature shall have and follow procedures for calling itself into extraordinary or special session.***

Consistent with the principle of the separation of powers in a representative democracy, the legislative, judicial and executive branches must enjoy high degrees of autonomy with regard to their internal procedures and personnel. It follows that the legislature shall enjoy the right to call itself into extraordinary or special session. This right shall be qualified by requiring an act or vote of at least one-fifth, but no more than two-thirds, of members. This right need not necessarily preclude allowing for a special session to be called for by the executive or head of state.

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<sup>81</sup> “Parliament must sit regularly.” *Roundtable on Managing Parliament-Executive Interface in the Commonwealth*. See also: “The legislature shall meet regularly, at intervals sufficient to fulfill its responsibilities.” *Recommended Benchmarks for Democratic Legislatures*, § 2.2.1.

<sup>82</sup> *Constitution of Japan*, Art. 52.

<sup>83</sup> *Constitution of the Federation of Pakistan*, 54(2).

<sup>84</sup> This suggested range takes into consideration the average number of sitting days in most democratic legislatures and allows for a small deviation from that norm. For example, the United States *Senate* sat for 132 days in 2004. The British *House of Commons* averages approximately 150 days per year, excluding election years.

<sup>85</sup> Jan Blondel. *Comparative Legislatures*. Prentice-Hall. New Jersey, 1973, p. 59 and pp. 156-157.

This form of legislative autonomy is already enjoyed by many legislatures. Differences among them are mostly procedural. In the French *Assemblée Nationale*, for example, an absolute majority is required to convene a special session, whereas two-thirds of members are required in Cameroon and Monaco, two-fifths in Denmark, and one-quarter in Japan.<sup>86</sup> In the United States, the right is enjoyed by both the president and Congress. The Constitution allows for the leaders of Congress, if authorized by resolution, to convene the chambers of Congress.<sup>87</sup>

**2.2.3 Provisions for the executive branch to convene a special session of the legislature shall be clearly specified.**

Should any event occur while the legislature is not in session that merits the focused attention of the citizens' representatives, a special session may be convened. Both the legislature and the executive branch may simultaneously enjoy the right to convene such a session, as described in § 2.2.2. It is not inconsistent with the principles of a representative democracy that special provisions exist for the executive branch to convene a special session, as the principle of legislative independence remains unaffected once the legislature has convened. Moreover, the executive branch may be in the strongest position to react to sudden events, given the greater range of technical and human resources they enjoy as executors of public policy. The minimum standard, therefore, is that the provisions for the executive branch to convene a special session of the legislature shall be clearly specified.

Indeed, in most of the countries where provisions are made for the calling of special sessions, the head of state or the executive branch is frequently empowered to convene such a session. In the United States, the constitution explicitly allows the president to convene both houses of Congress, or either one, by way of presidential proclamation.<sup>88</sup> In the United Kingdom, meanwhile, the speaker may give notice of an earlier sitting if a government minister contends that such a session is in the public interest.<sup>89</sup> In the above examples both the right and the method of execution are clearly defined.

## **2.3 PLENARY AGENDA**

**2.3.1 Legislators shall have the right to vote to amend the proposed agenda for debate.**

For the separation of powers of the executive, judicial and legislative branches to be effective and assured, each branch must enjoy a considerable degree of autonomy with regard to its internal functioning. This principled sovereignty is crucial in the ordering of the legislative process and particularly crucial in setting and amending the agenda for debate. The legislature's agenda is set by the executive branch in many countries, *de facto* if not *de jure*. This practice is

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<sup>86</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, p. 60.

<sup>87</sup> "...he may, on extraordinary Occasions, convene both Houses, or either of them..." *Constitution of the United States*, Art. II, § 3.

<sup>88</sup> *Id.*

<sup>89</sup> "Whenever the House stands adjourned and it is represented to the Speaker by Her Majesty's Ministers that the public interest requires that the House should meet at a time earlier than that to which the House stands adjourned, the Speaker, if he is satisfied that the public interest does so require, may give notice that, being so satisfied, he appoints a time for the House to meet, and the House shall accordingly meet at the time stated in such notice." *Standing Order No. 13(1)*.

not considered to be entirely undemocratic, since it is understood that the executive is a key part of the legislative process. Still, the executive must not dictate the life of the legislature, and executive involvement in the agenda needs to be balanced by the legislature's right to amend the proposed agenda. Hence, consistent with the declaration of the Commonwealth Parliamentary Association, the legislature shall have the right to amend its own agenda whether it has come from the executive branch or an internal body.<sup>90</sup>

The practice of preparing the proposed agenda is extremely diverse around the world. In most countries, the agenda is established by the speaker and members of a collegiate body, which is usually chaired by the speaker and involves party group leaders, as well as presidents and vice-presidents of the assembly. This collegiate body is sometimes known as the bureau, as in Estonia and Belgium, or the presidium, as in Norway and Ukraine. The speaker, though often a party leader, is charged with operating impartially and is therefore the most appropriate person to preside over agenda setting, even though he/she may give additional weight to requests from the executive branch.<sup>91</sup> Affording special weight to executive branch interests may be done in the interest of legislative efficiency, since all legislation will require executive and legislative approval. It also tends to be relatively uncontroversial since the party of the executive branch tends to reflect the party composition of the legislature. The use of such internal mechanisms to set the agenda is pursued, for example, in Algeria, Estonia, Lebanon, Norway, Poland, Spain and Ukraine. Yet, the agenda may then be amended if so proposed by a defined small number of legislators. This is the case in Belgium, for example, where 13 members can propose a vote to amend the agenda, and in the Republic of Korea where an item can be added by request of 20 members.

In other countries, a special committee determines the agenda. In the United States House of Representatives, for example, the Committee on Rules proposes the sequence in which, and the procedures by which, the House debates and votes on major bills. The House never formally adopts a legislative plan or schedule for a period of days, weeks, or months. The consideration of relatively non-controversial bills is controlled by the Speaker, but only after agreement by two-thirds of the chamber. The House decides to consider most important and more controversial bills as it accepts or rejects proposals made by the committee. This committee, acting as an agent of the majority party, proposes a resolution recommending that a certain bill be called up, debated, and voted upon under specific rules. The House debates and then accepts or rejects each such resolution by majority vote.<sup>92</sup> The speaker and majority leader typically define the days and sequence for the consideration of bills.

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<sup>90</sup> This internal or collegiate body may be known variously as the "presidium," "bureau" or "conference of presidents." A CPA Study Group has declared the right of legislators "to vote to amend to proposed agenda for debate." *Recommended Benchmarks for Democratic Legislatures*. § 2.4.1.

<sup>91</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, p. 62.

<sup>92</sup> Makram Ouais, Chrissy Mataya, Susan Benda, "Legislative Scheduling," in Lawrence D. Longley, Attila Agh, and Drago Zajc (eds.). *Working Papers on Comparative Legislative Studies IV: Parliamentary Members and Leaders, The Delicate Balance*. Research Committee of Legislative Specialists, International Political Science Association, 2000, p. 458.

**2.3.2 Legislators in the lower or popularly elected chamber shall have the right to initiate legislation and to offer amendments to proposed legislation.**

It is the right of every citizen to voice their opinions and proposals on any matter they should wish. In a representative democracy, it becomes the right of every legislator to propose legislation and introduce bills, regardless of majority or minority status. Whether successful or not, each piece of proposed legislation is an expression of the sentiment of a group of citizens, whether that group be geographic, social, or based on another common interest. The legislator's right to introduce legislation may be defined in the rules to manage the workload of the legislature. This minimum standard enjoys international support from inter-parliamentary bodies such as the Commonwealth Parliamentary Association.<sup>93</sup>

It is the norm in legislatures today that members in popularly elected chambers have the right to initiate and offer amendments to legislation.<sup>94</sup> In Nigeria, for example, bills can be introduced in both Houses of the National Assembly by any member, including on behalf of civil society groups.<sup>95</sup> In many countries, the executive branch may also introduce bills. Departing from this institutional arrangement, in the United States Congress, only legislators are empowered to introduce bills. Although the executive branch frequently sends draft bills to the legislature, formally, the independence of the legislature of the United States is maintained by requiring legislative sponsorship of the bills.<sup>96</sup>

**2.3.3 The legislature shall give legislators and citizens adequate advance notice of session meetings and the agenda for the meeting.**

In a fully functioning and active legislature, representatives will find themselves with a workload heavy with the analysis and drafting of bills, constituent relations activities and exercising oversight of the executive. To be able to fully engage in his/her constitutional responsibilities, a legislator must have sufficient means and mechanisms, as described in § 7.1.1. Pursuant to the declaration of the Commonwealth Parliamentary Association that there “shall be adequate parliamentary examination of proposed legislation,” a legislator must be provided with advance notice of session meetings and the agenda for that session.<sup>97</sup> If legislators are to work effectively amidst a heavy workload, it is imperative that their staff and citizens be given the earliest possible notice of session times and the agenda in order to prepare. This right of the legislator is especially important for members of the opposition.

The accepted norm for many legislatures is for the agenda of the following week to be publicly announced at the end of the legislative week. On the last legislative day of the week in the

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<sup>93</sup> CPA. “Legislators in the lower or only house shall have the right to initiate legislation and to offer amendments to proposed legislation.” *Recommended Benchmarks for Democratic Legislatures*. § 2.4.2.

<sup>94</sup> “Roles of Government and Parliament/backbenchers in the introduction and passage of legislation,” *Constitutional and Parliamentary Information*, No. 170, 2<sup>nd</sup> Half-year, 1995, pp. 114-5.

<sup>95</sup> “Appropriation Procedure—An aspect of the budgetary process in a parliamentary democracy: the experience of the National Assembly of Nigeria,” *Constitutional and Parliamentary Information*, No. 182, 2<sup>nd</sup> Half-year, 2001, p. 279.

<sup>96</sup> Practically speaking, the president's bills are always sponsored by legislators in the president's parties. The extra step, while a formality, serves to reinforce the separation of powers in the United States.

<sup>97</sup> CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VIII.

United States House of Representatives, for example, a representative of the minority leadership seeks unanimous consent to speak out of order for one minute to address the House for the purpose of asking the majority leader about the legislative program for the upcoming week. Following the announcement, the whip offices send members “Whip Notices” for the next week listing the specific bills to be considered. Members also receive copies of the legislation scheduled for consideration, in addition to partisan publications from the majority and minority parties with summaries of the upcoming legislation.<sup>98</sup>

## **2.4 PLENARY DEBATE**

### **2.4.1 *The legislature shall create and follow clear procedures for structuring debate and determining the order of precedence of motions tabled by members.***

Consistent with the principle of autonomy in the internal functioning of the executive, judicial and legislative branches, the legislature shall have complete control over the structuring of its debates and the order of precedence in motions. This exclusive power shall be clearly stated and explained in the rules of procedure, which always remains under the purview of the legislature as described in § 2.1.1. It is a right of both majority and minority members to be allowed the opportunity to present their opinions on all issues before the legislature. To safeguard this right, particularly as it relates to minority members, the procedures for structuring debate should be clearly stated and impartially executed.

Across the spectrum of legislatures, the task of conducting debates as impartially as possible and of seeing that the rules of procedure are observed usually falls to the presiding officer.<sup>99</sup> In some countries a list of speakers may be drawn up in advance, such as in Australia, France and Germany, and in the case of organized debates in Canada, India, Italy, Japan, Russia and South Africa.<sup>100</sup> The presiding officer shall be guided by the rules of procedure when determining the practical details of the debate such as the calculation of speaking time. This is the case, for example, in Canada, Colombia, China, Hungary, New Zealand and Spain. In India, the presiding officer must ensure that the time for speech is divided out among political groups in proportion to their seats. The task may also fall to a collegiate body, meanwhile, as in France, Italy, Lebanon, Poland and Senegal.<sup>101</sup>

### **2.4.2 *The legislature shall provide meaningful opportunity for legislators to publicly debate bills before a vote.***

All citizens have a right to voice their opinion and to affect the creation of laws. As the public assembly is the embodiment of the citizenry in a representative democracy, it follows that each legislator has the right to publicly reflect on bills under consideration. This right shall be

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<sup>98</sup> Floor Procedure in the U.S. House of Representatives. [http://www.rules.house.gov/archives/floor\\_man.htm#Ic](http://www.rules.house.gov/archives/floor_man.htm#Ic). Accessed 11/14/05.

<sup>99</sup> The most common terms for the presiding officer are “speaker” and “president.”

<sup>100</sup> Stanley Bach, “The Office of Speaker in Comparative Perspective,” in Lawrence D. Longley, Attila Agh, and Drago Zajc (eds.). *Working Papers on Comparative Legislative Studies IV: Parliamentary Members and Leaders. The Delicate Balance*. Research Committee of Legislative Specialists, International Political Science Association, 2000, p. 341.

<sup>101</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, pp. 67-68.

preserved for each legislator on a non-partisan basis. As a corollary to this right, and pursuant to the declaration of the Commonwealth Parliamentary Association that the legislature “shall provide adequate opportunity for legislators to debate bills,”<sup>102</sup> information and opportunities for debate shall be provided well in advance of a vote. The opportunities for public debate during the legislative process shall be clearly demarcated and strictly adhered to.

Legislatures commonly have one, two or, in the case of Denmark, Finland, Israel and the United States, three set times in which legislation can be publicly debated. Also known as “readings,” this process of systematically re-occurring intervals allows for the thorough reading and refinement of bills and for the input of interested and affected citizens as described in § 11.1. In the United Kingdom, for example, the first reading is where the bill is presented and ordered to be printed, without debate. In the second reading the main principles of the bill are determined before any committee work begins. In the next stage, the details of the bill are debated at the committee level. This is then followed by the report stage in the House itself in which the House makes changes that the government has agreed to in principle in committee and new points are debated. During the report stage the amendments may be voted on separately. A third reading then follows. It consists of a debate on the bill as it emerged from the committee and report stages and is confined to the contents of the bill.<sup>103</sup> French bills, on the other hand, have two readings. The first reading generally consists of a general debate on the principles of the bill, and the second consists of a detailed examination of the clauses, and of amendments proposed by committee. Ideally, since the will of the majority is usually already reflected in the content of the bill, compensatory steps may be taken to provide for the views of the opposition to be heard. So it is in Italy, for example, that the allocation of speaking time for opposition groups is greater than for those representing the majority when the government introduces a bill.

## **2.5 PLENARY VOTING**

### **2.5.1 *There shall be a presumption that votes in the legislature shall be public; the legislature shall publicly codify any exceptions to the presumption and give advance notice before a non-public vote.***

In a representative democracy, the legislature is the embodiment of the citizenry. To allow citizens to monitor the performance of their representatives and to sustain in them the belief that their legislators are working in their interests, and hence sustain their confidence in the institutions of their democracy, the activities of the legislature must always be transparent. This means that voting shall be presumed to be public, consistent with the widely endorsed *Warsaw Declaration* of the Community of Democracies: “The legislature [shall] be duly elected and transparent and accountable to the people.”<sup>104</sup> It is also consistent with the much more explicit views of the Commonwealth Parliamentary Association that “[a]ttendance and voting records... should be made readily available,” and that “plenary votes in the legislature shall be public.”<sup>105</sup>

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<sup>102</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 2.5.2. See also: *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VIII.

<sup>103</sup> Inter-Parliamentary Union. *Parliaments of the World: A Comparative Reference Compendium. Volume II. Second Edition*. Inter-Parliamentary Union, 1986, pp. 922-923.

<sup>104</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>105</sup> CPA. *Recommendations for an Informed Democracy: Conclusions of a CPA Study Group on Parliament and the Media*, paragraph 8.4; CPA. *Recommended Benchmarks for Democratic Legislatures*, § 2.6.1.

It is a widely accepted and practiced norm that voting shall be public. Yet, this requirement does not necessarily mean that all votes must be recorded, as many legislatures today use informal mechanisms, such as an oral vote as in the cases of India, the United Kingdom and the United States.<sup>106</sup> Rather, the minimum requirement here is that all votes at least be made in public (*i.e.*, not in closed session.) If votes are made in a closed session, they should be recorded, attributed to each legislator and be made publicly available. In the case of the hiring of personnel, such as advisors to a committee, the discussion of the suitability of candidates may be held in secret, yet the individual votes of legislators shall be publicly recorded if the final vote is not held in public view. An exception to this rule generally applies to the election of the presiding officer.<sup>107</sup> In some legislatures, such as Scotland, the speaker is chosen by secret ballot. That being said, this same vote remains public in many countries today, including India, Ireland, Israel, New Zealand, the United Kingdom and the United States House of Representatives.<sup>108</sup>

**2.5.2 *The legislature shall establish and follow procedures for a minority of legislators to demand that a recorded method of voting be used.***

In a fully functioning legislature, a tension will inevitably arise between the need to deal speedily with the business of the day, especially with non-controversial issues, and with the paramount importance of adhering to the principles of democratic governance. With regard to voting, the legislature will find it most efficient to allow for the use of non-recorded methods of voting. This preference for expediency, however, will always need to be balanced with the need for the legislature to be transparent and accountable in its activities, as expressed by the more than 100 countries signatory to the *Warsaw Declaration*: “The legislature [shall] be duly elected and transparent and accountable to the people.”<sup>109</sup> Therefore, the legislature shall establish and follow procedures for a minority of legislators to demand that a recorded method of voting be used. This minimum standard is supported by the Commonwealth Parliamentary Association: “Members in a minority on a vote shall be able to demand a recorded vote.”<sup>110</sup> To invoke such a recorded method of voting, no more than one-fifth of legislators present shall be required.

It is already the case that almost every legislature in the world today combines the use of non-recorded and recorded methods of voting. It is also the case that the number of legislators needed to oblige a recorded vote is low across the spectrum. For example, the United States Constitution makes clear that a roll call vote must be held in the Senate if demanded by one-fifth of a quorum of Senators present. In Israel less than one-fifth of legislators are required.

Recorded methods usually take on one of four forms: division of members, roll call, electronic voting and voting by paper. The “division of members” is used if an oral vote is challenged in the United Kingdom and many countries that have followed its procedural traditions. Quite literally, members gather on either side of the chamber and have their names noted by the clerk. The “roll call,” secondly, is one of the most common recorded voting methods. As each legislator’s name is called out, the member will reply “yes” or “no,” and have his/her preference

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<sup>106</sup> Thomas Saalfeld, “On Dogs and Whips: Recorded Votes,” in Herbert Doering (ed.), *Parliaments and Majority Rule in Western Europe*. Campus Verlag/St. Martin’s Press, Frankfurt and New York, 1995.

<sup>107</sup> Also known as the “speaker” or “president.”

<sup>108</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, p. 21.

<sup>109</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>110</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 2.6.2.

recorded accordingly. This is the case in Belgium, Canada, Greece, Israel, Italy, Switzerland, Spain and the United States. The use of electronic voting, is gaining increasing popularity, as it offers speed and accuracy. It is used in Egypt and India, among other countries. Voting by paper, lastly, allows for each legislator to vote on a piece of paper bearing his/her name. Although each of these four examples provides for different levels of speed and efficiency, their foundational principle is the same: On major issues such as the passage of legislation, the need to deal speedily with business shall not override the need for transparency at all times.

### **2.5.3 *Only legislators shall have a vote on issues before the legislature.***

It is the norm within a busy legislature that the elected representatives delegate some of their authority to unelected personnel, which is the case with the staff of the legislature, for instance. However, in all democratic legislatures, a clear line is always drawn: the functions and powers of the legislature are to be exercised solely by the members of the legislature. While support staff, civil society groups or the executive may assist a legislator in his/her work, they shall never assume his or her legislative powers, the most important of which is the power of the vote. Only legislators shall have a vote on issues before the legislature. Even when a legislator is entitled to vote by proxy, as in the German Bundesrat, the vote still belongs to the legislator. This minimum standard is incontrovertible and is adhered to by every democratic legislature around the world.

## **2.6 PRESIDING OFFICERS**

### **2.6.1 *The legislature shall elect or select presiding officers and members of a steering body pursuant to criteria and procedures clearly defined in the rules of procedure.***

The work of the presiding officer and the supporting steering body are of crucial importance within the legislature. Together, they perform a highly politicized role by organizing the legislative schedule, structuring and moderating debate, and determining the order of precedence of motions raised by members. They typically do this with executive and/or political party interests and legislative plans in mind. Given their role as “gatekeepers” for legislative activity, it is crucial that their selection and procedures be pursuant to clearly defined criteria in the rules of procedure.

The tasks of conducting debates as impartially as possible, observing adherence to the rules of procedure and ordering the legislative agenda typically fall to the presiding officer, who is chosen by the legislature.<sup>111</sup> The work of the presiding officer is often supported by a collective body that shares the workload.<sup>112</sup> The global practice in selecting the speaker differs widely, except that legislators are called upon to approve the appointment. Even in parliaments from the Westminster tradition that tend not to vote on the speaker, there are exceptions. In the Indian Lok Sabha, for example, a formal election must be held even if there is only one candidate. While the precise procedures may differ among countries, it shall remain a minimum standard that the legislature shall select the presiding officer and members of a steering body pursuant to criteria and procedures clearly defined in the rules of procedure.

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<sup>111</sup> The most common terms for the presiding officer are “speaker” and “president.”

<sup>112</sup> Often known as a “bureau,” “committee,” or “conference of presidents.”

### **3. Committees**

#### **3.1 ORGANIZATION**

##### **3.1.1 *The legislature shall have the right to form permanent and temporary committees.***

In a representative democracy, legislators will be confronted with many pressing duties and competing responsibilities, ranging from constituent relations activities to legislative analysis. To manage their workload, legislators may find it useful to organize their activities through committees as working groups. Consistent with the authority enjoyed by the legislature over its internal functioning, the legislature shall enjoy the ability to form committees on both permanent and temporary bases. These committees should reflect the party composition of the legislature, as described in § 3.1.2, and provide the opportunity for detailed analysis, drafting and public debating of bills as well as the exercise of executive oversight, as described in § 3.2. Committees shall, in this sense, alleviate the burden on the legislature as a whole, but their purview should not be so extensive as to act as a substitute for the legislature. The number and scope of these committees shall be the prerogative of the legislature.

The right of the legislature to create and assign work to its committees is an established principle of democratic governance. Though they vary in power across countries, committees are accepted as a practical way of managing the workload of the legislature by providing a focused working environment which a large assembly cannot offer in a plenary session. Committees can be especially instrumental in the exercise of executive oversight. In the case of Uganda, for example, select committees were used between 1997 and 1999 to conduct nine high profile investigations of executive branch officials accused of corruption, two of which led to the censure of one Minister of State and the forced resignation of another. Following inquiries into the activities of the vice president in her second role as minister for agriculture, the Ugandan president was forced to remove her from her ministerial position and reshuffle the cabinet.<sup>113</sup>

##### **3.1.2 *The legislature's assignment of committee seats shall reflect the political party composition of the legislature and shall include both majority and minority party members.***

It is the prerogative of the legislature to use a system of permanent and temporary committees to facilitate the efficient undertaking of its work, as described in § 3.1.1. The party composition of the legislature shall be reflected in the allocation of committee seats and shall include both majority and minority members. The majority party shall not exclude the minority from committees and vice versa. This principled distribution of seats by party ratios was an explicit recommendation of a Commonwealth Parliamentary Association Roundtable: "Membership of committees shall reflect the balance in the chamber and opposition members shall have the right to submit a minority report."<sup>114</sup>

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<sup>113</sup> Southern African Development Community [hereinafter, "SADC"] Parliamentary Forum. *Legislators Orientation Handbook: Professional Performance and Development for Legislators*, p. 42.

<sup>114</sup> CPA. *Governance Structures and the Democratic Process: Roundtable on Managing Parliament-Executive Interface in the Commonwealth*. See summary of recommendations.

This principle already governs the distribution of committee seats in many legislatures today. Committees in the German Bundestag, for example, parallel as accurately as possible the strength of party groups in the legislature, with the majority party or government coalition parties retaining control of all Bundestag committees. This rule also governs committee assignments in countries such as Bulgaria, Canada, France, Germany, Hungary, the United Kingdom and the United States.<sup>115</sup> It is also the case that many countries allow for minority reports. These are the written views of the minority of committee members which are commonly attached to a full committee report. They serve as a useful means of ensuring cross-partisan quality of committee reports, as well as ensuring that minority committee members have an incentive to keep investing their time in their committee. Such minority reports are common in countries such as Austria, Finland, Germany, Italy, Norway, Sweden and Switzerland.<sup>116</sup>

**3.1.3 *The legislature shall establish and follow a transparent method for electing or selecting the chairs of committees.***

All legislatures shall enjoy the ability to delegate their work to groupings of legislators in the form of committees, as described in § 3.1.1. The committee chairperson is formally often elected by the members of the committee. The selection of the chairperson shall be the prerogative of the legislature and not the executive branch. The process of selection by the legislature shall be transparent and guided by the rules of procedure.

Whether the committee chair is selected by the committee itself or by another organ of the legislature, it is likely that the chair will be a member of the governing majority. To ensure the rights of minority legislators in committees, opposition legislators or minority party legislators shall not be barred from chairing committees. Minority chairs already exist in the legislatures of Germany, Portugal and Romania for instance, while the Public Accounts committees in Canada, India and the United Kingdom goes so far as to reserve the chair for the opposition because it reviews the financial performance of the executive branch and has an audit function.

**3.1.4 *There shall be a presumption that committee hearings are open to the general public; the legislature shall publicly codify any exceptions to the presumption and give advance notice before a non-public committee meeting.***

In keeping with the principles of freedom of information, participatory governance and accountability, it is essential that the public have access to the daily functioning of the legislature. Because of the importance of committees to legislatures, there shall be a presumption that committee hearings are always open to the public. This is consistent with the calls for transparency in the *Warsaw Declaration* of the Community of Democracies and the *Social Charter* of the South Asian Association for Regional Cooperation.<sup>117</sup> The Commonwealth

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<sup>115</sup> National Democratic Institute. *Committees in Legislatures: A Division of Labor*. National Democratic Institute, 1996, p. 16. See also William E. Crowther and David M. Olson, "Committee Systems in New Democratic Parliaments," in David M. Olson and William E. Crowther (eds). *Committees in Post-Communist Democratic Parliaments*. Ohio State University Press, Ohio, 2002.

<sup>116</sup> Kaare Strom, "Parliamentary Committees in European Democracies," in *The Journal of Legislative Studies*, Vol. 4, Spring 1998, No. 1, pp. 45-46.

<sup>117</sup> "The legislature [shall] be duly elected and transparent and accountable to the people." Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*; "State Parties agree to [...]"

Parliamentary Association, moreover, has been forthright in declaring that “committee hearings shall be in public.”<sup>118</sup> It is especially important in the case of committees dealing with taxes, finances, and other issues of great importance to the citizens and taxpayers. This minimum standard shall also entail the provision of accurate schedules to the public and the media.

The trend across the spectrum of legislatures attests to the right of the citizenry to observe committee hearings. Indeed, even committee meetings are increasingly being opened to the public. Many countries currently use a mix of private and public meetings, but have been taking steps to grant increasing public access. In 1990, for example, France permitted the committee chairmen to open their meetings to public media, including television cameras. Then in 1997, the long-closed committees of inquiry were made public as well, following the passage of a specialized law.<sup>119</sup> In the Australian House of Representatives a media advisor is assigned to help committees develop communications and media strategies for their public inquiries, and to maximize media coverage of their activities. The Assemblée Nationale of the Ivory Coast has been permitting media attendance and reporting of its committee meetings since 2001.

Restrictions on this right to public access to hearings frequently occur, however, and may be justified for reasons of national security or in the interests of privacy during the hiring or firing of personnel. While there are acceptable reasons for committee hearings to be infrequently held in secret, this should be publicly accounted for. The Commonwealth Parliamentary Association has been explicit in its call for even committee meetings to be public: “There shall be a presumption that committee meetings are open to the public, so that closed meetings are the exception rather than the rule. Where it is necessary to hold a meeting, or part of a meeting, in private, a decision to that effect shall be taken in public and reasons for that decision shall be given.”<sup>120</sup> South Africa offers a model of acceptable balance between private and public proceedings. There, all committees are open to the public, unless closed by resolution of the committee. Minutes and supporting documentation from such meetings are nonetheless published.

## **3.2 POWERS**

### **3.2.1 *There shall be a presumption that the legislature will refer legislation to a committee, and any exceptions must be transparent, narrowly defined and extraordinary in nature.***

To ensure the adequate examination of legislation in light of the heavy burden of work facing each legislator, legislation shall be referred to committee as a matter of principle. Nominally, this shall provide an opportunity for both majority and minority members to analyze legislation in-depth. The committee stage shall become a codified step in the legislative process, which should allow legislators to publicly debate bills in keeping with § 2.4.2. On occasion, the committee stage may be bypassed for the passage of minor and uncontroversial legislation, or during an emergency. In the latter case especially, the circumstances shall be clearly defined and tightly circumscribed, as per § 6.4.1. Committees may also use this stage in the legislative process to

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underline the importance of transparent and accountable conduct of administration in public [...] institutions.” SAARC. *Social Charter*, Art. II.

<sup>118</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 3.1.4.

<sup>119</sup> “Parliament and television,” *Constitutional and Parliamentary Information*, No. 172, 2<sup>nd</sup> Half-year, 1996, p. 105.

<sup>120</sup> CPA. *Recommendations for Transparent Governance*, Recommendation 14.3.

solicit public views from interested groups, as per § 11.1. This requirement has found express endorsement in a recommendation of the Commonwealth Parliamentary Association that “there shall be a presumption that the legislature will refer legislation to a committee.”<sup>121</sup>

In many legislatures today, the committee stage is a routine step in the legislative process. In the legislatures of Argentina, Canada, France, Hungary, Ireland, Japan, Portugal, Romania, Russia and Sweden, for example, all bills are automatically referred to committees. In the New Zealand House of Representatives, moreover, committees always hold hearings to consider draft legislation and make every effort to solicit and consider public input in written and oral form.<sup>122</sup>

### **3.2.2 All committees shall have the power to amend legislation.**

For the legislature to function efficiently and fulfill its constitutionally mandated role, it must be able to delegate legislative work to its own committees. The work of considering and redrafting legislation is principally a committee function since legislative assemblies are ill-suited, due to their size, to elaborate on the details of bills.<sup>123</sup> As a corollary to this, all committees shall have the power to amend legislation, in addition to being able to summon witnesses including members of the executive branch, as described in § 3.2.4. Consistent with the autonomy enjoyed by the legislature over its internal functioning, the empowerment of committees to amend legislation is the prerogative of the legislature. The executive branch shall not be empowered to affect this power.

The empowerment of committees to amend or rewrite legislation already exists in many legislatures, not least those of Belgium, Finland, Germany, Iceland, Italy, Norway, Spain, Sweden, Switzerland and the United States. While power to amend legislation is the minimum standard, committees shall ideally also have the power to initiate legislation, provided the legislation is sponsored by a legislator. Such power is already enjoyed by committees in Austria, Iceland and Sweden.

### **3.2.3 All committees shall have the right to consult and/or hire experts.**

In a fully functioning representative democracy, legislators will be faced with a large number of issues which require specific expertise, from the review of complex legislation to the pursuit of executive oversight. To handle the heavy weight of issues before it, the legislature may use a system of committees who shall, in turn, be empowered to consider recommendations of external experts. This right of committees is distinct from the right to summon witnesses, as detailed in § 3.2.4. Each committee shall, therefore, have at its disposal the legal mechanisms and financial means with which to consult and/or hire experts. This right is in fact a power already enjoyed by the committees of a great number of legislatures today, including the majority of OECD countries.<sup>124</sup>

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<sup>121</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 3.2.1.

<sup>122</sup> Organization Economic Co-operation and Development [hereinafter, “OECD”], *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p. 14.

<sup>123</sup> Kaare Strom, “Parliamentary Committees in European Democracies,” *The Journal of Legislative Studies*, Vol. 4, Spring 1998, No. 1, p. 48.

<sup>124</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*, PUMA/LEG (2000)/2/REV1, p 19. There are a few cases in which this right of committees is essentially a “right to a means,” as some committees are obliged to

**3.2.4 Committees shall have the power of summons to examine persons, papers and records, including witnesses and evidence from the executive branch.<sup>125</sup>**

The problem of the legislature's heavy and diverse workload may be resolved through the use of a system of committees, whose function is to facilitate, but never substitute, the work of the legislature. To carry out this function, committees shall have the power of summons to examine witnesses and evidence, including witnesses from the executive. Indeed, this is one of the key instruments giving force to the concept of legislative independence, the right and ability of the legislature to pursue its constitutional responsibilities, including particularly the function of executive oversight as expressly stated in the Inter-Parliamentary Union's *Declaration on Democracy*.<sup>126</sup> This much has already found endorsement in principles agreed upon by the member governments of the Commonwealth Parliamentary Association, namely that "committees shall have the power to summon persons, papers and records, and this power shall extend to witnesses and evidence from the executive branch, including officials."<sup>127</sup> If this power is not enjoyed by permanent committees, it shall be enjoyed by temporary committees at a minimum.

Committees in the vast majority of legislatures today are already empowered by law to summon witnesses, including officials of the executive branch, and to demand documents. This list includes Australia, Czech Republic, Georgia, India, Romania and South Africa. In Switzerland, Article 169 of the constitution even states that official secrets do not constitute a reason for not giving evidence to a committee of inquiry. Instead, it holds the right to public accountability as trumping the right to official secrecy. Such a provision has the effect of lifting the protection enjoyed under official secrecy, thus serving the dual purpose of enabling the legislature to pursue its constitutional responsibilities while also formally absolving officials of the executive branch from any conflict of interest.<sup>128</sup> In cases where this power does not extend to temporary committees, it nevertheless applies to permanent committees, as in the United Kingdom.

**3.2.5 Only legislators appointed to the committee shall have the right to vote in the committee.**

The separation of the functions of the executive, legislative and judicial branches is a core tenet of a representative democracy, and is a prerequisite for the democratic functioning of the legislature. Still, legislators and the public may profit from the involvement of non-legislators on committees, such as executive branch officials or policy experts. While their input into

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go through their presiding officer or collegiate body. So it is in Scotland, where Rule 12.7 of the standing orders mandates "approval of the Parliamentary Bureau" for the hiring of experts. This is not seen as controversial, however, as the Parliamentary Bureau will not likely present an obstacle.

<sup>125</sup> Some countries use the words "subpoena" and "summons" interchangeably. This document will use "summons" for both.

<sup>126</sup> "Democracy is founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action." IPU. *Universal Declaration on Democracy*. Art. 11.

<sup>127</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*. § 3.2.4. See also: *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VII(a).

<sup>128</sup> "The New Swiss Constitution," *Constitutional and Parliamentary Information*, No. 179, 1<sup>st</sup> Half-year 2000, p. 11.

committee work shall not be considered undemocratic, they shall have no vote on issues before the committee, and shall have no role in the allocation of committee resources or control of its agenda. This minimum standard is consistent with the principle of the separation of powers.<sup>129</sup> Were non-members allowed to vote, they would not merely threaten the independence of the legislature; they would weaken the confidence of the citizenry in the institutions of their democracy by blurring the lines between the branches of democratic governance. Exceptions to this minimum standard are rare around the world, and frequently apply only to the upper house.<sup>130</sup>

## **4. Political Parties, Party Groups and Interest Caucuses<sup>131</sup>**

### **4.1 POLITICAL PARTIES**

#### **4.1.1 *The right of freedom of association shall exist for legislators as for all people.***

The right of freedom of association is an inviolable human right, and is guaranteed by the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.<sup>132</sup> This right also means freedom to join a political party. This right finds its most clear expression in the *Warsaw Declaration* of the Community of Democracies, which speaks of the “right of every person to freedom of peaceful assembly and association, including to establish or join their own political parties.”<sup>133</sup> It is also set out in the Inter-Parliamentary Union’s *Declaration on Democracy*, which states that everyone shall enjoy “the right to organize political parties and carry out political activities.”<sup>134</sup>

#### **4.1.2 *Any restrictions on the legality of political parties shall be narrowly drawn in law and shall be consistent with the International Covenant on Civil and Political Rights.***

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<sup>129</sup> In Canada, parliamentary secretaries of government ministers do sit on committees.

<sup>130</sup> National Democratic Institute. *Strengthening Legislative Capacity in Legislative-Executive Relations*, 2000, p. 40. It should also be noted that proxy voting or the use of substitutes is found in some legislatures. However, such a practice is not seen as undemocratic when the legislator has in full conscience nominated a replacement to cast a vote. In this case, the vote still *belongs* to the legislator in question.

<sup>131</sup> Given possible confusion when trying to understand the differences among what this report terms “political parties, party groups and interest caucuses,” it is worth clarifying the terminology. “Political parties” are distinct from “parliamentary parties/party groups.” “Political parties” refers to organizations that originate outside and act independently of the legislature, such as the Republican Party and the Democratic Party in the United States. “Parliamentary parties/party groups,” on the other hand, are usually groupings of political party members or members of like-minded parties originating within the legislature, such as the Liberal Democratic Parliamentary Party in the United Kingdom. Therefore, standards in this section relating to political parties are distinct from those relating to party groups and interest caucuses because political parties are exogenous to the legislature, while the latter two are endogenous.

<sup>132</sup> “Everyone has the right to freedom of peaceful assembly and association.” *UDHR*, Art. 20(1); “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” *ICCPR*, Art. 22.

<sup>133</sup> “The right of every person to freedom of peaceful assembly and association, including to establish or join their own political parties [...] with the necessary legal guarantees to allow them to operate freely on a basis of equal treatment before the law.” Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>134</sup> IPU, Art. 12.

Political parties are frequently the drivers of competitive democratic processes because they provide individual citizens with the opportunity to pool resources and compete among interest groups. The *Universal Declaration of Human Rights* protects the freedom of every person to form, join or be affiliated with a political party, and has been universally endorsed. The *International Covenant on Civil and Political Rights* similarly protects this right, but goes further by making clear that any restrictions on this fundamental right must be narrowly drawn: “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>135</sup> The exceptional nature of restrictions on political parties is further explained in the *Declaration of Criteria for Free and Fair Elections* of the Inter-Parliamentary Union:

“The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States’ obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Further, it continues: “Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.”<sup>136</sup> It shall be a minimum standard for democratic legislatures, therefore, that any restrictions on the legality of political parties shall be narrowly drawn in law and shall be consistent with the *International Covenant on Civil and Political Rights*.

It is not uncommon practice in established democracies that violent or racist parties may be prohibited from running in an election, as explained in § 1.2.1. Political parties that advocate the use of violence or use violence as a political tool may be prohibited from participating in a legislative election if such prohibition is approved as lawful by a competent, independent judicial body. In Croatia, Portugal, Slovenia and Turkey, the dissolution or prohibition of a party is the exclusive prerogative of the constitutional court.<sup>137</sup> In France, a decree by the president of the republic adopted in a meeting with the cabinet may dissolve a political party, but it is subject to appeal in the courts.<sup>138</sup>

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<sup>135</sup> ICCPR, Art. 22(2).

<sup>136</sup> IPU, *Declaration of Criteria for Free and Fair Elections*. Art.s 7, 8.

<sup>137</sup> European Commission for Democracy Through Law (Venice Commission). *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*. Adopted by the Venice Commission at its 41<sup>st</sup> plenary session. Venice, 10-11-December, 1999.

<sup>138</sup> *Loc cit*.

## **4.2 PARTY GROUPS<sup>139</sup>**

### **4.2.1 *Criteria for the formation of parliamentary party groups, and their rights and responsibilities in the legislature, shall be clearly stated in the rules.***

Parliamentary party groups are a key device for the translation of political party policies and campaign promises into legislative reality. Party groups allow for groupings of citizens to continue to be organized and active when elected into the legislature. The justification for party groups is typically based on one of two premises: that in a non-party list electoral system, legislators are free to exercise their basic rights of freedom of association to join, or not join, an association (in this case a party group); or, in a party list system, that political parties must be able to operate and actualize their policies within the legislature. These party groups play a fundamental role in the legislature. In addition to undertaking legislative initiatives, they are typically instrumental in appointing legislators to committees and laying out the timetable for debate. In these ways, party groups perform a crucial function in national political life. Membership of a group may or may not be obligatory; formation of a group may require one person or it may require 10; the group may allow members from one party only, or it may allow several. The minimum standard, however, is that the criteria for the formation of parliamentary party groups, and their rights and responsibilities, shall be clearly stated in the Rules of the legislature. This minimum standard for democratic legislatures has been explicitly called for by the Commonwealth Parliamentary Association.<sup>140</sup>

The existence of party groups in the legislature is the global norm. In some countries, their establishment is even expressly mandated in the Rules of the House. This is the case in Greece, Norway and Brazil.<sup>141</sup> The number of legislators required to form a group varies across the spectrum, from none at all in Japan, the Netherlands and the United Kingdom, and, five in Belgium and Brazil, and 20 in the Indian Lok Sabha. The party groups may comprise members of one party only, as in India and Philippines, or they may comprise members from more than one party, as in Greece, Japan, Poland and Senegal. Most uniform, however, is their important role in arranging for the ordering of debate. Their involvement in the work of the managing organs of the legislature, frequently through a “conference of presidents,”<sup>142</sup> allows them to lay out the timetable for debates, and is thus of crucial political importance. Given this important role, it shall be a minimum standard that the criteria for the formation of party groups, and their rights and responsibilities, shall be clearly stated in the rules of the legislature.

### **4.2.2 *In a non-party list electoral system, membership of a parliamentary party group shall be voluntary and a legislator shall not lose his/her seat for leaving his/her party group.***

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<sup>139</sup> A party group is sometimes known as a political party group, a parliamentary party or a party caucus. See footnote at beginning of section 4.

<sup>140</sup> CPA. “Criteria for the formation of parliamentary party groups, and their rights and responsibilities in the legislature, shall be clearly stated in the Rules.” *Recommended Benchmarks for Democratic Legislatures*, § 4.2.1.

<sup>141</sup> “The Status of Parliamentary Groups,” *Constitutional and Parliamentary Information*, No. 172, 1996, pp. 199-200.

<sup>142</sup> Conference of presidents typically comprises the presiding officer (in his/her capacity as directing authority of the legislature) and the leaders of the party groups. The term “conference of presidents” is common, as in Cameroon, France, Italy and Sweden. In other countries it can be known as the council of elders (Germany), or conference of spokespersons (Spain).

The right to freedom of association as articulated in the *Universal Declaration of Human Rights*<sup>143</sup> and the *International Covenant on Civil and Political Rights*<sup>144</sup> is a fundamental human right and a basic tenet of representative democracy. In addition, it is explicitly stated in international law that “no one may be compelled to belong to an association.”<sup>145</sup> It is a logical corollary, then, that legislators elected into office on a free mandate shall be free to join or not join a party group. When legislators are elected into office in a party list system, it is understood that his/her constituency is his/her party, that he/she will act as a party member first and foremost in the legislature, and that he/she is accountable to the party and is subject to rules guiding his/her actions within the legislature. In such systems, it is not uncommon for legislators to lose their seat for voting contrary to the party line. This minimum standard does not apply to such systems. It applies to all others. This minimum standard is well practiced around the world. It is already the case that membership in party groups is voluntary in a number of countries including, but by no means restricted to, Australia, Belgium, France, Ireland, Japan, Mali, the Netherlands, New Zealand, Poland, Senegal, Switzerland and the United Kingdom.<sup>146</sup> It is the norm, moreover, in non-party list systems that a legislator does not lose his/her seat for voting against the wishes of the party group.

**4.2.3 The legislature shall provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.**

The important role played by party groups in the work of the legislature is deserving of support. It is not uncommon practice for party groups in the legislature to receive assistance in the form of technical, administrative, or logistical support. Still, if public funds are being used, expenditure must always be done pursuant to a clear and transparent formula that does not unduly advantage the majority party, consistent with Article 12 of the *Declaration of Democracy* of the Inter-Parliamentary Union, which requires that “[p]arty organization, activities, finances, funding and ethics must be properly regulated in an impartial manner in order to ensure the integrity of the democratic processes.”<sup>147</sup>

It is already the case that many legislatures provide resources and facilities to party groups. In some countries, the party groups are directly funded. These countries include, for example, Belgium, Denmark, France, Germany, Ireland, Japan, New Zealand, Slovenia and Spain. In most of these cases, funds are proportional to party representation in the legislature and are thus not unduly advantageous to the majority.<sup>148</sup> The rules governing their funding may be grounded in different instruments: in the rules of procedure, as in Spain; in the law on the financing of political parties, as in Japan; or by a collegiate body, as in Poland and Italy.<sup>149</sup> Exactly what is provided may also differ; groups in the Spanish Senate receive offices and meeting rooms, while groups in the Israeli Knesset receive a monthly sum for staff costs. While the specifics of assistance will be decided by each country according to need and means, the provision of

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<sup>143</sup> *UDHR*, Art. 20.

<sup>144</sup> *ICCPR*, Art. 22.

<sup>145</sup> *UDHR*, Art. 20(2).

<sup>146</sup> “The Status of Parliamentary Groups,” *Constitutional and Parliamentary Information*, No. 172, 1996, p. 240.

<sup>147</sup> IPU. *Universal Declaration on Democracy*, Art. 12.

<sup>148</sup> “The Status of Parliamentary Groups,” *Constitutional and Parliamentary Information*, No. 172, 1996, pp. 217-219.

<sup>149</sup> *Id.*, pp. 219-222.

resources and facilities for party groups shall be done pursuant to a clear and transparent formula that does not unduly advantage the majority party.

### **4.3 INTEREST CAUCUSES**

#### **4.3.1 Legislators shall have the right to form interest caucuses around issues of common concern.**

The civil and political rights enjoyed by each citizen, as stated in the *Universal Declaration of Human Rights* and detailed in the *International Covenant on Civil and Political Rights*, are equally fundamental and inalienable for representatives of the citizens. As described throughout § 4.2, each legislator shall have the right to join or not join any formal or informal grouping of legislators for the pursuit of common interests. Although this right is commonly restricted with respect to party groups in party list systems, as described in § 4.2.2, the restriction does not apply to interest caucuses, as they are less formal, are not connected to political parties, and have less power in the legislature. Hence, it is a minimum standard that legislators have the right to form interest caucuses around issues of common concern. A Study Group of the Commonwealth Parliamentary Association has already declared their support for this minimum standard.<sup>150</sup> So it is, for example, that interested members of the United States Congress have come to form a Congressional Black Caucus and a Congressional Hispanic Caucus. Such examples can be found in legislatures around the world.

## **5. Parliamentary Staff**

### **5.1 AUTHORITY**

#### **5.1.1 The legislature, rather than the executive branch, shall control its staff.**

The legislative, executive and judicial branches of a representative democracy must have extensive control over their internal functioning to ensure their independence. Each branch shall have the means and mechanisms sufficient to carry out its constitutional responsibilities, including control over its own staff. With regard to the legislature, this means that not only shall it have the power and resources to hire and fire its own staff, as described in § 5.2, it alone shall be empowered to set the parameters of their employment, consistent with applicable labor laws and international treaty obligations.<sup>151</sup> This is consistent with the view of the Commonwealth Parliamentary Association that “the legislature, rather than the executive branch, shall control the parliamentary service and determine the terms of employment.”<sup>152</sup> Moreover, the relationship between the presiding officer, the staff of the legislature and the head of that staff service (secretary-general) must be unambiguous.<sup>153</sup> Whereas the presiding officer is generally a political appointment, the secretary-general should be non-partisan and enjoy the confidence of the whole legislature. As described in § 5.3.1, the secretary-general is the most senior staff member and must be ultimately accountable to the legislature. The post shall be filled on the

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<sup>150</sup> CPA. “Legislators shall have the right to form interest caucuses around issues of common concern.” *Recommended Benchmarks for Democratic Legislature*, § 4.3.1.

<sup>151</sup> *International Covenant on Economic, Social and Cultural Rights*, Art.s. 7, 8.

<sup>152</sup> CPA. *Recommended Benchmarks for Democratic Legislature*, § 5.1.2.

<sup>153</sup> The presiding officer is sometimes known as the “speaker” or “president.”

basis of merit only and must enjoy some level of protected status to prevent undue political pressure.<sup>154</sup> As a corollary, therefore, the staff of the legislature should ideally be managed by a semi-autonomous body within the legislature.

It is already a widely practiced norm in most legislatures today that the legislature has control over its own staff. Differences are found across the spectrum mainly with regard to the selection procedure for the secretary-general, whose position is usually filled by appointment of the presiding officer, a collegiate body, or the House as a whole.<sup>155</sup> All three models are used in many countries.<sup>156</sup> The appointment of officials to serve the legislature may then become the prerogative of the secretary-general, as in Canada, India, Israel, Japan and New Zealand, or it may become the prerogative of a collegiate body. The role of the legislature in deciding its own staff will be ensured through its own involvement in the collegiate body, which should reflect the composition of the legislature. This is the case in Belgium, Brazil, Congo and Sweden.<sup>157</sup>

### **5.1.2 The legislature shall draw and maintain a clear distinction between partisan and non-partisan staff.**

Although the legislature, and only the legislature, shall control its own personnel, it is imperative that routine administrative functions be performed by a neutral staff service. Beyond the secretary-general and his/her staff, which shall always be non-partisan as per § 5.3.1., it will be for each legislature to decide which other positions in the legislature are partisan and which are not (*i.e.*, in committees, caucuses, party groups, etc.). Using a collegiate body and a non-partisan secretary-general charged with the control and management of staff, but which remains under the legislature at all times, will help reduce the tension between staff independence and ultimate legislative control of the staff. To clarify those positions and others in the legislature, the legislature shall draw and maintain a clear distinction between partisan and non-partisan staff.

It is already the norm in legislatures today that the legislative staff is demonstrably distinct from the partisan staff of individual legislators and of parliamentary party groups. In Germany, for example, staff provide legislators with organizational, technical and specialized assistance. Staff are non-partisan, and can provide advisory assistance on procedural questions for example, or perform research. Although the service is headed by the president of the Bundestag, day-to-day responsibilities rest with the secretary-general.<sup>158</sup>

## **5.2 HIRING AND PROMOTION**

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<sup>154</sup> CPA. *Study Group on the Administration and Financing of Parliament, Zanzibar, Tanzania, 25-29 May 2005*, Key Recommendations.

<sup>155</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, p. 49.

<sup>156</sup> Choice of secretary-general by the presiding officer: Algeria, Czech Republic, Israel, Mali, Morocco, Nicaragua, Poland, Senegal, Syrian Arab Republic, Tunisia, Ukraine and Uruguay. Appointment by a collegiate body: Cameroon, France, Italy, the Netherlands, Niger, Russia, Spain and Togo. The presiding officer is still involved as he chairs the collegiate body. Lastly, appointment by the House itself, often following a suggestion or proposal by the presiding officer: Romania and the United States.

<sup>157</sup> Inter-Parliamentary Union. *Presiding Officers of National Parliamentary Assemblies*, Geneva, 1997, p. 51.

<sup>158</sup> "The parliamentary system of Germany," *Constitutional and Parliamentary Information*, No. 178, 2<sup>nd</sup> Half-year, 1999, p. 74.

**5.2.1 The legislature shall have adequate resources to hire staff sufficient to fulfill its responsibilities. Non-partisan staff shall be recruited and promoted on the basis of merit and equal opportunity.**

In a representative democracy, the legislative branch will be continuously faced with many diverse and complex tasks. Just as the judicial and executive branches must have the means to ensure that they can fulfill their constitutional responsibilities, so too shall the legislature have at its disposal the means to hire staff sufficient to meet its needs. This principled autonomy shall comprise at least two elements: 1) the legislature shall have control over the hiring and firing of its own staff, as declared by the Commonwealth Parliamentary Association and described in § 5.1;<sup>159</sup> and 2) the legislature shall have control over its own budget, as per § 6.3.3. These two elements should provide the legislature with the means and mechanisms to meet its staffing needs and strengthen its independence from the executive branch.

It is already universally accepted that the legislature must have its own staff. Perhaps the largest support service is that of the United States Congress which has approximately 24,000 staff, almost half of whom are personal staff to legislators. Approximately 2,500 staff provide support to the work of committees, and approximately 1,000 work in the non-partisan research and budget offices.<sup>160</sup> In the Japanese Diet, where the secretariat of the Shugiin employs 1,800 staff and the Sangiin employs about 1,300. Each house has a 75-member Legislative Bureau and benefits from an 850-member joint national library, including a research service of 160 researchers.<sup>161</sup> In the Mexican legislature, meanwhile, the Organic Law of 1999 introduced a career civil service for support staff of the legislature and provided for the integration of the libraries of each chamber.<sup>162</sup> As a further example, committees in Argentina have a secretary, an administrative secretary and two clerical assistants. In the United States House of Representatives, meanwhile, each of the 19 permanent committees may hire 18 professional and 12 clerical staff. These staff may arrange committee meetings, conduct research, assist in drafting legislation, provide expert advice, etc. In addition, the minority party may hire one-third of the staff. This latter provision goes some way to ensuring that the minority party is not unduly dominated by the majority party, especially if the party of the majority is the same as that of the executive branch.

**5.2.2 The legislature shall not discriminate in its hiring of any staff on the basis of race, ethnicity, religion, gender, or physical ability. Additionally, it shall not discriminate in its hiring of non-partisan staff on the basis of party affiliation.**

A representative democracy and all of its institutions of state are constituted by, and belong to, all of its citizens. To ensure the civil rights of all citizens are protected, and that each person enjoys citizenship on equal terms, no institution of the state may ever negatively discriminate on grounds of race, ethnicity, religion, gender, or physical ability. It follows that the hiring of staff

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<sup>159</sup> "Parliament shall be serviced by a professional staff independent of the regular public service," *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*. Annex, p. 22. See also: CPA. "The legislature, rather than the executive branch, shall control the parliamentary service and determine the terms of employment." *Recommended Benchmarks for Democratic Legislature*, § 5.1.1.

<sup>160</sup> All figures taken from *Vital Statistics on Congress, 1999-2000*, Norman Ornstein, Thomas Mann and Michael Malbin. American Enterprise Institute Press, Washington, 1999.

<sup>161</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG(2000)2/REV1, p. 15.

<sup>162</sup> *Id.*

for the legislature may not discriminate on any of the aforementioned grounds. This is consistent with the call of the African Union for equity in hiring procedures for public service, and the more explicit declaration of the Economic Community of West African States that “the State and all its institutions belong to all the citizens; therefore none of their decisions and actions shall involve any form of discrimination, be it on an ethnic, racial, religion or regional basis.”<sup>163</sup> The Commonwealth Parliamentary Association has similarly spoken out against using “race, ethnicity, religion, gender [or] disability” in the hiring of staff.<sup>164</sup> With regard to the legislature, it is of particular importance that party affiliation not be a criterion for a non-partisan job in the legislature. No prospective non-partisan employee should be required to declare his/her party affiliation or political beliefs as a prerequisite for employment. It is for the legislature to decide which positions are partisan and which are not, though the secretary-general and his/her staff shall always be non-partisan, as per § 5.1.2 and 5.3.1.

### **5.3 ORGANIZATION AND MANAGEMENT**

#### **5.3.1 *The legislature shall clearly codify the responsibilities of the semi-independent, non-partisan secretary-general. The secretary-general shall be ultimately accountable to the legislature, and the secretary-general’s tenure shall outlast the legislature.***

There exists a necessary tension with regard to the role of the secretary-general: On the one hand, the position must always be accountable to the legislature, as it is the legislature alone that has control over its own staff, as described in § 5.1 and elsewhere. On the other hand, the secretary-general must be able to stand aloof from the partisanship of the legislature and perform his/her functions neutrally. He/she shall, therefore, be a semi-independent, non-partisan figure who enjoys the confidence of the whole legislature. To approach this balance, the position and its boundaries shall be clearly delineated. In addition, the secretary-general’s tenure shall outlast the regular term of the legislature, ensuring that the functions and interests of the position remain professional instead of political and preserving his/her independence from the executive branch and from immediate party concerns.

The position of secretary-general is semi-independent and non-partisan in the vast majority of legislatures today, and is ultimately accountable to the legislature. The relationship of accountability is defined differently in legal and formal terms in different countries, but the principle of accountability remains the same. In the case of some legislatures, the secretary-general is accountable for his/her work directly to the presiding officer, as in Austria, the German Bundestag, Greece, Iceland, the Indian Lok Sabha, Italy, Mali and South Africa. Alternatively, he/she may be accountable to varying degrees to the Bureau, as in Albania, the Belgian House of Representatives, Denmark, Estonia and Norway, or to a specific committee, as

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<sup>163</sup> “In order to combat corruption and related offences in the public service, State Parties commit themselves to [...] ensure transparency, equity and efficiency in the management of tendering and hiring procedures in the public service.” AU. *African Union Convention on Preventing and Combating Corruption*, Art. 7; ECOWAS. *Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, Art. 1.

<sup>164</sup> CPA. *Recommended Benchmarks for Democratic Legislature*, § 5.2.2.

in the Australian Senate, the British House of Commons, the National Assembly of Namibia, the First Chamber of the Netherlands and the Swiss Federal Assembly.<sup>165</sup>

It is also the norm internationally that the secretary-general's tenure lasts until retirement and that re-confirmation is not needed upon the beginning of a new session. In Denmark, for example, the secretary-general can remain in office indefinitely, though he/she can be removed at any moment by the legislature. This ultimate power of the legislature is also seen in other countries such as Belgium and the Czech Republic.<sup>166</sup>

**5.3.2 No partisan or non-partisan staff of the legislature, including the secretary-general, shall have any legislative or procedural authority, including voting, in the legislature.**

In the interests of equitable citizenship, and to maintain the confidence of citizens in the institutions of their democracy, a state bureaucracy must always be impartial and non-interventionist in political life. So too must the bureaucracy of the legislature be neutral in the undertaking of its responsibilities. No staff of the legislative service shall have any political function in the legislature. Most emphatically, no member of staff, including the secretary-general, shall have a vote on either the assembly floor or in committee. This minimum standard is consistent with widespread international practice, in which the function of the secretary-general is purely technical-administrative and not political.

**5.3.3 All staff shall be subject to a code of conduct.**

The paramount importance of integrity in the work of all staff, and neutrality and impartiality in the work of non-partisan legislative staff, has been described in §§ 5.1.2, 5.3.1 and 5.3.2. To guide them in their work, and to ensure there exists no room for confusion or the dilution of the integrity of the legislature, all staff shall be subject to a code of conduct. The code of conduct shall ensure that staff do not exploit their position for personal advantage, either for themselves or for another, beyond the legal remuneration to which they are entitled as employees.<sup>167</sup> This code of conduct may be a code by which all public employees are guided, or it may be drawn up by the legislature with their staff specifically in mind. In the Indian Rajya Sabha, for example, there is no specific code for legislative staff. Rather, the code for national government employees applies. Something similar is true in Colombia, Croatia, Ireland and Philippines. In Kuwait, on the other hand, there is a specific code based on the civil service code. Something similar is found in the United Kingdom, Uruguay and Zambia.<sup>168</sup> Given global practice, therefore, it shall be a minimum standard that all staff shall be subject to a code of conduct.

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<sup>165</sup> "The role of the Secretary General in the Administration of Parliament," *Constitutional and Parliamentary Information*, No. 180, 2<sup>nd</sup> Half-year, 2000, pp. 116-117.

<sup>166</sup> *Id.*

<sup>167</sup> "Codes of conduct for parliamentary staff," *Constitutional and Parliamentary Information*, No. 175, 1<sup>st</sup> Half-year, 1998, pp. 30-82.

<sup>168</sup> *Id.*, p. 60-66.

## **5.4 MEDIA FUNCTION**

### **5.4.1 *The legislature shall have a non-partisan media relations facility that shall be sufficiently and consistently funded under the administrative budget and operate under the office of the secretary-general.***

To enable citizens, civil society and the media to monitor legislators and legislative activity, information emerging from the legislature must be free from all political bias. The legislature shall have a non-partisan media relations facility that is part of the legislative bureaucracy. As such, it shall be sufficiently and consistently funded by the budget of the legislature and be accountable to the non-partisan secretary-general, who in turn is ultimately accountable to the legislature itself as per § 5.3.1. A Study Group of the Commonwealth Parliamentary Association has endorsed this minimum standard.<sup>169</sup>

Most legislatures today already have a non-partisan media relations facility or spokesperson, employed by the administration and directly accountable to the secretary-general. This is the case in countries such as Estonia, Germany, Ireland, Israel, Italy, Namibia, the Netherlands, Russia, Slovenia, Switzerland and the United Kingdom.<sup>170</sup> Some legislatures go a step further and employ staff to actively push the activities of the legislature. So it is in the Australian House of Representatives, for example, where a media advisor is assigned to help committees develop communications and media strategies for their public inquiries, and to maximize coverage of their activities. Whether a legislature goes this far or not, it shall be a minimum requirement that accurate, unbiased information about the activities of the legislature be made available through a non-partisan media relations facility that is sufficiently and consistently funded under the administrative budget and operates under the office of the secretary-general.

### **5.4.2 *The legislature shall maintain a central depository for records of daily proceedings and votes that can be readily accessed by legislators, staff and citizens.***

Freedom of information is a central tenet of democratic governance, and a practical necessity for ensuring full participation in a representative democracy. All citizens, and hence all legislators, shall have access to written records of proceedings to effectively monitor the governing majority and the performance of their representatives. This information shall be held in an archive administered by the non-partisan parliamentary staff, and be open to the general public at all times. Freedom of information about the proceedings in the legislature plays an important role in civil society's monitoring of the legislature to root out corruption and other unethical practices. The African Union, for example, has declared that "each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences."<sup>171</sup> More explicitly, and in a more technologically progressive vein, the Organization of American States has resolved to encourage member states "to take necessary measures to facilitate the electronic availability of public information."<sup>172</sup> Similarly, the Commonwealth Parliamentary Association has expressly

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<sup>169</sup> CPA. "The legislature shall have a non-partisan media relations facility." *Recommended Benchmarks for Democratic Legislatures*. § 9.1.3.

<sup>170</sup> *Id.*, p. 119.

<sup>171</sup> AU. *African Union Convention on Preventing and Combating Corruption*, Art. 7.

<sup>172</sup> OAS. AG/RES. 2057 (XXXIV-O/04). *Access to Public Information: Strengthening Democracy*, Art. 5.

recommended that “[a]ttendance and voting records, registers of Members’ interest and other similar documents should be made readily available”<sup>173</sup> and that “the legislature shall maintain and publish readily accessible records of its proceedings.”<sup>174</sup>

#### **5.4.3 Non-partisan staff shall publish transcripts, votes and schedules.**

In the interests of transparent governance, a core tenet of a representative democracy, all citizens shall have access to basic, non-partisan information about legislative proceedings. This includes legislators and minority party legislators in particular, for whom the availability of unbiased details of legislative proceedings is crucial if they are to fulfill their constitutional responsibilities. This means that the staff service, under the management of the secretary-general, shall publish and make freely available transcripts, votes and schedules. Ideally, a legislature may make material available on the internet and provide for the broadcasting of proceedings on a free and widely available television or radio station. This is consistent with a Resolution of the Organization of American States encouraging member states to “take necessary measures to facilitate the electronic availability of public information.”<sup>175</sup> At a minimum, the schedule shall be made available at the building of the legislature, and all transcripts, recorded votes and related material shall be stored at a central depository, consistent with a recommendation of a Commonwealth Parliamentary Association Roundtable.<sup>176</sup>

In most legislatures today, the staff of the legislature provide for the publishing and storage of materials on legislative activity. In addition, non-partisan research staff serve the needs of individual legislators or committees through the collection, standardization and analysis of data. In Namibia, for example, the independent library is staffed with researchers and has access to media, databases and on-line resources.<sup>177</sup> Many other countries, including most members of the Organization for Economic Cooperation and Development, also provide the legislature with legal services.<sup>178</sup>

Many countries also offer access to legislative materials via the internet and go to great lengths to broadcast proceedings. In Latvia, for example, an online database contains the full text of draft laws, while proceedings of the Portuguese legislature are broadcast on television and on-line. In Peru, a website contains the daily journal, legislative summaries and the full text of bills before the legislature. In Botswana, live radio broadcasts cover parliamentary sittings, press briefings on the agenda, and regular interviews with ministers where listeners can submit questions directly. The National Assembly of the Republic of Korea, meanwhile, launched its own television channel for legislative affairs that broadcasts the proceedings of the Assembly.

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<sup>173</sup> CPA. *Recommendations for an Informed Democracy: Conclusions of a CPA Study Group on Parliament and the Media*, paragraph 8.4; CPA. *Recommended Benchmarks for Democratic Legislatures*, § 2.7.1.

<sup>174</sup> *Id.*, paragraph 8.7.

<sup>175</sup> OAS. *AG/RES. 1932 (XXXIII-O/03). Access to Public Information: Strengthening Democracy*. Resolution 4.

<sup>176</sup> CPA. *Governance Structures and the Democratic Process: Roundtable on Managing Parliament-Executive Interface in the Commonwealth*. See summary of recommendations.

<sup>177</sup> “The parliamentary system of Namibia,” *Constitutional and Parliamentary Information*, No. 176, 2<sup>nd</sup> Half-year, 1998, p. 149.

<sup>178</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p 15.

## Part III FUNCTIONS OF THE LEGISLATURE

### 6. Legislative Function

#### 6.1 IN GENERAL

##### 6.1.1 ***The approval of the legislature is required for the passage of all legislation, including budgets.***

It is a foundational principle of any democracy that no legislation passes without the consent of the people. In a representative democracy where the legislature embodies the citizenry, this means that all bills shall require the consent of the legislature before they can be signed into law. This is perhaps the prime function of the legislature, a source from which most of its powers and functions draw. This principled power, moreover, is explicitly endorsed by inter-parliamentary associations such as the Commonwealth Parliamentary Association (CPA), who attest to the “legislature’s primary responsibility for law making.”<sup>179</sup> A Study Group of the CPA, moreover, has already endorsed this precise standard.<sup>180</sup> Ideally, this minimum standard shall also include the need for legislative approval of major international treaties, conventions and trade agreements, consistent with the CPA’s *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, which states that “[p]arliament should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.”<sup>181</sup>

It is an internationally accepted and practiced norm that all legislation must be approved by the legislature. Moreover, most legislatures now exert their primacy in lawmaking with regard to binding international agreements. The role of the legislature in international agreements is sometimes qualified and restricted to commercial treaties and those affecting citizen’s rights (*e.g.*, Belgium), major treaties only (*e.g.*, Canada), or when a charge on public funds is involved (*e.g.*, Ireland); but the principled role of the legislature is broadly accepted across the spectrum. Significantly, many countries have ensured the role of the legislature in the determination of trade agreements, an especially pressing role in light of the impact of trade agreements on national sovereignty. The United States Congress, for example, has created an express statutory scheme for the approval of reciprocal and free trade agreements, thus asserting the central role of the legislature in all lawmaking.<sup>182</sup>

##### 6.1.2 ***The legislature shall have the power to enact resolutions or other non-binding expressions of its will.***

The legislature, as the embodiment of the citizenry, has the prerogative to debate and comment upon any subject, whether local, national, or international. To provide for this right, the

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<sup>179</sup> CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle II(a).

<sup>180</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 6.1.1.

<sup>181</sup> *Id.* at Art. VIII.

<sup>182</sup> “Role of parliament in the conduct of foreign relations,” *Constitutional and Parliamentary Information*, No. 173, 1<sup>st</sup> Half-year, 1997, pp. 58-60.

legislature shall have the power to enact resolutions or other non-binding expressions of its will. This means that the collective views of the legislature, or at minimum the majority, can be conveyed with no legal ramifications. So it is in the United States Congress, for example, where either House may pass a resolution expressing its will, or both Houses may advance joint resolutions.

**6.1.3 *Chambers where a majority of members are appointed and/or enjoy hereditary seats shall have no power or means to permanently deny or reject money bills.***

The authority of the legislature is derived from the consent of the citizenry as demonstrated through the direct election of representatives through universal and equal suffrage, as per § 1.1.1. Still, it is not entirely uncommon for the directly elected house to exist with another house that mostly consists of appointed and/or hereditary members. Such houses are rooted in culturally specific contexts, and are increasingly being consigned to the past. Having a legislative body in which the majority of members are appointed or hereditary naturally flies in the face of democratic theory and practice. While such bodies can provide a useful function in the scrutiny of bills and the executive, it shall be a minimum standard that chambers where a majority of members are appointed and/or enjoy hereditary seats shall have no power or means to permanently deny or reject money bills.

This minimum standard is consistent with international practice. The number of such chambers around the world has decreased markedly over the last century, and the powers of those remaining are also decreasing. It is also the norm in countries with a wholly elected chamber and a chamber with a majority of non-directly elected members that the latter chamber has no power or means to collapse the government, as per § 7.5.2. This is true of both Canada and the United Kingdom, for example.

## **6.2 LEGISLATIVE PROCEDURE**

**6.2.1 *In a bicameral legislature, the legislature shall clearly define the roles of each chamber in the passage of legislation.***

For the legislature to function efficiently, and for the confidence of the citizenry in the institutions of their democracy to be sustained, the many stages in the legislative process should be efficient and clearly codified. This need is most pressing in a bicameral legislature where legislation passes between houses, and the involvement of two chambers gives rise to many opportunities for institutional gridlock.

There are three common ways for chambers to come to agreement on the passage of legislation: *la navette*/shuttle; conference; and the dominance of the more powerful chamber. The most common practice is *la navette*, or the shuttling of bills, in which one chamber examines the bill passed by the other until both chambers agree on a single text. This practice is found in Australia, Belgium, Canada and Switzerland. In the case of the conference, a joint committee of both chambers meets to discuss and agree upon a final text. The conference sometimes follows after the failure to reach agreement by *la navette*, as in Canada, France and Ireland. But it is also occasionally the usual method for seeking consensus, as in Japan, Spain and the United States. Lastly, there are countries in which the upper chamber is relatively powerless in comparison to

the lower chamber. In such cases, the upper chamber may delay but not amend or terminate a bill. The wishes of the more dominant chamber prevail.

### **6.2.2 *The legislature shall have the right to override an executive veto.***

It is entirely consistent with the principles of the separation of powers in a representative democracy that the executive branch plays a key role in the legislative process. In presidential systems especially, the need for executive approval of all legislation is the core function and power of the office. But whereas the holders of the executive office tend to represent the majority of citizens, the legislature in theory offers a truer reflection of popular will. As such, the legislature shall retain the right to override any veto of the executive. This minimum standard, which has been explicitly supported by a Study Group of the Commonwealth Parliamentary Association, does not place the legislature in as strong a position as might first appear: the legislature must still work within the boundaries of the constitution or basic law.<sup>183</sup>

It is a widely accepted and practiced norm that the legislature has the right to override an executive veto, typically through supermajority, with differences across countries usually pertaining to the ways in which it can do so. In a great many countries, such as Argentina, Brazil, Costa Rica, Namibia and the United States, a two-thirds majority is required. In other countries, there are more circuitous routes to overcoming an executive veto. In Finland, for example, if the executive does not approve a bill it cannot become law unless passed again in the same form by the legislature following a new election. If this occurs, however, the bill becomes law without executive approval. These examples illustrate that in most legislatures today an executive veto is not the final word.

## **6.3 FINANCIAL AND BUDGETARY POWERS**

### **6.3.1 *The proposed national budget shall require the approval of the legislature, and the legislature shall have the power to amend the budget before approving it.***

It is a core principle of democratic governance that the citizenry decides upon its sources of revenue and the ways in which that revenue will be spent. It is an essential corresponding feature of a representative democracy that the legislature has the “power of the purse.” In addition to legislative and oversight power, the power over public funds assures the instrumentality of the legislature in public life. Therefore, all executive branch expenditures as stated in the proposed budget require the approval of the legislature, which shall also have the right to make amendments. As per § 3.2.1, budget legislation shall also go through a committee stage for detailed analysis and the consideration of public input.

It is already the case in the majority of countries today that the legislature must pass the budget and has the right to make amendments. Differences across the spectrum largely relate to the degree of influence over budget policy that the legislature enjoys. The most powerful legislatures in this regard are empowered to write the budget. So it is in the United States Congress, where the legislature can write its own budget. In reality, it receives a proposed budget from the executive but amends it how it sees fit. The Brazilian Congress, meanwhile, enjoys a

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<sup>183</sup> CPA. “The legislature shall have the right to override an executive veto.” *Recommended Benchmarks for Democratic Legislatures*, § 6.2.2.

constitutionally protected role in the whole budget process.<sup>184</sup> Today all issues relating to appropriations, taxes and national debt are deliberated and voted on in the legislature, while both majority and minority members of Congress routinely find their amendments adopted.<sup>185</sup> Constitutional revisions in Portugal have also had the effect of expanding the legislature's power in the budget arena to include debating, amending and approving the budget. Today, the Portuguese legislature is quite active in the budget process and regularly offers more than 100 amendments to the government's annual budget.<sup>186</sup> Many Asian, European, Latin American and Nordic legislatures approve the budget with only minor changes. Indeed, approximately two-thirds of Organization for Economic Cooperation and Development countries regularly approve the budget with only a few changes.<sup>187</sup>

### **6.3.2 The legislature shall have a reasonable period of time in which to review the proposed budget.**

The state budget is one of the most important pieces of legislation that comes before the legislature. As with all legislation, it is the right of the legislature to consider, amend and approve the budget, as per §§ 6.1.1 and 6.3.1. The role of the legislature in the process is especially crucial as the committee stage allows for detailed analysis and the consideration of public input, while the plenary stage allows for debate. To provide for the plenary stage, the legislature shall have a reasonable period in which to review the budget. This is consistent with the *Commonwealth Principles* agreed upon by the member governments of the Commonwealth Parliamentary Association, which have declared that there “should be adequate parliamentary examination of proposed legislation.”<sup>188</sup> More explicitly, the Organisation for Economic Cooperation and Development has said that in “no case should [the proposed national budget be presented to parliament in] in less than 3 months.”<sup>189</sup>

Although the importance of the legislature's role in the budget process is widely accepted, the period in which to consider the budget differs across countries.<sup>190</sup> Legislatures in most member states of the Organization for Economic Cooperation and Development are presented with the budget between two and four months in advance of the new fiscal year.<sup>191</sup> In Uganda, meanwhile, the Budget Act of 2001 requires the government to provide several advance reports on the government's spending and taxing plans, which effectively affords the legislature a role in the budget drafting stage. In addition, the establishment of a Budget Office with full- and part-

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<sup>184</sup> *Constitution of Federative Republic of Brazil*, §§ 48, 70, 74.

<sup>185</sup> National Democratic Institute. *Legislatures and the Budget Process: An International Survey*. National Democratic Institute, 2003, p. 10.

<sup>186</sup> *Id.*

<sup>187</sup> World Bank. *Results of the Survey on Budget Practices and Procedures*, <http://ocde.dyndns.org/>. Accessed 9/15/05.

<sup>188</sup> *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*, Art. VIII. See also: CPA. “The legislature shall have a reasonable period of time in which to review the proposed budget.” *Recommended Benchmarks for Democratic Legislatures*, § 7.2.1.

<sup>189</sup> OECD. *OECD Best Practices for Budget Transparency*. May 2001.

<sup>190</sup> Riccardo Pelizzo, Rick Stapenhurst, David M. Olson (eds). *The Role of Parliaments in the Budget Process*. World Bank Institute, Washington, DC, 2005.

<sup>191</sup> World Bank. *Results of the Survey on Budget Practices and Procedures*, <http://ocde.dyndns.org/>. Accessed 9/15/05.

time professional staff provides committees and legislators with the tools to analyze budget proposals and to articulate their own ideas.<sup>192</sup>

**6.3.3 Only the legislature shall be empowered to determine and approve the budget of the legislature.**

It is an important corollary to the separation of powers principle that each branch of government has a considerable degree of autonomy with respect to its internal functioning, as described throughout this document. A key element of this autonomy is the financial independence of the legislature. If the legislature is to operate independently and exercise oversight of the executive branch, it must not be reliant on the executive branch to provide the financial means to fulfill this function. The surest way of securing for the legislature the resources it needs is for it alone to determine and approve its own operating budget. This is consistent with the minimum standard requiring the legislature's approval for the passage of all legislation, as described in § 6.1.1. It is also consistent with the view of a Commonwealth Parliamentary Service Study Group, which has endorsed the same standard.<sup>193</sup>

After the legislature makes its detailed and transparent budget, the relevant department or ministry shall enter the required sum into the national estimates without questioning them or consulting the executive branch about them. In Israel, the Knesset is assured that the Ministry of Finance will grant it its budget. In France, the Houses notify the Finance Ministry how much is required and the Ministry writes it into the state budget.<sup>194</sup> These budgets are subject to audit. In the French case, the auditing structures are internal to the legislature. In the United States, the budget of Congress is independently audited by the external Government Accountability Office.

**6.4 DELEGATION OF LEGISLATIVE POWER**

**6.4.1 The legislature shall have the prerogative to delegate legislative functions to the executive branch under legally grounded criteria, for a limited period of time, and for strictly defined purposes.**<sup>195</sup>

It is not inconsistent with democratic practice that the legislative and executive branches will sometimes work closely together for the sound, democratic functioning of the state. For practical purposes, there are two specific occasions when the legislature may wish to allow the executive branch to legislate in its stead; administrative efficiency, and urgency brought about by national or international circumstance. The prerogative to delegate legislative functions to the executive branch shall belong solely to the legislature. This prerogative shall be exercised according to legally grounded criteria, for strictly defined purposes, and shall be for a limited period of time. State agencies may be regulated by officials of the executive branch in the interests of bureaucratic efficiency. However, they shall only do so within legal parameters agreed upon by

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<sup>192</sup> SADC. *Parliamentarians Orientation Handbook*. SADC Parliamentary Forum. *Professional Performance and Development for Legislators*, p. 33.

<http://www.undp.org/governance/parldev/docs/mpsorient.doc>. Accessed 9/13/05.

<sup>193</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 6.1.2.

<sup>194</sup> "Debate on the Management Role of the Secretary General," *Constitutional and Parliamentary Information*, No. 185, 1<sup>st</sup> Half-year, 2003, p. 13.

<sup>195</sup> Legislation arising from this function is sometimes known as subordinate legislation.

the legislature. In this sense, the power delegated shall be an administrative and regulatory one and shall not equate to the power to make new law, which is the sole preserve of the legislature. To lend coherence to this function, it shall be clearly established what is considered law (the preserve of the legislature) and what is considered regulation (the function of executive branch).

It is both common and sound practice for the legislature to delegate some of its power to the executive branch to allow for the smooth functioning of the state. In the United States, for example, the *Administrative Procedure Act of 1946* established procedures and uniform standards for rule-making and adjudication by executive branch agencies in order to guarantee fairness and due process in administrative actions. However, regulations emerging from the executive office always remain under the scrutiny of the legislature and remain subject to amendment. In Australia, the legislature may, by statute, give the executive branch limited power to legislate in certain areas. Power may be delegated to allow the executive branch to make regulations, rules and by-laws. In these cases, and in others around the world, the legislature accommodates the executive branch for the efficient administration of the state, but it always retains ultimate control over the power to legislate.

In the second case, legislative powers may be delegated to the executive branch during a state of emergency. Due to its schedule or its size, the legislature may be unable to act promptly if legislation is urgently needed. In this case, the legislature may wish to temporarily delegate some of its legislative powers, beyond its administrative and regulatory powers, to remedy a crisis or to ensure the smooth functioning of the state. In a presidential system, for example, the president may be empowered to rule by decree. However, although there may be sound justifications for allowing such “emergency powers,” the threat posed to democratic life would be extraordinary if the powers were abused by the executive branch. Therefore, the power delegated during an emergency shall be temporary in nature, shall be confirmed by the legislature when invoked, shall be clearly defined and demarcated in constitutional or statutory law, and the legislature shall always retain the right to legislate on delegated matters and to withdraw the delegated power.

Most countries make special provision for the delegation of legislative power in cases of urgency or crisis. The power delegated in case of emergency typically enables the executive branch to issue law. Yet, just as the delegation of regulatory power as described above is always tightly circumscribed and may always be withdrawn, so too is the delegation of legislative power during a state of emergency narrowly drawn, of limited scope, and requires the consent of the legislature. Italy provides a good case in point. Under Article 77 of the Italian Constitution, the executive branch may, in extraordinary situations, adopt provisional measures which have the force of law. However, such measures fail if they are not confirmed into law by the legislature within a period of 60 days from their promulgation. In Spain, meanwhile, the constitution allows for the executive branch to issue urgent decrees but clearly mandates the need for delegated powers to be limited in time and scope by excluding key areas such as those relating to the basic institutions of the state and those relating to the rights and duties of citizens.<sup>196</sup>

It is also the norm for the legislature to retain the right to legislate on delegated matters during a state of emergency. Indeed, the delegation of legislative powers during an emergency does not

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<sup>196</sup> “Roles of Government and Parliament/backbenchers in the introduction and passage of legislation,” *Constitutional and Parliamentary Information*, No. 170, 2<sup>nd</sup> Half-year, 1995, pp. 114-5.

mean the cessation of the legislature. In Sweden, for example, the War Delegation, led by the Speaker and consisting of 50 members elected by the legislature, may replace the legislature under specified emergency conditions. If the executive branch comes to be invested with special powers, the War Delegation is empowered to decide upon the resumption by the legislature of its normal powers.<sup>197</sup>

## **6.5 CONSTITUTIONAL AMENDMENTS**

### **6.5.1 *In the absence of a public referendum, constitutional amendments shall require the approval of the legislature.***

Equitable citizenship and the rule of law are prerequisites for a representative democracy. If a country wishes to formally ground such foundational principles in a constitution, it is of paramount importance that mechanisms exist for democratic control over the constitution. In the interest of social stability and the protection of minority rights, it will be necessary to ensure that the opportunity to change the constitution is not made extremely easy, nor should it be made overly difficult and cumbersome, which would prevent changes being made over time. In a representative democracy, the citizens' desire to change their constitution requires a referendum and/or an act of the legislature. In the absence of a public referendum, constitutional amendments shall require the approval of the legislature.

It is already the case in the majority of countries today that the constitution can be amended by a special majority of the legislature. Many countries require a two-thirds majority including, but not restricted to, countries such as Algeria, Belgium, Brazil, Costa Rica, Cuba, Finland, India, Malawi, Malaysia, Mexico, Netherlands, Norway, Korea, Spain, Sri Lanka and the United States. In these cases, the legislature works within the constitution, but the citizenry can, through their elected representatives, change their own constitution.

## **7. Oversight Function**

### **7.1 IN GENERAL**

#### **7.1.1 *The legislature shall have sufficient means and mechanisms to effectively fulfill its oversight function.***

Overseeing the executive branch and holding it to account is one of the prime responsibilities of the legislature. This oversight function is what is meant by the statement of the *Warsaw Declaration* that “[g]overnment institutions be transparent, participatory and fully accountable to the citizenry.”<sup>198</sup> In a representative democracy, this means that the executive shall be ultimately accountable to the legislature. In the case of parliamentary systems of government, where the life of the government is contingent on the continued support of the legislature, it shall be a minimum requirement that government is ultimately responsible to the legislature, either collectively or individually, as described in § 7.5.1. In non-parliamentary systems of

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<sup>197</sup> IPU. *Parliaments of the World: A Comparative Reference Compendium. Volume II. Second Edition*, 1986, pp. 1273-75.

<sup>198</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

government, where the separation of powers affords the executive branch greater independence, the legislature shall nonetheless be empowered to enforce the ultimate accountability of executive branch officials through the use of impeachment, as described in § 7.5.1. To give effect to this minimum requirement for a democratic legislature, whether it is in a parliamentary or non-parliamentary system, there shall exist sufficient means and mechanisms to enable the legislature to effectively fulfill its oversight function. This is consistent, moreover, with the *Commonwealth Principles* agreed upon by the member governments of the Commonwealth Parliamentary Association which explicitly call for “adequate mechanisms to enforce the accountability of the executive to Parliament.”<sup>199</sup>

Most legislatures in the world today possess some mix of mechanisms to allow for oversight of the executive branch, from the ability to summon officials to the ability to withdraw support in a parliamentary regime or impeach executive branch officials in a non-parliamentary system. Collective responsibility (*i.e.*, the entire cabinet) is found in at least 40 countries, including Brazil, Canada, France, India, Japan, Jordan, Kenya, Malaysia, Thailand and the United Kingdom. Individual responsibility (*i.e.*, a cabinet member) also exists in many countries, sometimes alongside collective responsibility. This is the case, for example, in Australia, Austria, Brazil, Denmark, the Republic of Korea, the Netherlands, Norway, Sweden and the United Kingdom. In non-parliamentary regimes, the norm is that the legislature can impeach executive branch officials.

Legislatures also exercise oversight of the executive branch through less direct means. Countries such as Greece and Sweden have established committees to exercise oversight of public authorities, while the Republic of Korea’s Kuk Hoe conducts an annual inspection of the state administration.<sup>200</sup> Legislatures also use their own personnel to better assist them in the pursuit of executive oversight. A strong example of this is the Congressional Budget Office in the United States, which has about 245 highly trained staff. Research capacity on a smaller scale also plays an important supporting role in countries like Uganda, where the Budget Office is staffed with 13 economists.<sup>201</sup>

**7.1.2 The legislature shall have mechanisms to obtain information from the executive branch sufficient to meaningfully exercise its oversight function.**<sup>202</sup>

It is both a right and a responsibility of the legislature, as the embodiment of the citizenry, to monitor the performance of the executive branch. The legislature shall have sufficient means and mechanisms to effectively fulfill its oversight function, as described in § 7.1.1 and explicitly endorsed by the Commonwealth Parliamentary Association.<sup>203</sup> Providing the legislature with sufficient means and mechanisms to effectively oversee the executive branch facilitates the requirement of the *Warsaw Declaration* that “[g]overnment institutions be transparent,

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<sup>199</sup> CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VII(a).

<sup>200</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p. 9.

<sup>201</sup> International Budget Project. <http://www.internationalbudget.org/themes/LEG/index.htm>. Accessed 9/15/05.

<sup>202</sup> This includes the right for questions and answers to be responded to in a complete and timely manner.

<sup>203</sup> “Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.” CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VII(a).

participatory and fully accountable to the citizenry.”<sup>204</sup> The primary mechanism that the legislature needs to conduct oversight is the ability to obtain information from the executive branch. This shall include the power to summon executive branch officials to appear before committees, as described in § 3.2.4. In a parliamentary system of government, this oversight function is accompanied by the power of the legislature to hold government to account by the withdrawal of support.

Many legislatures today are legally empowered with the mechanisms needed to obtain information from the executive branch. In addition to the power of committees to summon officials and demand documents, many legislatures—in parliamentary regimes especially—have the right to regularly submit questions to ministers and ministries in plenary sessions, as well as the right to have their questions answered in a complete and timely manner. In Morocco, for instance, the constitution provides for at least one session a week to be allocated for questions from members of the Chamber of Representatives and to government answers.<sup>205</sup> It is common practice in many countries for questions to be supplied to the executive branch in advance of the “Question Time,” as happens in Hungary, Ireland, the Republic of Korea and the United Kingdom.<sup>206</sup> Questions and answers during “Question Time” are often time-limited. For example, the Canadian legislature limits each question to 30 seconds, with 35 seconds provided for answers. Such strict time limits force speakers to be precise. Time is of the essence even in countries that do not allow for questions to be provided in advance, such as Finland, where questions and answers are limited to one minute. In the case of written questions submitted outside of a public “Question Time,” ministers are often obliged to respond in a timely way. The limit is six days in Denmark and Norway, for example, and seven in Japan.<sup>207</sup>

**7.1.3 The oversight authority of the legislature shall include meaningful oversight of the security and intelligence forces and of state-owned enterprises.**

In a representative democracy, every organ and institution of the state must come under democratic control. There should be no institution that claims to be of the citizenry but that is not in some way accountable to it. So it is that the oversight authority of the legislature shall include meaningful oversight of the security sector and of state-owned enterprises. The *Warsaw Declaration* of the Community of Democracies requires that “civilian, democratic control over the military be established and preserved.”<sup>208</sup> Further, the *Code of Conduct on Politico-Military Aspects of Security* of the Organization for Security and Cooperation in Europe declares that “participating States consider the democratic political control of military, paramilitary and internal and security forces as well as of intelligence services and the police to be an indispensable element of stability and security.”<sup>209</sup> The Commonwealth Parliamentary Association has also been forthright in this regard: “the oversight authority of the legislature

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<sup>204</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>205</sup> “The Parliamentary System of Morocco,” *Constitutional and Parliamentary Information*, 1st Half-year, 2002, No. 183, p. 13.

<sup>206</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p. 16.

<sup>207</sup> *Id.*, p. 8.

<sup>208</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>209</sup> OSCE. *Code of Conduct on Politico-Military Aspects of Security*, Art. 20.

shall include meaningful oversight of the military, security and intelligence services,” as well as “state owned enterprises.”<sup>210</sup>

The legislature may exercise this oversight function in many different ways: by summoning relevant executive branch officials and demanding documents, as described in § 3.2.4; by passing laws that define and regulate the security services and the mandates of state-owned companies, as per § 6.1.1; by having the final say on budgetary allocations, as per § 6.3.1 and the OSCE *Code of Conduct* declaration that “each participating State will provide for its legislative approval of defense expenditures;”<sup>211</sup> through the investigatory powers of the ombudsman, as per § 7.3.1; and, ultimately, by holding the government collectively or individually responsible in a parliamentary system, as per § 7.1.1.

A particularly strong tool in the exercise of the oversight function is a well-developed committee structure. The ability of the legislature to exercise oversight is strengthened by the use of not just one committee but several committees, such as defense, foreign affairs, budget/finance, intelligence, industry/trade, science/technology and home affairs/interior.<sup>212</sup> In addition, countries such as Sweden have found the use of a quasi-autonomous ombudsman to be an excellent oversight mechanism. Sweden’s ombudsman ensures that all state officials, including police, comply with law and respect the basic rights and freedoms found in the constitution. The ombudsman may also request assistance from the Office of Audit, which is responsible for reviewing the use of public funds by executive branch agencies. This provides the ombudsman with another important mechanism for assuring control over agencies like the police, namely, financial accountability.<sup>213</sup> When the ombudsman finds an irregularity or possible infraction, the legislature can establish a commission to investigate, as is explained in §7.2.1, below.

#### **7.1.4 “Whistleblower” protections shall protect informants and witnesses presenting accurate information about corruption or unlawful activity.**

It is the prerogative of the legislative branch, as the embodiment of the citizenry, to establish a commission of inquiry into matters of public concern, as described in § 7.2.1. A corollary to this right is the ability of informants and witnesses, or “whistleblowers,” as they are commonly known, to come forth with accurate information with the assurance that their identities will not be disclosed and that they will not suffer any detrimental effects, either personal or professional, as a result of their admissions. Such “whistleblower protections” are explicitly called for in the *Inter-American Convention Against Corruption* of the Organization of American States, the *Convention on Preventing and Combating Corruption* of the African Union and the *Criminal Law Convention on Corruption* of the European Union.<sup>214</sup>

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<sup>210</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, §§ 7.1.2, 7.1.3.

<sup>211</sup> *Id.*, Art. 22.

<sup>212</sup> IPU and Geneva Centre for the Democratic Control of Armed Forces. *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices*, Handbook for Legislators No. 5, 2003, p. 87.

<sup>213</sup> National Democratic Institute. *Democratic Oversight of Police Forces*. Rule of Law Series Paper, 2005, p. 13.

<sup>214</sup> “Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.” OAS. *Inter-American Convention Against Corruption*, Art. 3; “State parties undertake to [...] adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities [and] adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.” *African Union Convention on Preventing and Combating Corruption*, Art. 5;

“Whistleblower” legislation already exists in many countries and is a growing trend across the world. In many member states of the Organization for Economic Cooperation and Development, for example, general protection is mainly offered to public servants through public sector law.<sup>215</sup> The quality and scope of protection differs across the spectrum in ways which are subtle yet important. In the United Kingdom, for example, the relevant law covers both private and public employees (except police), and provides that “a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the worker has made a protected disclosure.” It protects a broad array of disclosures, but mandates that the “whistleblower” must use prescribed channels to enjoy protection. The law thus clearly disfavors disclosures that are wider than is demonstrably necessary to correct the wrongdoing being disclosed. On the other hand, the law encourages employers to fix their own problems, as it were. This same approach is found in “whistleblower” legislation in South Africa and New Zealand.<sup>216</sup> In the United States, meanwhile, the Office of Special Counsel is charged with the protection of whistleblowers in the federal employment sector. It provides a secure channel through which federal employees and applicants can make disclosures of official wrongdoing, with assurances that their identities will be kept confidential. What sets this law apart from the examples of the United Kingdom, South Africa and New Zealand is that the “whistleblower” is not obliged to make his/her disclosure through any particular channel in order to enjoy protection.<sup>217</sup> This ensures protection when information is given to the press. Nonetheless, all of the countries cited attest to the growing appreciation of the need for a strong degree of protection for “whistleblowers.”

## **7.2 COMMISSIONS OF INQUIRY**

### **7.2.1 *The law shall guarantee the right of the legislature to create commissions of inquiry. Such commissions shall have the power to compel executive branch officials to appear and give evidence under oath.***

As an integral principle of a representative democracy, freedom of information and citizens’ “right to know” must be actively pursued by the legislative branch. It is always the prerogative of the citizenry to demand transparency in all public affairs, a universally accepted principle seen in international agreements such as the *Social Charter* of the South Asian Association for Regional Cooperation: “State Parties agree to...underline the importance of transparent and accountable conduct of administration in public...institutions.”<sup>218</sup> In a representative democracy, this means that the legislature, as the embodiment of the citizenry, has the generalized right to ask questions and demand answers. The legislature shall, therefore, have a legally established right to call for the establishment of commissions of inquiry. This right shall be strengthened by the accompanying right of the legislature to summon witnesses, including executive branch officials,

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“Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: (a) those who report the criminal offences established in accordance with Art.s 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; (b) witnesses who give testimony concerning these offences.” *Criminal Law Convention on Corruption*, Art. 22.

<sup>215</sup> OECD. *Building Public Trust: Ethics measures in OECD Countries*. PUMA Public Policy Brief No. 7, September 2000, p. 4.

<sup>216</sup> Elaine Kaplan, “The International Emergence of Legal Protections for Whistleblowers,” *The Journal of Public Inquiry*, Fall/Winter 2001, pp. 38-41.

<sup>217</sup> *Id.*

<sup>218</sup> SAARC. *Social Charter*, Art. II.

and to demand documents, as described in § 3.2.4. This minimum standard is consistent, moreover, with the principles agreed upon by member governments of the Commonwealth Parliamentary Association.<sup>219</sup>

Legislatures in many countries are already empowered by law to summon witnesses, including officials of the executive branch, and to demand documents. Typically, this right is exercised through committees, as described in § 3.2.4. The vast majority of OECD countries, moreover, provide for the launching of inquiries by the legislature. In Belgium, Italy and the Netherlands, for example, both chambers enjoy this power, while this right is enjoyed exclusively by the lower chamber in Czech Republic and Poland. The establishment of an inquiry may require a qualified majority, as in Mexico, or a motion by only a small number of legislators, as in Japan. Occasionally, an act of the governing body of the legislature is required, such as in Austria and the Netherlands, or sometimes the committee on parliamentary procedures, as in Denmark. In the Republic of Korea, the plenary first approves an “Investigation Plan” outlining the purpose, issue, scope, method, period and cost of the inquiry. In many countries, the committees of inquiry enjoy extensive powers, often similar to those of an investigating magistrate or prosecutor. Examples of this can be found in countries such as Belgium, France, Germany, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, Portugal and Switzerland.<sup>220</sup>

### **7.3 LEGISLATIVE OMBUDSMEN**

#### **7.3.1 *The legislature shall have a non-partisan ombudsman or a similar body that investigates complaints of executive branch malfeasance, makes recommendations and reports directly to the legislature.***

One of the core functions of a legislature in a representative democracy is the role of executive oversight. In regimes where the executive-legislative balance already weighs favorably on the side of the executive branch, the importance of the legislature’s role in exercising oversight of the executive is even more pronounced. To properly enable the legislature to fulfill this key role, and to provide for greater civic access to the levers of executive oversight, the legislature shall have a non-partisan ombudsman or a similar body which investigates complaints of government malfeasance and reports directly to the legislature. This is explicitly called for in the *Charter of Fundamental Rights* of the European Union: “Any citizen of the Union... has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.”<sup>221</sup> The ombudsman or similar body shall possess three fundamental

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<sup>219</sup> “The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence...Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues.” CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle IX(a).

<sup>220</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*, PUMA/LEG (2000)/2/REV1, p. 13, § 42.

<sup>221</sup> EU. *Charter of Fundamental Rights of the European Union*, Art. 40. See also a similarly explicit call of the Commonwealth Parliamentary Association; “Steps which may be taken to encourage public sector accountability include: (a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government’s activities. Independent bodies such as Public Accounts Committees, Ombudsmen...can play a key role in enhancing public awareness of good governance and rule of law

powers: to investigate, to recommend and to report.<sup>222</sup> The findings of the investigation as contained in the final report shall then be submitted to the legislature.

The office of the ombudsman has a long history in some countries, and is becoming the norm in most others around the world. Such bodies have already been established in at least three-quarters of member states of the Organization for Economic Cooperation and Development.<sup>223</sup> In Belgium, for example, the independence of the Federal Ombudsmen Office is legally established. The office examines complaints brought against federal administrative authorities, indicates shortcomings in existing legislation and makes recommendations to improve public administration.<sup>224</sup> The status of the ombudsman or a similar body can differ from country to country in, for example, whether or not the position enjoys immunity, but the principle does not: the non-partisan ombudsman or similar body investigates complaints of government malfeasance, makes recommendations and reports directly to the legislature.

## **7.4 PUBLIC ACCOUNTS COMMITTEES OR AUDIT COMMITTEES**

### **7.4.1 *The legislature shall ensure that public accounts committees provide opposition parties with a meaningful opportunity to engage in effective oversight of executive branch expenditures.***

Oversight of the executive branch and its spending of taxpayer's money is one of the prime functions of the legislature. While the majority of legislators may have means and mechanisms to perform this oversight function, the likelihood of thorough oversight is decreased when both the executive and the legislative majority come from the same, or similar, parties. Hence, it is essential that the rules of procedure governing the legislature not be drawn in such a way as to entirely empower the majority at the expense of the minority. Minority rights within the legislature must be protected during the legislative process, on the floor as well as in the committees. Any deterioration of minority rights would be especially problematic were the majority to abrogate its role of executive oversight. This is especially the case with regard to taxpayers' money. Therefore, to ensure that the legislature engages in meaningful oversight of the budgetary and fiscal activities of the executive branch, opposition parties shall have a meaningful opportunity to use public accounts committees to engage in effective oversight of executive branch expenditure. Indeed, the Commonwealth Parliamentary Association goes so far as to recommend that the "chair of the Public Accounts Committee shall normally be an opposition member."<sup>225</sup> So it is in Canada, for example, where the standing committee on public accounts is always chaired by an opposition legislator so as to provide extra scrutiny of the executive branch and its activities.

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issues." CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle IX.

<sup>222</sup> National Democratic Institute. *The Role and Effectiveness of the Ombudsman Institution*. National Democratic Institute, 2005, p. 9.

<sup>223</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*, PUMA/LEG (2000)/2/REV1, p. 10; OECD. *Building Public Trust: Ethics measures in OECD Countries*, PUMA Public Policy Brief No. 7, September 2000, p. 4.

<sup>224</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p.10.

<sup>225</sup> CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Annex, p. 21.

**7.4.2 Public accounts or audit committees shall have access to records of executive branch accounts and related documentation sufficient to be able to meaningfully review the accuracy of executive branch reporting on its revenues and expenditures.**<sup>226</sup>

The legislature shall possess sufficient means and mechanisms to effectively fulfill its oversight function, as described in § 7.1.1. Some of these means and mechanisms have already been mentioned throughout this document, such as the power of committees to summon executive branch officials, the role of the legislature in passing the budget, or the work of a supreme or national audit office. The ability of the legislature to exercise oversight of the executive branch is most effective when the legislature can draw on several of these mechanisms at the same time. So it is with legislative oversight of executive branch accounts in which the legislature uses its committee system, its power to demand documents, and its ability to hire professionals to review the accuracy of executive branch reporting on its revenues and expenditures. Additionally, it is consistent with the declaration of the Commonwealth Parliamentary Association that “parliamentary procedures shall provide adequate mechanisms to enforce the accountability of the executive to Parliament,”<sup>227</sup> as well as the *Convention on Preventing and Combating Corruption* of the African Union.<sup>228</sup>

**7.4.3 There shall be an independent, non-partisan Supreme or National Audit Office that conducts audits and reports to the legislature in a timely way.**

Consistent with the right of the legislature to possess sufficient means and mechanisms to effectively fulfill its oversight function, it shall be the prerogative of the legislature to draw upon the resources of a Supreme or National Audit Office. Such an office shall be independent, non-partisan, and shall exist to better enable the legislature to scrutinize government expenditure by conducting audits and presenting their reports to the legislature in a timely way. Legislative control over such an office shall be maintained by the power of the legislature to hire and fire the head of the office, though only non-partisan criteria may be used. This is consistent with the view of the Commonwealth Parliamentary Association that “the supreme or national audit office shall be provided with adequate resources and legal authority to conduct audits in a timely manner.”<sup>229</sup>

At least 80 percent of states in the Organization for Economic Cooperation and Development already have a Supreme or National Audit Office that reports to the legislature.<sup>230</sup> Moreover,

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<sup>226</sup> Public accounts or audit committees are sometimes known as appropriations committees.

<sup>227</sup> CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VII(a). See also: CPA. “Oversight committees shall have access to records of executive branch accounts and related documentation sufficient to be able to meaningfully review the accuracy of executive branch reporting on its revenues and expenditures.” *Recommended Benchmarks for Democratic Legislatures*, § 7.2.3.

<sup>228</sup> “State Parties undertake to adopt legislative and other measure that are required to establish [corrupt activities] as offences [and] to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.” *African Union Convention on Preventing and Combating Corruption*, Art. 5.

<sup>229</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, §, 7.2.5. See also: “There shall be an independent, non-partisan Supreme or National Audit Office whose reports are tabled in the legislature in a timely manner.” § 7.2.4.

<sup>230</sup> World Bank. *Results of the Survey on Budget Practices and Procedures*, <http://ocde.dyndns.org/>. Accessed 9/15/05. See 4.5.

almost 90 percent of countries with such an office carry out audits of government accounts and report to the legislature independently of the executive branch. It is also the norm for the audit results to be circulated and discussed in the legislature, either by the relevant budget or budgetary oversight committee, or on the floor of the legislature itself. Countries label this office differently. In the United States, for example, it is the Government Accountability Office that scrutinizes the programs and expenditures of the federal government. The Office serves as the investigative arm of Congress, while remaining independent and non-partisan. It also evaluates federal programs, audits federal expenditures and issues legal opinions. The director of the office is known as the comptroller-general. A similar title, comptroller and auditor general, is given to the head of the National Audit Office in the British House of Commons, the body that scrutinizes government expenditure. Its function is the same: to better enable the legislature to exercise oversight of government expenditure by providing an independent, non-partisan expert auditing service.

## **7.5 NO CONFIDENCE AND IMPEACHMENT**

### **7.5.1 *The legislature shall have mechanisms to impeach or censure officials of the executive branch and/or express no-confidence in the government.***

In a representative democracy, all institutions of the state are “of, by and for” the citizens. This is most emphatically the case with the legislative and executive branches. As such, all office holders are ultimately accountable to the citizens. In a presidential regime where the principle of the separation of powers is strictly adhered to, executive branch officials are not always politically responsible to the legislature. Nevertheless, the principle of the separation of powers does not put any citizen, regardless of his/her position, whether it be elected or un-elected, beyond the reach of the law. Every public office holder ultimately remains accountable to the citizens. Even in such a presidential regime, therefore, the legislature shall have mechanisms to impeach or censure officials of the executive branch for acts inconsistent with the constitution. This concurs with principles expressed by inter-governmental associations, such as the Commonwealth Parliamentary Association’s (CPA) *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*.<sup>231</sup> Indeed, a Study Group of the CPA has explicitly endorsed this minimum standard.<sup>232</sup>

In parliamentary systems, where the life of the government is dependent on the support of the legislature, expressions of no-confidence are one of the key mechanisms giving force to the principle that the government is ultimately responsible to the legislature. Very often, this device is used out of simple dissatisfaction with the performance of the executive branch, i.e. for political reasons. In presidential regimes, meanwhile, where the principled separation of powers is more strictly adhered to, the legislature is usually able to impeach the president, vice-president, or officials of the executive branch for breaches of their constitutional mandate or acts which break the law and go beyond activity protected under the privilege of office. In most of these regimes, it is common for a two-thirds majority to be needed to begin impeachment

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<sup>231</sup> “Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.” CPA. *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, Principle VII(a).

<sup>232</sup> CPA. “The legislature shall have mechanisms to impeach or censure officials of the executive branch, or express no-confidence in the government.” *Recommended Benchmarks for Democratic Legislatures*, § 7.3.1.

proceedings. Yet irrespective of the regime type, the principle is the same: the legislature is the embodiment of the citizenry and, as such, it is empowered to ensure the ultimate accountability of the executive branch, whether it be cabinet government or presidential in form.

**7.5.2 *Chambers where a majority of members are not directly elected shall have no power or means to collapse the government.***

The authority of the legislature is derived from the consent of the citizenry as demonstrated through the direct election of representatives through universal and equal suffrage, as per § 1.1.1. Still, it is not uncommon for the directly elected house to exist with another house that may not be wholly directly elected through universal suffrage. These houses are rooted in culturally specific contexts, and are increasingly being consigned to the past. Having a legislative body in which the majority of members are unelected naturally flies in the face of democratic theory and practice. Yet, there may be cases in federal states in which members of a house are appointed by the state governments, as in Germany. While such bodies can provide a useful function in the scrutiny of bills and the executive, it shall be a minimum standard that chambers where a majority of members are not directly elected shall have no power or means to collapse the government. This minimum standard has been endorsed by a Study Group of the Commonwealth Parliamentary Association: “In bicameral systems, only a popularly elected house shall have the power to bring down government.”<sup>233</sup>

This minimum standard is consistent with international practice. The number of unelected chambers around the world has decreased markedly over the last century, and the powers of remaining unelected chambers are also decreasing. It is the norm in countries with a wholly elected chamber and a chamber with a majority of unelected members that the latter chamber has no power or means to collapse the government, and that the latter house can not permanently delay or kill off money bills. This is true of both Canada and the United Kingdom, for example.

## **7.6 LEGISLATIVE-JUDICIAL RELATIONSHIP**

**7.6.1 *The legislature's consent shall be required in the confirmation of senior judges and the legislature shall have mechanisms to impeach judges for serious crimes.***

The separation of the powers of the legislative, executive and judicial branches is a foundational principle of every sound democracy. It is especially important that the judiciary, as the guardian of the constitution, civil rights and the rule of law, be able to operate free from political interference. At the same time, however, it is also a defining characteristic of a representative democracy that all institutions are “of, by and for” the citizens. In this light, it is imperative that the judiciary remains under democratic control.

This is consistent with the *Warsaw Declaration* of the Community of Democracies: “Rights [shall] be enforced by a competent, independent and impartial judiciary open to the public, established and protected by law.”<sup>234</sup> The reference to the judiciary being “established” by law conveys the principle that it is the legislature, as the embodiment of the citizenry and the promulgator of laws, which gives the judiciary its legitimacy and ensures democratic oversight.

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<sup>233</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 6.1.4.

<sup>234</sup> Community of Democracies, *Final Warsaw Declaration: Toward a Community of Democracies*.

It is a logical corollary, then, that the legislature's consent shall be required in the confirmation of judges and that the legislature shall have mechanisms to impeach judges for serious crimes. Yet, the role of the legislature in ensuring democratic oversight of the judiciary does not equate to a judicial function: the interpretation and application of the law is the responsibility of the judiciary, not the legislature.

It is already the case in many representative democracies that the approval of the legislature is required in the appointment of senior judges. In the United States, for example, Senate approval is needed for Supreme Court and federal judges.<sup>235</sup> The legislature is involved in the appointment of Supreme Court judges in countries such as Argentina,<sup>236</sup> Brazil,<sup>237</sup> Belgium<sup>238</sup> and Mexico.<sup>239</sup> The Israeli Knesset is involved by virtue of having two of its members on the judges' appointment committee.<sup>240</sup> It is even more common for the legislature to be empowered to impeach or otherwise remove a judge of the highest court. So it is that legislatures in countries such as Australia,<sup>241</sup> Argentina,<sup>242</sup> Canada,<sup>243</sup> Germany,<sup>244</sup> Ireland,<sup>245</sup> Republic of Korea<sup>246</sup> and the United States have the power to impeach or otherwise effect the removal of a Supreme Court judge.<sup>247</sup>

## **8. Representational Function**

### **8.1 REPRESENTATIONAL NATURE OF THE LEGISLATURE**

#### **8.1.1 *The number of seats in the legislature shall not be so low, and hence the citizen-legislator ratio so high, as to render impossible meaningful constituent relations.***

The prime duty of each legislator is to represent his or her constituents. When a community, or a collection of communities, delegates a fellow citizen to represent its views and interests in the national legislature, the elected representative is charged with representing the views and interests of the whole population, including those citizens who may not have voted to elect that particular legislator. But to allow the citizens the opportunity to convey their views, interests and needs throughout the term of the legislature, there must exist a meaningful opportunity for citizens to interact with their representative. There must exist, for instance, resources sufficient to allow legislators to travel periodically to their constituencies to hear from their constituents, as described in § 8.2.1. However, to be able to hear the views of constituents in the first place, the legislator must first have a reasonable chance of engaging with his or her constituents. Thus, the number of seats in the legislature shall not be so low, and hence the citizen-legislator ratio so

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<sup>235</sup> *Constitution of the United States*, Art. II, § 2.

<sup>236</sup> *Constitution of the Argentine Republic*, § 99(4).

<sup>237</sup> *Constitution of the Federal Republic of Brazil*, Tit. IV, Chp.1, § IV, Art. 52(IIIa).

<sup>238</sup> *Constitution of the Kingdom of Belgium*, Art. 151(3).

<sup>239</sup> *Constitution of the United Mexican States*, Tit. III, Chp. IV, Art. 96.

<sup>240</sup> *State of Israel. Basic Law: The Judiciary, 1984*, Art. 4(b).

<sup>241</sup> *Constitution of the Commonwealth of Australia*, Chp. III, 72, ii.

<sup>242</sup> *Constitution of the Argentine Republic*, § 53.

<sup>243</sup> *Canada. Constitution Act, 1867*, Art. 99.

<sup>244</sup> *Constitution of the Federal Republic of Germany*, § IX, Art. 98(2).

<sup>245</sup> *Constitution of the Republic of Ireland*, Chp. X, Art. 35, § 4.1.

<sup>246</sup> *Constitution of the Republic of Korea*, Chp. III, Art. 65(1).

<sup>247</sup> *Constitution of the United States*, Art. I, § 2.

high, as to render impossible meaningful constituent relations. Stated otherwise, in order to ensure that constituent relations are meaningful, constituencies must be small enough for the citizens to access their representatives.

For most countries with a population of 60 million or less, legislators represent no more than 100,000 constituents. The United Kingdom, for example, has 646 legislators representing around 60 million people, providing for one representative for approximately every 93,000 constituents. Outside of extremely populous nations like India and the United States, it is most frequent for countries to have one legislator for every 40,000-80,000 citizens.<sup>248</sup>

## **8.2 CONSTITUENT RELATIONS**

### **8.2.1 *The legislature shall provide all legislators with sufficient resources to enable the legislators to fulfill their constituency responsibilities, including travel to and from their constituencies.***

Interaction with constituents is vital if a legislature is to effectively fulfill its representative function. It follows that legislators must have sufficient personnel and financial resources to effectively represent their constituents. In this regard, it is important that the system of reimbursement and allowances does not discriminate in favor of the ruling party. Any differences in allowances (such as greater allowances for committee chairs) must have a basis in the duties of those members, rather than simply to favor the majority party (which typically holds the majority of committee chairs). Although the resources allocated to legislators may be constrained by the country's level of economic development, it is important that legislators have sufficient resources to enable them to fulfill their constitutional responsibilities. Typically, resources would at least include an office premises, communication resources (*i.e.*, telephone, postage service), and reimbursement for periodic transportation to and from the constituency and the capital.

Allowances (or reimbursement of expenses) for traveling to and from the constituency is one aspect of this minimum standard, and is practiced by the majority of legislatures. In some countries, travel compensation is even enshrined in the constitution or other basic laws. This is the case in Belgium,<sup>249</sup> Norway,<sup>250</sup> Switzerland,<sup>251</sup> Portugal,<sup>252</sup> Greece<sup>253</sup> and Germany.<sup>254</sup> Countries may differ on whether legislators can be remunerated for travel merely to and from the constituency, within the constituency, or within the capital itself, yet remuneration for travel as a norm is widely accepted. In Denmark, for instance, legislators living in Greenland or the Faeroe Islands receive an expense allowance that is three times greater than that payable to legislators living within a 45 kilometer radius of the legislature in Copenhagen.<sup>255</sup> Countries will differ in

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<sup>248</sup> Figure derived from a simple calculation of the ratio of legislative seats to citizens in countries with 60 million people or fewer.

<sup>249</sup> *Constitution of the Kingdom of Belgium*, Tit. III, Chp. 1, § 1, Art. 66(2), and § II, Art. 72(3).

<sup>250</sup> *Constitution of the Kingdom of Norway*, § C, Art. 65(1).

<sup>251</sup> "Assistance provided for individual members in respect of allowances, equipment and staff," *Constitutional and Parliamentary Information*, No. 173, 1<sup>st</sup> Half-year 1997, p. 75.

<sup>252</sup> Portugal. *Law of the Organization and Functioning/Services of the Assembly of the Republic*, Chp. VI, § I, Art. 37(4).

<sup>253</sup> *Constitution of the Hellenic Republic*, Part III, § III, Chp. 3, Art. 63(2).

<sup>254</sup> *Constitution of the Federal Republic of Germany*, Chapter III, Art. 48(3).

<sup>255</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*, Geneva, 2000, p. 35.

their use of formulae, for travel as well as funding for offices, but the minimum standard is the same: the legislature shall provide all legislators with sufficient resources to enable the legislators to fulfill their constituent responsibilities, including travel to and from their constituencies.

### **8.3 INTERNATIONAL REPRESENTATION**

#### **8.3.1 *The legislature, including its members and staff, shall have the right to send and receive development assistance, whether technical or advisory in nature, regardless of origin or destination.***

Legislative bodies must be able to adapt over time to meet the shifting needs of the citizenry. Whether this means incorporating developing technologies or expanding human resources, legislators will profit from the sharing of best practices with their foreign counterparts and other legislative experts. In nascent legislatures especially, inter-parliamentary communication and collaboration with civil society can offer an excellent means of navigating the problems common to legislative development. The right to receive and send development assistance, whether technical or advisory in nature, regardless of origin or destination, shall exist for all legislators, legislative staff and legislatures. This right finds its legal grounding in Articles 19 and 20 of the *Universal Declaration of Human Rights*, which make clear the human right to “to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>256</sup> This inalienable right, and the related right of legislators to travel and consult with whomever they please, has been similarly endorsed in the *Charter of Fundamental Rights of the European Union*<sup>257</sup> and the *International Covenant on Civil and Political Rights*.<sup>258</sup> This minimum standard also finds explicit endorsement in the *Warsaw Declaration*, in which over 100 countries pledged to “strengthen democratic institutions and practices and support the diffusion of democratic norms and values,...[and] work with relevant institutions and international organizations, civil society and governments to coordinate support for new and emerging democratic societies.”<sup>259</sup>

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<sup>256</sup> *UDHR*, Art. 19; “1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association,” Art. 20.

<sup>257</sup> “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” *EU Charter of Fundamental Rights of the European Union*, Art. 11, § 1; “Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters...” Art. 12, § 1.

<sup>258</sup> “Everyone shall be free to leave any country, including his own.” *UN ICCPR*, Art. 12, § 2; “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Art. 19, § 2; “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Art. 19, § 1.

<sup>259</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*. See also the explicit support for this standard from a Commonwealth Parliamentary Association Study Group: “The legislature shall have the right to receive development assistance to strengthen the institution of parliament,” and; “Members and staff of parliament shall have the right to receive technical and advisory assistance, as well as to network and exchange experience with individuals from other legislatures.” *Recommended Benchmarks for Democratic Legislatures*, §§ 8.2.1., 8.2.2.

Such assistance, which is sometimes referred to as a form of parliamentary diplomacy, is the stated purpose of many parliamentary and inter-parliamentary bodies. At the international level, many inter-parliamentary associations facilitate the exchange of ideas and people between national legislatures. Such activities are the *raison d'être* of organizations such as the Inter-Parliamentary Union,<sup>260</sup> the Commonwealth Parliamentary Association,<sup>261</sup> the Inter-Parliamentary Forum of the Americas,<sup>262</sup> the OSCE Parliamentary Assembly,<sup>263</sup> the Canada-Europe Parliamentary Association,<sup>264</sup> *Assemblée parlementaire de la Francophonie*,<sup>265</sup> and European Parliamentarians for Africa (AWEPA).<sup>266</sup> At the national level, many established democracies have set up bilateral parliamentary associations. In Canada, for example, bilateral relationships have been created with China, France, Japan, the United Kingdom and the United States. There also exists the Canadian Parliament's International and Interparliamentary Affairs Directorate, which provides support to parliamentarians in their promotion of democracy, good governance and the Canadian parliamentary system on the international scene. Similarly, in the United States Congress, the Office of Interparliamentary Affairs facilitates the reception of foreign legislators. The United States has gone still further with its House Democracy Assistance Commission. Created by *House Resolution 135, § 3* in 2005, the commission works to strengthen democratic institutions by assisting parliaments in emerging democracies. It provides technical expertise to enhance accountability, transparency, legislative independence and government oversight in foreign legislatures.

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<sup>260</sup> “[The IPU shall... ] (a) Foster contacts, coordination and the exchange of experience among Parliaments and parliamentarians of all countries.” *Statutes of the IPU*, Art. 1, § 2.

<sup>261</sup> “The following strategies are recommended: the facilitation of inter-parliamentary and cross-organizational mentoring arrangements, work attachments and other forms of mutual exchange; the preparation of training materials, manuals guides to agreements and other training tools in a format suitable for use by Parliamentarians, and; the further development of linkages between the CPA and other organizations within and outside the Commonwealth to undertake related work.” CPA. *Enhancing the Role of Parliamentarians in the Debate on Trade and Globalization. Report of a CPA Study Group*, pp. 22-23.

<sup>262</sup> “The Inter-Parliamentary Forum of the Americas has the following objectives:

(b) To increase the sharing of experiences, dialogue, and inter-parliamentary cooperation on issues of common interest to the member states.” Inter-Parliamentary Forum of the Americas (FIPA). *FIPA Regulations*, Chapter 1 Nature and Objectives, 2.

<sup>263</sup> “The Assembly's primary task is to facilitate inter-parliamentary dialogue, an increasingly important aspect of the overall effort to meet the challenges of democracy throughout the OSCE area.” OSCE Parliamentary Assembly. *Mission Statement*.

<sup>264</sup> “The objectives of the Association are to provide the structures for the exchange of visits, information and ideas between Canadian parliamentarians and parliamentarians from: (a) The European Parliament (b) The Parliamentary Assembly of the Council of Europe (c) The Western European Union Assembly (d) Similar European parliamentary organizations (e) Individual parliaments of all countries of Europe, And provide opportunities to identify mutual goals and problems and strive for attainment and solution.” Canada-Europe Parliamentary Association. *Constitution*, Art. II;

<sup>265</sup> “[AFP] commits to implementing action aimed at [supporting the domains of interparliamentary development and democracy. Those actions aim to reinforce solidarity between parliamentary institutions and to promote democracy and the rule of law, more particularly within the French-speaking community.” *Assemblée parlementaire de la Francophonie [AFP]. Objectifs* (author's translation).

<sup>266</sup> “AWEPA works to support the well functioning of parliaments in Africa and to keep Africa on the political agenda in Europe... This includes attention to: African-European sharing of parliamentary experience; building parliamentary networks at national, regional and inter-regional levels as fora for political and non-governmental interaction.” European Parliamentarians for Africa (AWEPA). *Mission Statement*.

## **Part IV Values of the Legislature**

### **9. Accessibility**

#### **9.1 CITIZENS AND THE PRESS**

**9.1.1 *The legislature shall ensure that the buildings of the legislature shall be accessible and open to citizens and the press, subject only to demonstrable public safety and work requirements.***

Public scrutiny of the legislature is enabled by the ability of media and civil society groups to closely observe legislative activities. Without the involvement of media and civil society groups, the principled transparency of the legislature is stillborn. It is crucial that, in addition to public voting and open committees, the building that houses the legislature be open to all interested citizens, including media and civil society groups. There shall be no unwarranted obstacles to observing plenary floor debates and committee meetings, or any other public act of the legislature for that matter. This is consistent with the *Warsaw Declaration* of the Community of Democracies which pronounces “the right of the press to collect, report and disseminate information, news and opinions, subject only to restrictions necessary in a democratic society and prescribed by law...”<sup>267</sup> Even more explicit is the call of the Commonwealth Parliamentary Association for legislatures to “be accessible and open to citizens and the media, subject only to demonstrable public safety and work requirements.”<sup>268</sup> It shall be required of any representative democracy, therefore, that the legislature shall ensure that the buildings of the legislature shall be accessible and open to citizens and the press, subject only to demonstrable public safety and work requirements. Indeed, this is already the case in almost every legislature today.

**9.1.2 *The legislature shall not use credentialing of the media in the legislature for the purpose or with the effect of creating a ruling party bias.***

Rules governing the granting of building passes to the media should seek to enhance a supportive environment for the free flow of information. The selective granting of passes with the aim of creating a bias in media reporting is fundamentally inconsistent with the principles of democratic governance. Indeed, the Commonwealth Parliamentary Association has explicitly called on legislatures to “reject or repeal legislation to license media, journalists and presses.”<sup>269</sup> Hence, it is a minimum requirement that credentialing of the media shall not be used for the purpose of creating a ruling party bias. To ensure adherence to this minimum democratic standard, authorizing passes should be administered by the non-partisan staff service of the legislature. This is the case in the United Kingdom, for example, where the non-partisan deputy-sergeant at arms is responsible for authorizing access passes.

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<sup>267</sup> Community of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*.

<sup>268</sup> CPA. See also the call of the CPA for legislatures to “provide as a matter of administrative routine all necessary access and services to the media to facilitate their coverage of proceedings.” *Recommendations for an Informed Democracy: Conclusions of a CPA Study Group on Parliament and the Media*, paragraph 8.1.

<sup>269</sup> CPA. *Parliament and the Media: Principles for an Informed Democracy*.

## **9.2 LANGUAGES AND DISABILITIES**

### **9.2.1 *The legislature shall facilitate the use of all working languages recognized by the constitution or in the rules of procedure, including simultaneous interpretation in debates and proceedings and the enactment of laws in all working languages.***

It is a foundational principle of a democracy that participation in political life is not contingent on the gender, race, ethnicity, religion, or language of a citizen. It follows that state institutions are obliged to receive and communicate information in all official languages. In countries with one or more official spoken language, it is imperative that officially recognized languages do not constitute an obstacle to free political participation. This is consistent with the *International Covenant on Civil and Political Rights*.<sup>270</sup> Hence, the legislature shall facilitate the use of all working languages recognized by the constitution or in the rules of procedure, including providing for simultaneous interpretation in debates and proceedings in the legislature, and by enacting laws in all working languages.

In many countries the protection and inclusion of officially recognized linguistic groups in legislative life is demonstrated by its treatment in constitutions, bills of rights, or other basic laws. In Canada, for example, the *Charter of Rights and Freedoms* explicitly mandates that debates, proceedings and laws are to be made public in all official languages, and that citizens have the right to interact with the state in an official language of their choosing.<sup>271</sup> Simultaneous interpretation is offered in both chambers, including in committee chambers.

### **9.2.2 *The legislature shall make every reasonable effort to publish all official papers and bills in all working languages recognized by the constitution or in the rules of procedure.***

It is consistent with the principle of transparency in a representative democracy that all citizens shall have access to non-partisan, accurate information about the proceedings of the legislature, as described in §§ 5.4 and 11.1.2. As a corollary to this minimum requirement, the legislature shall make every reasonable effort to publish all official papers and bills in all official languages. This is one way of enabling all language groups to scrutinize the work of the legislature. Indeed, it is already the case that the vast majority of multilingual countries publish the records of the legislature in more than one language.<sup>272</sup>

### **9.2.3 *The legislature shall make every reasonable effort to accommodate the special needs of persons with disabilities, including wheelchair access, the translation of documents into Braille, and the use of closed captioning in televised broadcasts.***

The free participation of citizens in political life may never be conditioned on physical ability, just as it may never be conditioned on any discriminatory basis. Persons with physical disabilities shall enjoy the right to elect and be elected, as with every citizen as described in §

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<sup>270</sup> ICCPR, Art. 2(1). This minimum standard has also been endorsed by a Commonwealth Parliamentary Association Study Group: "Where the constitution or parliamentary rules provide for the use of multiple working languages, the legislature shall make every reasonable effort to provide for simultaneous interpretation of debates and translation of records." *Recommended Benchmarks for Democratic Legislatures*, § 9.2.1.

<sup>271</sup> *The Canadian Charter of Rights and Freedoms*, 16-22.

<sup>272</sup> Inter-Parliamentary Union. *Parliaments of the World: A Comparative Reference Compendium. Volume 1. Second Edition*, 1986, pp. 579-586.

1.3.1. This is consistent with the explicit declaration contained in the *African Charter on Human and Peoples' Rights* of the African Union that the “aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs,”<sup>273</sup> as well as the *Charter of Fundamental Rights of the European Union* which states that the European Union “recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence...and participation in the life of the community.”<sup>274</sup> With regard to the legislature, this means that every reasonable effort shall be made by the legislature to accommodate the special needs of persons with disabilities, including wheelchair access in the buildings of the legislature, translation of documents into Braille, and the use of closed captioning (subtitles) of televised broadcasts for the hearing impaired.

## 10. Transparency and Integrity

### 10.1 TRANSPARENCY AND INTEGRITY

#### **10.1.1 *The legislature shall approve and enforce rules on conflicts of interest that promote the independence of legislators from private interests or unreasonable political pressures.***

Transparency and integrity are fundamental principles that must always guide the life of the legislature. For legislators to be able to fulfill their constitutional responsibilities and for the citizenry to sustain confidence in their legislature, it is of paramount importance that every activity of a legislator be characterized by transparency and integrity. To provide for this, the legislature shall approve and enforce rules on conflicts of interest that promote the independence of legislators from private interests or unreasonable political pressures. This minimum requirement is supported internationally and practiced globally. The *United Nations Convention against Corruption*, for instance, calls on every country “to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest... In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.”<sup>275</sup> Both the African Union<sup>276</sup> and the Organization of American States have made similarly explicit calls for codes of conduct, as well as for supporting instruments to monitor and enforce adherence to these codes.<sup>277</sup> Such codes of conduct shall also oblige legislators to fully declare all of their

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<sup>273</sup> AU. *African (Banjul) Charter on Human and Peoples' Rights*, Art. 18.

<sup>274</sup> EU. *Charter of Fundamental Rights of the European Union*, Art. 26.

<sup>275</sup> *United Nations Convention against Corruption*, Art. 7(4), 8(2).

<sup>276</sup> “...States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen: 1. Standards of conduct for the correct, honorable, and proper fulfillment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation of resources entrusted to government officials in the performance of their functions.” OAS. *Inter-American Convention Against Corruption*, Art. 2; “... States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen...2. Mechanisms to enforce these standards of conduct,” Art. 2, § 1, 2.

<sup>277</sup> “In order to combat corruption and related offences in the public service, State Parties commit themselves to: 1. require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service. 2. Create an internal committee or a similar body mandated to establish a code of conduct and to monitor its implementation, and sensitize and train public officials on matters of ethics. 3. Develop disciplinary measures and investigation procedures in corruption and related offences with a view to

financial assets and interests, consistent with Article 7 of the *African Union Convention on Preventing and Combating Corruption*<sup>278</sup> and the *Commonwealth Principles* of the Commonwealth Parliamentary Association, and as described in § 10.2.2.<sup>279</sup>

Individual legislatures will define acceptable levels of conduct and influence according to what is culturally appropriate, but each shall use its code of conduct to ensure the highest ethical standards, not only to guarantee the integrity of the office and public confidence in the assembly, but also to allow legislators freedom in their legislative activities. So it is in Greece, for example, that a legislator cannot be an employee of a commercial firm or enterprise, and has no right to enter into agreements on the supply of goods or to execute any activity in favor of state or municipal enterprises. In France, meanwhile, a legislator may not be the chairman of an administrative council or the head of an enterprise, financial authority, or any firm which aims to make profit.

There exist two core institutional models that seek to give force to the code of conduct: the self-regulatory and the independent. At a minimum, adherence shall be monitored and enforced by an ethics committee. In the United States, for example, both houses of Congress have detailed codes of conduct and ethics committees which operate independently of each other. Each committee provides interpretative and advisory rulings, has jurisdiction over the members and officers of each House, can investigate allegations of improper conduct and can impose sanctions. There is considerable detail in the codes and rules. For example the Gift Rule, adopted on December 7, 1995, was accompanied by a 10-page explanatory memorandum that sets out numerous, finely distinguished situations in which gifts are or are not permitted. The *House Ethics Manual*, which is a compendium of rules and interpretative guidelines for members and officers of the House of Representatives, runs to 500 pages.

Ideally, monitoring the adherence of members to the code of conduct shall be the task of an independent or non-partisan entity, as in the case of the Parliamentary Commissioner for Standards in the United Kingdom. The code of conduct is enforced by the Committee on Standards and Privileges, and it is the duty of the commissioner to advise the committee; maintain the Register of Members' interests; advise members confidentially on registration matters; monitor the operation of the code and the register; and receive and, if appropriate, investigate complaints from legislators and citizens. Although the commissioner cannot impose penalties, a power left to the committee, he or she brings to the role greater levels of impartiality than might reasonably arise from the self-monitoring of an ethics committee. Moreover, while the committee could reject the commissioner's findings for partisan reasons, it is at least significant that cases of improper conduct be publicized.

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keeping up with technology and increase the efficiency of those responsible in this regard." *African Union Convention on Preventing and Combating Corruption*, Art. 7.

<sup>278</sup> "In order to combat corruption and related offences in the public service, State Parties commit themselves to: 1. require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service." *African Union Convention on Preventing and Combating Corruption*, Art. 7.

<sup>279</sup> "Conflict of interest guidelines and codes of conduct shall require full disclosure by ministers and members of their financial and business interest." *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*. See annex, "Latimer House Guidelines for the Commonwealth," V(2a).

**10.1.2 Legislatures shall require legislators to fully disclose their financial assets and business interests.**

It is consistent with the principle of transparency in a representative democracy that the legislator be afforded certain privileges which go beyond those normally enjoyed by citizens, as described in § 1.5. In a similar vein, it is entirely reasonable for a legislator to be obliged to be more transparent with some of his/her personal information than would normally be expected for any other job. This means that, in addition to adhering to rules and regulations set out in the code of conduct, legislatures shall require legislators to fully disclose their financial assets and business interests. This is consistent with the *African Union Convention on Preventing and Combating Corruption* that requires state parties to “require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.”<sup>280</sup> The Commonwealth Parliamentary Association has determined that “[c]onflict of interest guidelines and codes of conduct shall require full disclosure by ministers and members of their financial and business interest.”<sup>281</sup>

Many countries today already require a declaration of interests or assets by legislators, and the global trend is growing in this regard. For instance, almost every European Union nation has joined the trend. Declaration requirements are also found in countries such as Algeria, Australia, Bolivia, Japan, Uruguay and Venezuela.<sup>282</sup> Between countries, there are discernible overlaps and differences. In the United Kingdom, for example, a greater emphasis is placed on financial and economic connections that might affect members’ independence than on the risk of unlawful accumulation of wealth. Legislators are required to disclose potential conflicts of interest in House dealings, in addition to making a more thorough formal disclosure at the beginning of their term. Such a disclosure includes: any consultancy contracts under which they accept money or other benefits in exchange for services rendered or advice given in their capacity as legislators; any financial interest in companies that lobby the legislature; any other special interest that they wish to disclose because they concern matters that might affect how public opinion views the way in which they carry out their duties.<sup>283</sup>

In Australia, meanwhile, legislators must also disclose the interests of their spouses and dependent children, while in the United States, obligatory declarations also apply to congressional staff and those running for office. Yet, declarations are not always made public. The general trend is that the greater the depth of the declaration, the greater privacy afforded to the legislator, such as in France, Poland, Romania, Spain, Uruguay and Venezuela. As a further noteworthy case in point, the Committee on Financial Transparency in Politics in the French legislature monitors changes in members’ assets. It keeps the bureau informed of cases in which a member fails to file the appropriate declarations, a failure that could lead to disqualification. The Constitutional Council then rules on disqualification and may declare that the legislator has resigned as an automatic consequence of failure to observe the rules.

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<sup>280</sup> *African Union Convention on Preventing and Combating Corruption*, Art. 7.

<sup>281</sup> *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*. See annex, “Latimer House Guidelines for the Commonwealth,” V(2a).

<sup>282</sup> Inter-Parliamentary Union. *The Parliamentary Mandate: A Global Comparative Study*, Geneva, 2000, pp. 52-53.

<sup>283</sup> *Id.*, p. 54.

**10.1.3 To protect the dignity of the legislature, the legislature shall promulgate and enforce rules to regulate the conduct of legislators.**

In the legislature, where citizens' representatives compete to advance the interests of their constituents, it is essential that the dignity of the institution be secured at all times. Hence, rules to regulate the conduct of legislators shall include procedures to protect the dignity of the legislature. Such rules may provide for the presiding officer to discipline a legislator for clearly refusing to obey the rules of procedure or being unduly obstructionist if the legislator, for instance, takes the floor without the authorization of the presiding officer; refuses to conclude a statement or to leave the podium; ignores a call to order; refuses to defer to the authority of the presiding officer; or introduce extraneous material into a statement.<sup>284</sup> However, as explained in the *Commonwealth Principles* of the Commonwealth Parliamentary Association, "the offence of contempt of parliament should be narrowly drawn."<sup>285</sup>

In almost every legislature, a call to order is the most frequently used disciplinary sanction. Typically, it is the presiding officer who calls a member to order. The next gradient of sanction is usually a call to order with a corresponding entry in the record. In the French *Assemblée Nationale*, the president may impose this penalty on any member who, at the same sitting, has already been called to order or who has insulted, provoked or threatened one or more of his or her colleagues. The penalty automatically entails a reduction of the member's salary by 25 percent for one month. In countries such as Greece, Slovenia and the United States, members who have been warned or called to order once may be temporarily deprived of the right to the floor if they persist in disobeying the rules. Beyond this sanction, a simple censure may be used. In the French *Assemblée Nationale*, it can be imposed on any member who, after being called to order with an entry in the record, fails to obey the ruling or causes further disturbance. Given the gravity of this sanction, it is the house that takes the decision by a standing vote and without a debate, upon the president's proposal. The member concerned is, however, entitled to a hearing or to have a colleague speak on his or her behalf.<sup>286</sup>

It is also the case that the "naming" of a member is the most severe penalty that a presiding officer can impose, as in Canada, Kenya and the United States. In Canada, a member can be named for failing to respect the speaker's authority by, for example, refusing to cease interrupting a member who has the floor. Before taking that step, the speaker usually warns the offender several times of the penalty that may be imposed for failure to obey. If the member apologizes and the speaker is satisfied, the incident is usually deemed to be resolved. But if the member is named, the speaker may order the offender to either withdraw from the chamber for the remainder of the sitting or simply wait until the House takes any other disciplinary measure it deems appropriate.<sup>287</sup> Elsewhere, the presiding officer may order the member to apologize. This sanction is found in Japan, the Republic of Korea, Slovakia and the United States. The United States also uses a unique sanction: the loss of seniority. Though imposed for failure to respect ethical rules rather than for purely disciplinary purposes, it is not a purely symbolic sanction, as

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<sup>284</sup> *Id.*, p. 113.

<sup>285</sup> *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*, Art. 3(b).

<sup>286</sup> Inter-Parliamentary Union, *The Parliamentary Mandate: A Global Comparative Study*, Geneva, 2000, p. 115.

<sup>287</sup> *Id.*, p. 116.

seniority is an important criterion for obtaining appointment to certain offices (*i.e.*, committee chairperson).<sup>288</sup>

**10.1.4 The legislature shall create legal mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.**

One of the most heinous crimes a legislator can ever commit is the act of “selling favors.” Accepting bribes, in cash, goods, or kind, is a gross betrayal of the confidence placed in the legislator by the citizens, and is one of the most outrageous assaults on the integrity of the legislature. It has been declared so in many international treaties and conventions. The European Union’s *Criminal Law Convention on Corruption*, for instance, is clear on the criminality involved in the active or passive bribery of legislative officials.<sup>289</sup> It describes active bribery as “the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.” The *Inter-American Convention Against Corruption*, meanwhile, asserts the need for “deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.”<sup>290</sup> Therefore, it is a clear minimum standard for all legislatures that there shall be mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.

## **10.2 PRESSURE GROUPS AND LOBBYISTS**

**10.2.1 The legislature shall create a system for recording and making public all activities with, and exchange of gifts or favors between, lobbyists and legislators/legislative staff.**

It is the right of every citizen to petition his/her legislator, and the right of the legislator to consult with whomever he/she pleases for advice, consistent with §§ 11.1 and 3.2.3 respectively. Still, it should be appreciated that wealthier interest groups, especially business groups, will frequently enjoy disproportionately greater access to the legislature than will interest groups with weaker resources. When material wealth translates into access and greater political power, a nation’s democracy is threatened. To counter this threat, and to mitigate the likelihood of corrupt

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<sup>288</sup> *Id.*, p. 117.

<sup>289</sup> “Art. 2—Active bribery of domestic public officials. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions; Art. 3—Passive bribery of domestic public officials: Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions; Art. 4—Bribery of members of domestic public assemblies: Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Art.s 2 and 3, when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.” EU. *Criminal Law Convention on Corruption*.

<sup>290</sup> *Inter-American Convention Against Corruption*, Art. III.

practices, there shall be a system for regulating pressure groups or lobbying groups seeking to influence the legislature. To this end, a legislature may find a code of conduct to be a useful tool with which to regulate lobbying and pressure groups.

There is growing international recognition of the need to regulate the activities of pressure groups, particularly those who engage in lobbying professionally. The United States, for instance, defines a lobbyist as one who receives compensation for spending more than 20 percent of a six-month period lobbying legislative officials, and lobbying restrictions thus apply.<sup>291</sup> Congress requires their registration and a list of principals lobbied for, as well as an annual disclosure of the size of all lobbying-related expenditures.<sup>292</sup> Canada, meanwhile, has introduced a *Lobbyists' Code of Conduct*. It declares certain general principles and a list of rules on transparency, confidentiality and conflict of interest for paid lobbyists, who are to be registered under the *Lobbyists' Registration Act*. The German Bundestag, as a further example, has specific rules stipulating that groups wishing to express or defend their interests before the legislature shall be entered in a register.<sup>293</sup> Attempts to regulate the effect of lobbyists, however, should not focus exclusively on the regulation of groups. Legislators themselves should be guided by the highest ethical standards in their dealings with private interests groups, as described throughout § 10.1.<sup>294</sup>

## **11. Public Consultation and Participation**

### **11.1 CITIZEN PARTICIPATION**

#### **11.1.1 *The legislature shall create and utilize mechanisms for receiving and considering public views on proposed legislation.***

It is a fundamental principle of democratic governance that all state institutions must be transparent and accessible to the public. In a representative democracy, all of the institutions are “of, by and for” the citizens. In a legislature representative of the citizenry, the democratic dividend is increased when the views of citizens are considered in the promulgation of laws. This much has been explicitly endorsed by the Organization of American States, the Commonwealth Parliamentary Association and the *Warsaw Declaration* of the Community of Democracies.<sup>295</sup> In

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<sup>291</sup> *Lobbying Disclosure Act, 1995*, § 3. Lobbying activities are defined as “[l]obbying contacts and any efforts in support of such contacts, including preparation or planning activities, research and other background work that is intended, at the time of its preparation, for use in contacts and coordination with the lobbying activities of others.”

<sup>292</sup> CRS Report for Congress. *Lobbying Congress: An Overview of Legal Provisions and Congressional Ethics Rules*, 2001, p. 2.

<sup>293</sup> European Parliament, Directorate General for Research. *Rule Governing Lobbying in the National Parliaments of the Member States*. National Parliament Series, 1995.

<sup>294</sup> Justin Greenwood and Clive S. Thomas. “Regulating Lobbying in the Western World,” *Parliamentary Affairs*, Vol. 51, No. 4, Oct. 1998, p. 495.

<sup>295</sup> “Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.” OAS. *Inter-American Democratic Charter*. Art. II; “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy.” Art. VI; “Where appropriate, opportunity shall be given for public input into the legislative process.” CPA. *Commonwealth Principles on the Accountability of and Relationship Between the Three Branches of Government*, Art. VIII; “Informed participation by all elements of society, men and women, in a country’s economic and political life, including by persons belonging to minority groups is fundamental to a vibrant and durable democracy.” Community

practice, this means that there shall be mechanisms for receiving and considering public input on proposed legislation.

This minimum standard is already widely practiced in legislatures today. Every year in Canada, for example, the Finance Committee of the House of Commons conducts cross-country consultations on the federal budget.<sup>296</sup> In Mexico, the Citizen Attention Unit of the Cámara de Senadores serves as a liaison between the Chamber and citizen associations, while the Commission of Citizen Participation of the Cámara de Diputados promotes dialogue with non-governmental organizations, trade unions, citizen groups and individual citizens.<sup>297</sup> Chile, meanwhile, maintains a directory of civil society organizations for the aid of legislators.<sup>298</sup> Perhaps most famously, the constitution of South Africa explicitly mandates public access to and participation in the legislative process.<sup>299</sup> In Macedonia, the Inter-Parliamentary Lobby Group works on the promotion of the rights of people with disabilities and their quick and efficient incorporation into society. The Macedonian legislature is constantly open to and receives representatives of non-governmental organizations and association of persons with various disabilities, who can directly express their demands and remarks concerning the adoption of legislation in the fields of their interest.<sup>300</sup> In New Zealand, committees in the House of Representatives hold public hearings when examining draft legislation and attempt to hear all members of the public who wish to appear before them. The committees usually receive a large amount of public input, and the government is expected to issue a report commenting on the input before the committee decides whether to amend or recommend the passage of the legislation.<sup>301</sup> Many countries also provide for the use of referenda, also known as initiatives. In Slovenia, one-third of members or 40,000 citizens may call for a referendum. In Macedonia, 150,000 signatures are required for a referendum and only 10,000 for a legislative proposal which the legislature will decide whether to pursue or not. These are all examples of how the legislature can both recognize and actualize the right of citizens to participate in the oversight and legislative functions of the legislature.

**11.1.2 Information shall be provided to the public in a timely manner regarding matters under consideration by the legislature, sufficient to allow the public and civil society to provide their views on draft legislation.**

The consideration of public input in the legislative process is an internationally endorsed and widely practiced minimum standard of democratic legislatures, as explained in § 11.1.1. As a corollary to this standard, it is imperative that the details of legislative activity be published and made widely available, sufficient to allow citizens and civil society organizations the time to prepare their views, arrange for the delivery of input and have their views considered by the legislature. In this vein, a Study Group of the Commonwealth Parliamentary Association has said

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of Democracies. *Final Warsaw Declaration: Toward a Community of Democracies*. Warsaw, Poland. June 27, 2000.

<sup>296</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*, PUMA/LEG (2000)/2/REV1, p 19.

<sup>297</sup> *Id.*

<sup>298</sup> *A Concept Paper on Legislatures and Good Governance*. UNDP. 1999, p. 17.

<sup>299</sup> *Constitution of South Africa*. “The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.” Art. 59(1)(a).

<sup>300</sup> “Relationship between parliament and civil society,” *Constitutional and Parliamentary Information*, No. 187, 1<sup>st</sup> Half-year, 2004, p. 39.

<sup>301</sup> OECD. *OECD Report on Parliamentary Procedures and Relations*. PUMA/LEG (2000)/2/REV1, p. 14.

“information shall be given to the public in a timely manner.”<sup>302</sup> Although individual legislators and committees may find it profitable to occasionally seek out and notify relevant civil society actors for their input on a proposed bill, at a minimum, the semi-independent staff service will be tasked with regularly publishing the agenda and schedule, as described throughout § 5.4.

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<sup>302</sup> CPA. *Recommended Benchmarks for Democratic Legislatures*, § 6.3.2.

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## **ANNEX: SUMMARY LISTING OF MINIMUM STANDARDS**

### ***Preface***

### ***Table of Contents***

### ***Introduction***

## ***PART I ELECTION AND STATUS OF LEGISLATORS***

### **1. Election and Status of Legislators**

- 1.1 The Election of Legislators
  - 1.1.1 Members of the popularly elected or only house shall be directly elected through universal and equal suffrage in a free and secret ballot.
  - 1.1.2 Legislative elections shall meet international standards for genuine and transparent elections.
  - 1.1.3 Term lengths for members of the popular house shall reflect the need for accountability through regular and periodic legislative elections.
- 1.2 Candidate Eligibility
  - 1.2.1 Restrictions on candidate eligibility shall not be based on religion, gender, ethnicity, race or physical ability.
  - 1.2.2 Measures of positive discrimination used to encourage the political participation of marginalized groups shall be narrowly drawn to accomplish precisely defined and limited objectives.
  - 1.2.3 No elected member shall be required to take a religious oath against his/her conscience in order to take his/her seat in the legislature.
- 1.3 Incompatibility of Office
  - 1.3.1 In a bicameral legislature, a legislator may not be a member of both houses.
  - 1.3.2 A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch, except in limited instances involving front-line delivery of public services.
- 1.4 Immunity
  - 1.4.1 Legislators shall have immunity for speech conducted during the exercise of their duties; former legislators shall never be liable for speech conducted during the exercise of their duties as a legislator.
  - 1.4.2 Parliamentary immunity shall not be used to place legislators above the law and shall not extend beyond their term of office, though a former legislator shall continue to enjoy protection for his/her term of office.
  - 1.4.3 Only an act or vote of the legislature can lift parliamentary privilege and the immunity of a legislator. The executive branch shall have no right or power to lift the immunity of a legislator.
  - 1.4.4 After the legislature votes to lift the immunity of a legislator, it has no power to mandate changes to or otherwise affect proceedings involving the legislator before other branches of government.
- 1.5 Remuneration and Benefits
  - 1.5.1 The legislature shall provide all legislators with fair remuneration and adequate physical infrastructure, and all forms of remuneration and infrastructure shall be allocated on a non-partisan basis.

- 1.6 Resignation
  - 1.6.1 Legislators shall have the right to resign their positions.

## **PART II ORGANIZATION OF THE LEGISLATURE**

### **2. Procedure**

- 2.1 Rules of Procedure
  - 2.1.1 Only the legislature may adopt and amend its rules of procedure.
- 2.2 Sessions
  - 2.2.1 The legislature shall meet regularly, at intervals sufficient to fulfill its responsibilities.
  - 2.2.2 The legislature shall have and follow procedures for calling itself into extraordinary or special session.
  - 2.2.3 Provisions for the executive branch to convene a special session of the legislature shall be clearly specified.
- 2.3 Plenary Agenda
  - 2.3.1 Legislators shall have the right to vote to amend the proposed agenda for debate.
  - 2.3.2 Legislators in the lower or popularly elected chamber shall have the right to initiate legislation and to offer amendments to proposed legislation.
  - 2.3.3 The legislature shall give legislators and citizens adequate advance notice of session meetings and the agenda for the meeting.
- 2.4 Plenary Debate
  - 2.4.1 The legislature shall create and follow clear procedures for structuring debate and determining the order of precedence of motions tabled by members.
  - 2.4.2 The legislature shall provide meaningful opportunity for legislators to publicly debate bills prior to a vote.
- 2.5 Plenary Voting
  - 2.5.1 There shall be a presumption that votes in the legislature shall be public; the legislature shall publicly codify any exceptions to the presumption and give advance notice before a non-public vote.
  - 2.5.2 The legislature shall establish and follow procedures for a minority of legislators to demand that a recorded method of voting be used.
  - 2.5.3 Only legislators shall have a vote on issues before the legislature.
- 2.6 Presiding Officers
  - 2.6.1 The legislature shall elect or select presiding officers and members of a steering body pursuant to criteria and procedures clearly defined in the rules of procedure.

### **3. Committees**

- 3.1 Organization
  - 3.1.1 The legislature shall have the right to form permanent and temporary committees.
  - 3.1.2 The legislature's assignment of committee seats shall reflect the political party composition of the legislature and shall include both majority and minority party members.
  - 3.1.3 The legislature shall establish and follow a transparent method for electing or selecting the chairs of committees.
  - 3.1.4 There shall be a presumption that committee hearings are open to the general public; the legislature shall publicly codify any exceptions to the presumption and give advance notice before a non-public committee meeting.

### 3.2 Powers

- 3.2.1 There shall be a presumption that the legislature will refer legislation to a committee, and any exceptions must be transparent, narrowly defined and extraordinary in nature.
- 3.2.2 All committees shall have the power to amend legislation.
- 3.2.3 All committees shall have the right to consult and/or hire experts.
- 3.2.4 Committees shall have the power of summons to examine persons, papers and records, including witnesses and evidence from the executive branch.
- 3.2.5 Only legislators appointed to the committee shall have the right to vote in the committee.

## 4. Political Parties, Party Groups and Interest Caucuses

### 4.1 Political Parties

- 4.1.1 The right of freedom of association shall exist for legislators as for all people.
- 4.1.2 Any restrictions on the legality of political parties shall be narrowly drawn in law and shall be consistent with the International Covenant on Civil and Political Rights.

### 4.2 Party Groups

- 4.2.1 Criteria for the formation of parliamentary party groups, and their rights and responsibilities in the legislature, shall be clearly stated in the rules.
- 4.2.2 In a non-party list electoral system, membership of a parliamentary party group shall be voluntary and a legislator shall not lose his/her seat for leaving his/her party group.
- 4.2.3 The legislature shall provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.

### 4.3 Interest Caucuses

- 4.3.1 Legislators shall have the right to form interest caucuses around issues of common concern.

## 5. Parliamentary Staff

### 5.1 Authority

- 5.1.1 The legislature, rather than the executive branch, shall control its staff.
- 5.1.2 The legislature shall draw and maintain a clear distinction between partisan and non-partisan staff.

### 5.2 Hiring and Promotion

- 5.2.1 The legislature shall have adequate resources to hire staff sufficient to fulfill its responsibilities. Non-partisan staff shall be recruited and promoted on the basis of merit and equal opportunity.
- 5.2.2 The legislature shall not discriminate in its hiring of any staff on the basis of race, ethnicity, religion, gender, or physical ability. Additionally, it shall not discriminate in its hiring of non-partisan staff on the basis of party affiliation.

### 5.3 Organization and Management

- 5.3.1 The legislature shall clearly codify the responsibilities of the semi-independent, non-partisan secretary-general. The secretary general shall be ultimately accountable to the legislature, and the secretary-general's tenure shall outlast the legislature.
- 5.3.2 No partisan or non-partisan staff of the legislature, including the secretary-general, shall have any legislative or procedural authority, including voting, in the legislature.
- 5.3.3 All staff shall be subject to a code of conduct.

### 5.4 Media Function

- 5.4.1 The legislature shall have a non-partisan media relations facility that shall be sufficiently and consistently funded under the administrative budget and operate under the office of the secretary-general.

- 5.4.2 The legislature shall maintain a central depository for records of daily proceedings and votes that can be readily accessed by legislators, staff, and citizens.
- 5.4.3 Non-partisan staff shall publish transcripts, votes and schedules.

### **PART III FUNCTIONS OF THE LEGISLATURE**

#### **6. Legislative Function**

##### 6.1 In General

- 6.1.1 The approval of the legislature is required for the passage of all legislation, including budgets.
- 6.1.2 The legislature shall have the power to enact resolutions or other non-binding expressions of its will.

##### 6.2 Legislative Procedure

- 6.2.1 In a bicameral legislature, the legislature shall clearly define the roles of each chamber in the passage of legislation.
- 6.2.2 The legislature shall have the right to override an executive veto.

##### 6.3 Financial and Budgetary Powers

- 6.3.1 The proposed national budget shall require the approval of the legislature and the legislature shall have the power to amend the budget before approving it.
- 6.3.2 The legislature shall have a reasonable period of time in which to review the proposed budget.
- 6.3.3 Only the legislature shall be empowered to determine and approve the budget of the legislature.

##### 6.4 Delegation of Legislative Power

- 6.4.1 The legislature shall have the prerogative to delegate legislative functions to the executive branch under legally grounded criteria, for a limited period of time, and for strictly defined purposes.

##### 6.5 Constitutional Amendments

- 6.5.1 In the absence of a public referendum, constitutional amendments shall require the approval of the legislature.

#### **7. Oversight Function**

##### 7.1 In General

- 7.1.1 The legislature shall have sufficient means and mechanisms to effectively fulfill its oversight function.
- 7.1.2 The legislature shall have mechanisms to obtain information from the executive branch sufficient to meaningfully exercise its oversight function.
- 7.1.3 The oversight authority of the legislature shall include meaningful oversight of the security and intelligence forces and of state-owned enterprises.
- 7.1.4 "Whistleblower" protections shall protect informants and witnesses presenting accurate information about corruption or unlawful activity.

##### 7.2 Commissions of Inquiry

- 7.2.1 The law shall guarantee the right of the legislature to create commissions of inquiry. Such commissions shall have the power to compel executive branch officials to appear and give evidence under oath.

##### 7.3 Legislative Ombudsmen

- 7.3.1 The legislature shall have a non-partisan ombudsman or a similar body that investigates complaints of executive branch malfeasance, makes recommendations and reports directly to the legislature.
- 7.4 Public Accounts Committees or Audit Committees
  - 7.4.1 The legislature shall ensure that public accounts committees provide opposition parties with a meaningful opportunity to engage in effective oversight of executive branch expenditures.
  - 7.4.2 Public accounts or audit committees shall have access to records of executive branch accounts and related documentation sufficient to be able to meaningfully review the accuracy of executive branch reporting on its revenues and expenditures.
  - 7.4.3 There shall be an independent, non-partisan Supreme or National Audit Office that conducts audits and reports to the legislature in a timely way.
- 7.5 No Confidence and Impeachment
  - 7.5.1 The legislature shall have mechanisms to impeach or censure officials of the executive branch and/or express no-confidence in the government.
  - 7.5.2 Chambers where a majority of members are not directly elected shall have no power or means to collapse the government.
- 7.6 Legislative-Judicial Relationship
  - 7.6.1 The legislature's consent shall be required in the confirmation of senior judges and the legislature shall have mechanisms to impeach judges for serious crimes.

## **8. Representational Function**

- 8.1 Representational Nature of the Legislature
  - 8.1.1 The number of seats in the legislature shall not be so low, and hence the citizen-legislator ratio so high, as to render impossible meaningful constituent relations.
- 8.2 Constituent Relations
  - 8.2.1 The legislature shall provide all legislators with sufficient resources to enable the legislators to fulfill their constituency responsibilities, including travel to and from their constituencies.
- 8.3 International Representation
  - 8.3.1 The legislature, including its members and staff, shall have the right to send and receive development assistance, whether technical or advisory in nature, regardless of origin or destination.

## **PART IV VALUES OF THE LEGISLATURE**

### **9. Accessibility**

- 9.1 Citizens and the Press
  - 9.1.1 The legislature shall ensure that the buildings of the legislature shall be accessible and open to citizens and the press, subject only to demonstrable public safety and work requirements.
  - 9.1.2 The legislature shall not use credentialing of the media in the legislature for the purpose or with the effect of creating a ruling party bias.
- 9.2 Languages and Disabilities
  - 9.2.1 The legislature shall facilitate the use of all working languages recognized by the constitution or in the rules of procedure, including simultaneous interpretation in debates and proceedings and the enactment of laws in all working languages.

- 9.2.2 The legislature shall make every reasonable effort to publish all official papers and bills in all working languages recognized by the constitution or in the rules of procedure.
- 9.2.3 The legislature shall make every reasonable effort to accommodate the special needs of persons with disabilities, including wheelchair access, the translation of documents into Braille, and the use of closed captioning in televised broadcasts.

## **10. Transparency and Integrity**

### 10.1 Transparency and Integrity

- 10.1.1 The legislature shall approve and enforce rules on conflicts of interest that promote the independence of legislators from private interests or unreasonable political pressures.
- 10.1.2 Legislatures shall require legislators to fully disclose their financial assets and business interests.
- 10.1.3 To protect the dignity of the legislature, the legislature shall promulgate and enforce rules to regulate the conduct of legislators.
- 10.1.4 The legislature shall create legal mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.

### 10.2 Pressure Groups and Lobbyists

- 10.2.1 The legislature shall create a system for recording and making public all activities with, and exchange of gifts or favors between, lobbyists and legislators/legislative staff.

## **11. Public Consultation and Participation**

### 11.1 Citizen Participation

- 11.1.1 The legislature shall create and utilize mechanisms for receiving and considering public views on proposed legislation.
- 11.1.2 Information shall be provided to the public in a timely manner regarding matters under consideration by the legislature, sufficient to allow the public and civil society to provide their views on draft legislation.

## ***Bibliography***

### ***Annex: Summary Listing of Minimum Standards***