



A Practical Guide to

Constitution Building:

The Design of the Legislature

Markus Böckenförde

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International IDEA resources on Constitution Building

A Practical Guide to Constitution Building: The Design of the Legislature

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Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still belies constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance, what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today after the legacy of the 1990s is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,
former President of Mauritius*

Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen
Secretary-General, International IDEA

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UNDP United Nations Development Programme

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The Design of the Legislature

1. Introduction

The legislature is one of the three branches of government, which are central to the institutional design of a constitution. The allocation of powers and the interrelation between the three branches of government—the executive, the legislature, and the judiciary—are key elements of such a structure. Beyond the broad and general distinction that the legislature makes the laws and approves the budget, the executive implements the laws, and the judiciary adjudicates on laws, many questions need to be addressed and answered in order to design the appropriate balance between the three. The extent to which these branches should be separated from one another and the different degrees of reciprocal checks and controls between them are a source of constant debate in the process of drafting a new constitution or reforming an existing one. Thus, the design of the legislature cannot be discussed in clinical isolation, but requires an understanding of the governmental structure within which it operates.

Before addressing design options for the legislature in more detail, a brief overview of the interrelation of the three branches seems helpful. In particular, the institutional balance between the executive and the legislative branches of government offers a variety of different arrangements and design options. People who study and debate constitutions often sort the wide array of systems into three categories: the presidential system, the parliamentary system, and in between the two, with characteristics of both, the mixed systems. The elementary difference between the presidential and parliamentary system is that in a presidential system the legislature and the head of government are both

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The allocation of powers and the interrelation between the three branches of government, the executive, the legislature, and the judiciary, are key elements of institutional design of a constitution. Each constitution designs its own specific and context-related balance between the three.

directly elected for a fixed term, whereas in a parliamentary system only Parliament is directly elected, and the head of government is selected or elected by Parliament and requires its constant support. Other distinctions between systems can be made, but opinions vary as to whether these distinctions support the classification of a given system as presidential, parliamentary, or semi-presidential.

2. Systems of government and their impact

One central issue in democratic constitution building and constitutional design is the framing of the state structure.

Generally, constitutions do not expressly declare that they have adopted a presidential, parliamentary or mixed system. Instead, each constitution designs its own specific and context-related balance between the two branches of government, and political scientists then categorize them as following a specific model design. Since different scholars rely on different parameters to define those models, a number of countries are categorized differently by different authors. This vagueness makes it very difficult if not impossible to argue reliably the potential strengths and weaknesses of one system.¹ Acknowledging this caveat, the following paragraphs briefly introduce the systems and give a general overview. Those characteristics that are commonly acknowledged as a generally accepted parameter to describe a specific system of government are indicated in bold type in boxes 1–3. Criteria that are often referred to by some observers but which others regard as irrelevant are also added though they are not considered defining elements of the respective governmental system.

The quest for a stable, democratic constitution to establish peace and functioning government is often accompanied by an evaluation of the relative merits and consequences of different systems of government.

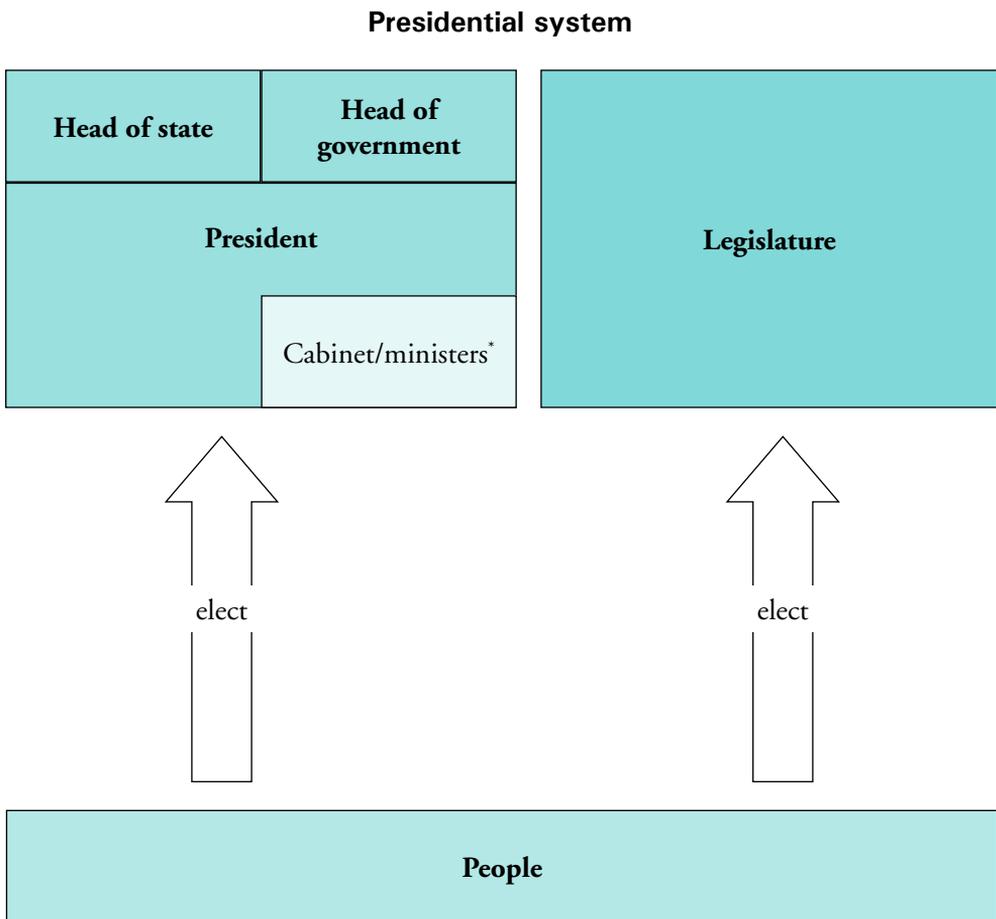
2.1. A presidential system

Box 1. Characteristics of a presidential system of government

The key characteristic of the presidential system is that the executive and legislature are separate agents of the electorate, and their origin and survival are thus separated (which creates the possibility of an impasse between the two without a constitutionally available device to break the impasse).

- **The President is both the head of state and the head of government.**
- **The President is elected by popular vote (or by an intermediate institution that carries out the popular preferences).**
- **The President's term of office is fixed (there is no vote of no confidence). S/he is neither politically accountable to the legislature nor dependent on his/her party's support to stay in office.**
- Generally, the Cabinet derives its authority exclusively from the President.
- Often, the President has some political impact in the process of law-making.

Figure 1. A presidential system of government



* Ministers are generally appointed and dismissed by the President.

Source: Adapted from: Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution, 2nd edn* (Max Planck Institute, 2009)

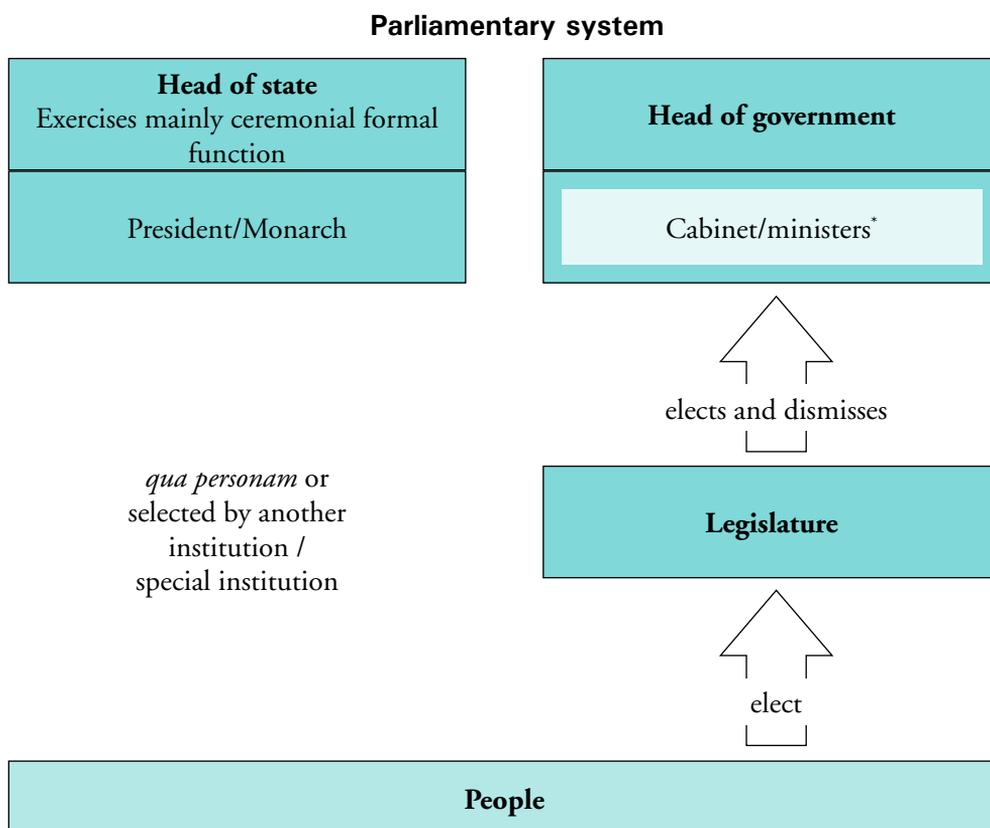
2.2. A parliamentary system

Box 2. Characteristics of a parliamentary system of government

The key criterion is the fusion of powers: the executive is hierarchically subordinated to the legislature, thus its origin and survival depend on the legislature.

- The head of government is elected by the legislature.
- The head of government is accountable to Parliament (through a vote of no confidence) and dependent on his/her party's support.
- Generally, the head of state (often a monarch or ceremonial President) is not the same person as the head of government.

Figure 2. A parliamentary system of government



* Ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from: Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Max Planck Institute, 2009)

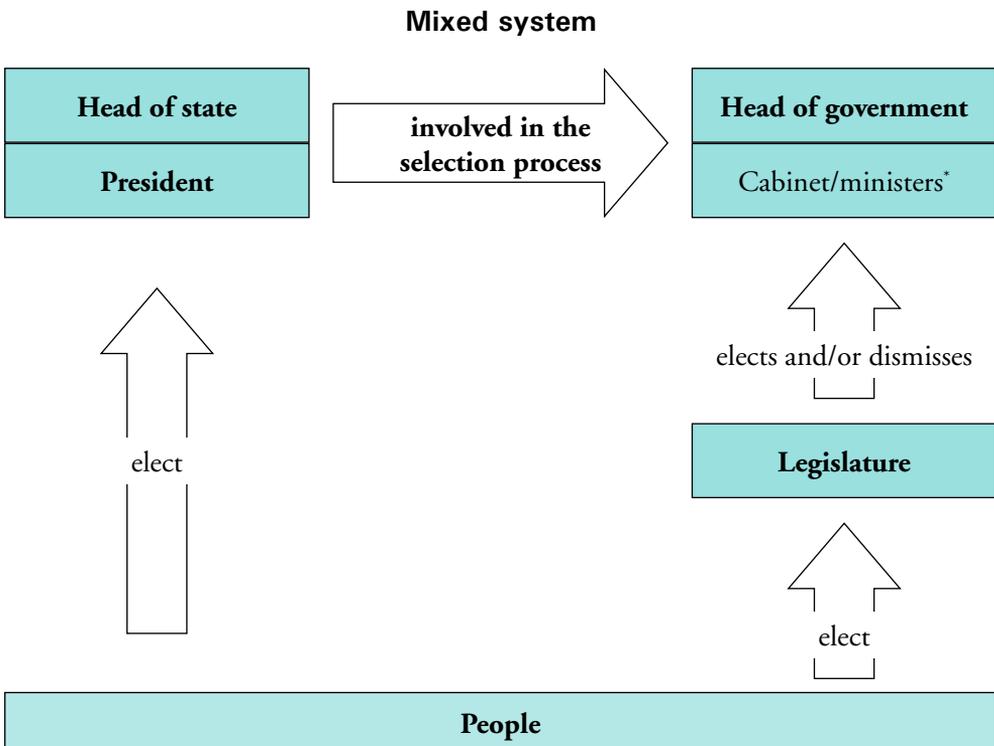
2.3. A mixed system (often referred to as a 'semi-presidential system')

Box 3. Characteristics of a mixed system of government

The key characteristic of a mixed system is a dual executive. It combines a transactional relationship between the executive and the legislature with a hierarchical one.

- The President, who serves as the head of state, is elected by popular vote.
- Neither the President nor the legislature is in full control of selecting/appointing and removing the Prime Minister.
- The Prime Minister as the head of government is accountable to Parliament (through a vote of no confidence).
- Generally, the President possesses quite considerable executive powers.

Figure 3. A mixed system of government



* Ministers might be part of the appointment / dismissal process that applies for the head of government; or ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from: Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Max Planck Institute, 2009)

2.4. Potential strengths and challenges of different systems of government

Constitution builders are expected to design a draft model of a constitution that provides peace, stability, reconciliation and (often) a democratic transition as well as capable governments that are effective and do not abuse their powers. The quest for the appropriate system of government is thus often accompanied by evaluating the relative merits and consequences of the respective systems of government to reach those ends. Indeed, a vast literature exists that explores the strengths and challenges of each system. Table 1 illustrates the strengths that are commonly attributed to the respective systems of government and the challenges associated with each.

Table 1. The potential strengths of and challenges to different systems of government

	Strengths	Challenges
Presidential system	<p>Direct mandate. The direct mandate provides citizens with more choices, allowing them to choose a head of government and legislative representatives who can more closely reflect their specific preferences; furthermore, it provides citizens with a more direct mechanism by which to hold the executive accountable.</p> <p>Stability. Fixed terms of office for the President provide more predictability and stability in the policymaking process than can sometimes be achieved in parliamentary systems, where frequent dismantling and reconstructing or Cabinet instability might impair the implementation of governmental programmes and destabilize the political system.</p> <p>Separation of powers. The executive and the legislature represent two parallel structures, allowing each to check the other. This also provides more freedom to debate alternative policy options, since opposition to the government does not endanger the survival of the government or risk the calling of new elections.</p>	<p>Tendency towards authoritarianism. Due to the ‘winner-takes-all’ nature of presidential elections, presidents are rarely elected with more than a slim majority of voters, but gain sole possession of the nation’s single most prestigious and powerful political office for a defined period of time. Despite sometimes thin margins of majority support, the sense of being the representative of the entire nation may lead the President to be intolerant of the opposition, inclining him or her to abuse executive powers in order to secure re-election, or even create a feeling of being above the law.</p> <p>Political gridlock. Dual legitimacy often results in political stalemate if the President does not have the required majority to get his/her agenda through the Parliament.</p>

<p>Parliamentary system</p>	<p>Inclusiveness. A parliamentary system may offer the possibility of creating a broad and inclusive government in a deeply divided society.</p> <p>Flexibility. The head of government can be removed at any time if his/her political programme no longer reflects the will of the majority; the head of government might call new elections if s/he lacks the support of Parliament.</p> <p>Effectiveness. The legislative process might be faster since no political veto of the executive retards or blocks the process.</p>	<p>Instability. Government could collapse by majority vote; coalition governments especially might have difficulty of sustaining viable cabinets.</p> <p>Lack of inherent separation of powers. Parliament may not be critical of the government due to the intimate relationship; in turn, there is a risk that the government may not be able to introduce bold policies and programmes for fear of being ousted.</p>
<p>Mixed system</p>	<p>Inclusiveness. It can allow for a degree of power sharing between opposing forces. One party can occupy the presidency, another can occupy the premiership and, thereby, both can have a stake in the institutional system.</p> <p>In a best case scenario, it might combine some of the strengths of both the other systems.</p>	<p>Stalemate. In a mixed system, there is a potential for intra-executive conflict between the President and the Prime Minister, especially during periods of ‘cohabitation’ where the President and the Prime Minister come from different parties. Under cohabitation, both the President and the Prime Minister can also legitimately claim that they have the authority to speak on behalf of the people (similar to the presidential system).</p> <p>In a worst case scenario, it might combine some of the challenges of both the other systems.</p>

2.5. The limited significance of indicators of strengths of and challenges to different systems of government

To predict the effect of a system of government on political life in a country is a difficult task. Table 1, which gathers together the different opinions of various authors with regard to the strengths and challenges of those systems, needs to be read with caution, for several reasons.

First, as stated above, there is no general agreement on the definition of each system. At present, at least three different definitions of a mixed/semi-presidential system are commonly applied, and each categorizes countries differently. Some countries are still considered parliamentary or already perceived as semi-presidential (Austria, Ireland) or counted as presidential instead of semi-presidential (Republic of Korea, or South Korea), depending on the respective definition. It is difficult to argue reliably that presidential or semi-presidential regimes are potentially problematic if there is no common agreement on how to define each concept.

Second, within the set of presidential systems there is a tremendous variety among types of presidentialism, encompassing different degrees of presidential power and accountabilities. Thinking in terms of a generic category—the presidential system—and trying to generalize about the consequences of presidentialism might give an inaccurate picture. Explaining political outcomes requires greater focus on the details of institutional structure.

The wide array of political systems are often sorted into three categories: the presidential system, the parliamentary system, and in between, with characteristics of both, the mixed systems. There is no general agreement on the definition of each system.

Third, determining the viability of a country and its potential for stable and effective government by focusing on one institutional variable only (the system of government) is sometimes misleading. For example, parliamentary systems with disciplined political parties and single-member plurality electoral districts promote a ‘winner-takes-all’ approach more than many presidential systems do. Indeed, as a result of the points raised above, there is a controversy about the actual impact of the type of governmental system on political behaviour. Whereas some researchers argue that presidential systems are more likely than parliamentary systems to experience breakdown and be replaced by an authoritarian regime,² others make the opposite argument,³ while still others argue that there is no relationship whatsoever.⁴

Determining a country’s potential for stable and effective government by focusing on one institutional variable only (the system of government) can be misleading.

Fourth, next to the country-specific context, individual actors also matter. Russia, for example, has a dual executive consisting of both a President and a Prime Minister. While some prime ministers during Boris Yeltsin’s presidency were able to exert influence on the direction of government policies, prime ministers when Vladimir Putin was President were resigned to executing his policy decisions. Despite its formal structure, political scientists considered Putin’s government as hyper-presidentialist. This evaluation altered once more when Putin became Prime Minister and Dmitriy Medvedev was elected President. Without any amendment to the Russian Constitution, actual executive power shifted due to the identity of individual players.

Fifth, the drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether one should choose

The drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether to choose a parliamentary or presidential system, but rather finding a system that works given the specific context of the constitution-building process.

a parliamentary or presidential system, but rather looking for a system that works. Often, there are contextual, historical and symbolic reasons for an institutional system existing in a country, and only under very specific circumstances is a dramatic change from one institutional system to another pursued.⁵

Considering these statements, this chapter relies more on identifying specific aspects of institutional design reflecting the interaction within a branch of government and between the branches of government. By addressing particular constitutional devices (for example, the dissolution of the legislature, the selection of the Cabinet, presidential term limits, modalities for second chambers in the legislature, etc.) the chapter acknowledges that these aspects are part of a larger whole. The way in which they work and interact depends on the broader context in which they are adopted. However, singling them out in the first place and initiating a debate on these lesser issues may help to identify which system best meets the actual needs. Agreeing on specific institutional powers, institutional checks, and intra-institutional decision-making processes may allow a mosaic to be formed. This inductive approach is not meant to be applied exclusively, but it might help to avoid getting gridlocked in an early political debate on which governmental system to choose.

There is another factor that is not captured by analysing systems of government but that plays an important role in the broader picture of checks and balances and the separation of powers—the role of the judiciary, its institutional independence including the appointment procedure, and the authority to review laws or even check on the constitutionality of constitutional amendments. This is the topic of chapter 6 of this Guide.

3. Aim/overview

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, it represents the political arena in which society's divergent opinions compete. In a post-conflict setting, previously warring groups struggle to replace violence and hatred with politics. In such a setting the design of the legislature can facilitate this evolution, by constructing a forum for the expression, consideration and accommodation of different opinions.

More pragmatically, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. Because political parties predominantly make up the legislature, their interests—in addition to the visions of their leaders—often dominate the process of designing the legislature. Dominant parties might negotiate a 'winner takes all' model not only concerning the electoral system, but also concerning the entire legislative design—aggregating legislative power by permitting a simple majority to exercise far-reaching authority. Parties representing a minority group, be it religious or cultural, might prefer a different design.

Often there are high expectations of the legislature and its role in the governmental structure. Especially in scenarios where people have suffered from authoritarian rulers running a country on the basis of a strongly centralized executive, relief is awaited from a viable legislature. Adherents of democracy might not find anything problematic about a potent legislature that aggregates considerable powers. The

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, it represents the political arena in which society's divergent opinions compete.

legislature is perceived as a deliberative branch in which bargaining and compromise, followed by voting, are the order of the day.

However, designing a legislative branch of government also comes with challenges. Constitution builders may consider that untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

‘If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength. For my own part, I cannot believe it; the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them.’

Source: Alexis de Tocqueville, ‘Tyranny of the Majority’, chapter XV, Book 1, *Democracy in America*.

This chapter examines a variety of constitutional options for a legislative design. It organizes this variety along the three basic functions: representation, oversight, and law-making. It adds two further elements: the degree of the autonomy of the legislature and additional substantive tasks of the legislature next to law-making. Figure 4 explains the organizational structure of the chapter in more detail.

Section 5 of this chapter looks into the institutional design of the legislature and addresses three issues: (a) different institutional structures that allow for different forms of representation, (b) the institutional structure of legislative oversight/control over the executive, and (c) different forms of checking the legislature.

- (a) There are different angles by which to allow for inclusive representation of the people in the legislature. One angle looks at the composition of the legislature, which ultimately depends on the electoral system that translates the votes of the citizens into seats in the legislature. Another, related issue tackles the question of whether quotas or reserved seats should have an impact in the composition of the legislature. A third is the question whether a legislature should introduce a minority protection device into the voting procedure within the legislature by allowing for different means to count votes of members of Parliament (double voting). Yet another angle is the question whether the legislature as such should consist of one or two chambers. A second chamber would allow a pattern of representation different from that of the first chamber. Next to increasing the degree of representation by a second chamber at the national level, the drafters of constitutions may also consider whether to have legislatures at different levels of government (provinces, local government) each vested with its own distinct authorities.

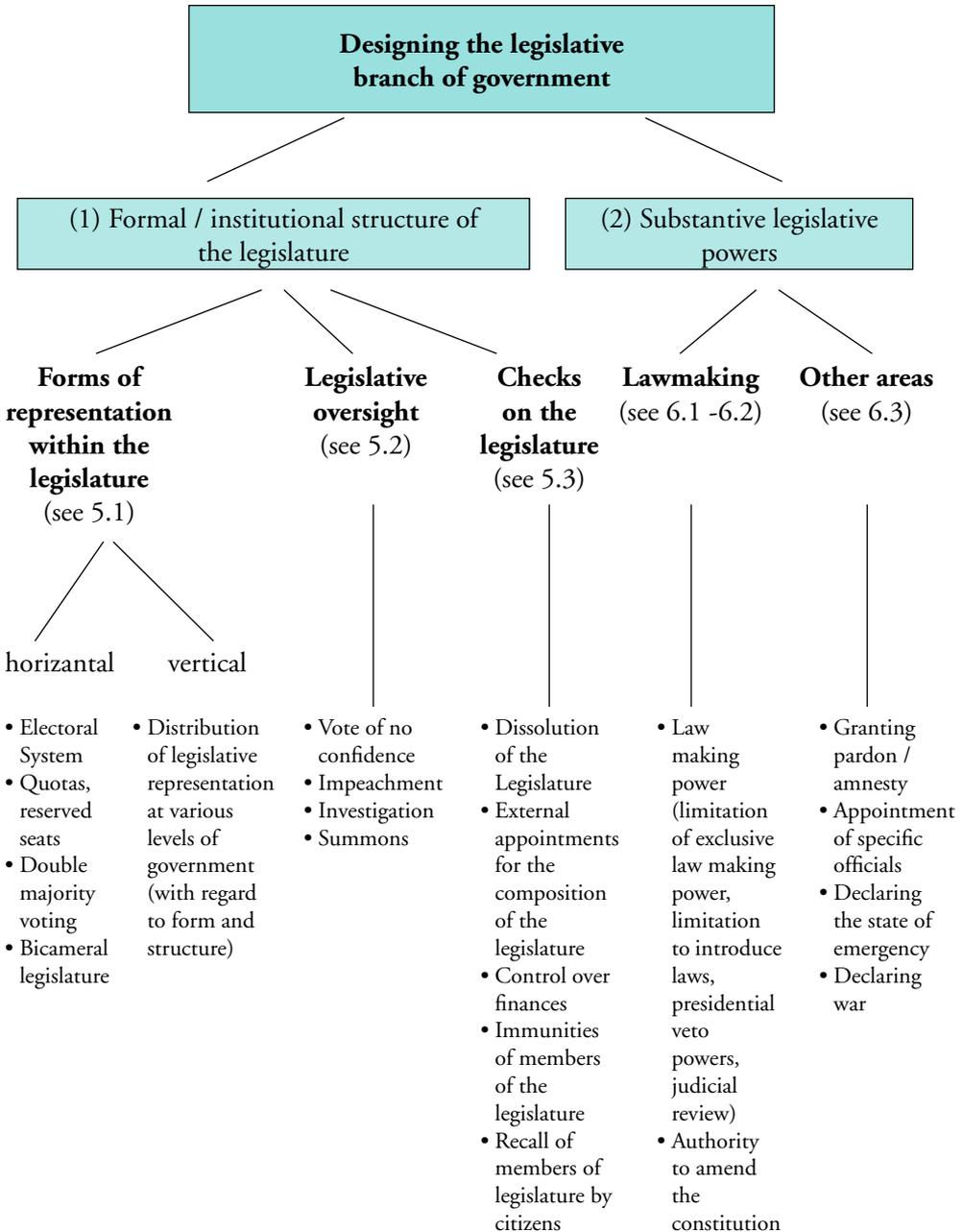
- (b) Oversight/control is another task of the legislature, and comes in different forms: (i) as a specific legislature–executive relationship in which the origin and/or survival of the executive depends on the legislature; (ii) as part of a quasi-judicial mechanism for handling executive wrongdoing (impeachment); or (iii) as part of more day-to-day accountability checks on the executive.
- (c) On the other hand, the degree of the legislature’s own autonomy needs to be determined. Various ways and means of checking or influencing the legislature in an overall system of checks and balances might be considered.

Section 6 focuses on the substantive powers of the legislature, predominately the law-making power, including the power to amend the constitution. Here again, this substantive power might rest exclusively with the legislature or be shared with other institutions. Finally, the substantive powers of the legislature are not restricted to law-making only. Thus the substantive legislative involvement in other areas is addressed as well.

Often there are high expectations of the legislature, especially where people have suffered under authoritarian rulers. However, untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

Constitutional design often represents a compromise between various actors with different interests and expectations. Post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available.

Figure 4. Designing the legislative branch of government



4. Context matters

Designing an effective legislature for post-conflict scenarios presents various challenges. Empirical evidence and experience too often do not support general parameters and theoretical assumptions. If we focus on the institutional approach that defines the authority patterns of the legislature and the other branches of government and how they are constitutionally related to each other, we will fail to consider extra-constitutional factors, such as party discipline and leadership dynamics. For example, a parliamentary system theoretically permits the direct selection and removal of the chief executive. In practice, however, the structure and operation of the political party system, in addition to a host of other factors, often drive legislative governance. Disciplined political parties in many countries have curtailed the doctrine of ‘parliamentary supremacy’ as the head of a majority party sets policy, relying on his/her fellow party members in the legislature to adopt supportive legislation instead of questioning the political agenda.

‘Because of the combination of disciplined parties, single member plurality electoral districts, and the prime minister’s ability to dissolve the parliament, Westminster systems provide a very weak legislative check on the premier. In principle, the MPs of the governing party control the cabinet, but in practice they usually support their own party’s legislative initiatives regardless of the merits of particular proposals because their electoral fates are closely tied with that of the party leadership.’

Source: Mainwaring, Scott and Shugart, Matthew J., ‘Juan Linz, Presidentialism, and Democracy: A Critical Appraisal’, *Comparative Politics*, 29/4 (July 1997).

Often, the personality and affability of individuals standing for Prime Minister, rather than the respective party platforms, determine the results of elections to the legislature. Electoral campaigns for the legislature advertising with the potential head of the executive if the respective party gains the majority of seats can reflect the factual

balance of strength between the two branches. Even in a presidential system, a President endowed with strong constitutional powers in a political party system that is highly fragmented and where support from the legislature is unreliable might wield less power than a President governing with fairly weak constitutional powers but with disciplined majority support in the legislature. Additionally, it cannot be assumed that even an appropriate constitutional provision, by its mere existence, will conjure up the social conditions that are preconditions of success. Informal cultural norms and conventions may exert considerable influence over the means by which legislatures use and apply their constitutional powers. For example, the Canadian Constitution grants the second chamber of the legislature an absolute veto power, but by convention the second chamber hardly exercises that veto.⁶ In short, the drafters of constitutions should be

Context matters. Extra-constitutional factors, such as the operation of the political party system, party discipline and leadership dynamics, personality and informal cultural norms and conventions may exert considerable influence. A design option borrowed from another country may result in political dynamics and outcomes that are quite different from those observed in the country of origin.

aware that a specific design option borrowed from another country may result in political dynamics and outcomes that are different from those observed in the country of origin. In turn, constitutional options that did not work in one country may well fit in the context of another. Thus, analysing and understanding the context of the country of origin and comparing it with the experiences in the country concerned is an indispensable second step in the drafting of a constitution.

5. Institutional design options

5.1. Forms of representation within the legislature

It is commonly agreed that one task of a democratic legislature is to represent the people. Discussions about the design of the legislature include various aspects of representation. However, representation can come in different forms. It can be geographical, linking the representative to a specific area and constituents within it. It can be based on ethnic, tribal or other identity. It can be party-political and it can be descriptive, seeking to ensure that an elected legislature contains women and men. The design of the legislature depends on the choices made about what forms of representation are most important in the historical and cultural context of a country.

The design of the legislature depends on the choices made about what forms of representation are most important in the historical and cultural context of a country.

Legislative representation might be achieved with one chamber at the national level. Within that chamber, a single party might assume majority control, buttressed by a ‘winner-takes-all’ electoral system without allocating any seats for minorities or women. Especially in a diverse society that has suffered from conflicts due to marginalization, this form of representation does not ideally reflect the diversity of and various interests in the country.

Constitution builders might disaggregate legislative power by various means: (a) adopting a constitutional framework that requires the legislature to better reflect the variety and diversity of a country—not only by mandating better representation of minority groups generally but also by mandating their influence in sensitive areas

Representation can come in different forms. It can be geographical, or based on ethnic, tribal or other identity. In a diverse society that has suffered from conflicts due to marginalization, a ‘winner-takes-all’ electoral system does not ideally reflect the diversity of and various interests in the country.

of legislation; or (b) discouraging single-party government through an appropriate electoral system. Constitution builders also could achieve formal disaggregation and space to accommodate different aspects of representation (c) horizontally within the legislature by introducing a second chamber, or (d) vertically between levels of government by creating regional legislatures.

5.1.1. Designing representation through electoral systems

The task of an electoral system is to translate the citizens' vote into seats in the legislature. The design of systems for electing legislative representatives impacts upon which parties obtain representation and to what extent their share of seats equates with their share of votes. For example, First Past The Post systems, where one legislator is elected by a simple plurality in each electoral district, have the direct effect of under-representing minority parties. Even if those parties managed to receive as much as 10 or 20 per cent of the national vote, they might not gain a single seat in the legislature if their support and that of other parties were distributed evenly across the country.⁷ By contrast, electoral systems based on proportional representation support diversity of opinion by allowing a number of political parties to secure seats in the legislature—which encourages multiparty coalitions. On the other hand, if a large number of parties obtain representation, it is less likely that the governing party will enjoy reliable support in the legislature. It then becomes more difficult for legislators to reach the level of agreement required to enact necessary reforms. Electoral systems that favour proportional representation therefore need to some degree to balance representation and effectiveness. They often rely on a minimum threshold for representation. This threshold has to be carefully determined in order not to nullify its original purpose of broad representation. Otherwise, as in Turkey (2002), a threshold of 10 per cent excludes the vast majority of parties and almost 46 per cent of all votes. At the other extreme, the current 2 per cent threshold in Israel (after 1 per cent until 1992 and 1.5 per cent until 2006) has allowed as many as 12

parties to sit in the Knesset (120 members), making it extremely challenging to form a stable government. Those differences are not only a result of the respective percentage, but are also linked to the party landscape and the electoral systems chosen. The International Institute for Democracy and Electoral Assistance (International IDEA) has published a Handbook on electoral systems that explains the importance of those systems and highlights how different systems have worked in different countries.⁸

Constitution builders can accommodate different aspects of representation in different ways. One is to designing representation through the electoral system. First Past The Post systems tend to under-represent minority parties, while electoral systems that favour proportional representation need to some degree to balance representation and effectiveness.

5.1.2. Reserved seats

Another way to increase the representation of minorities or women in the legislature is by introducing reserved seats or quotas. Reserved seats set aside a certain number of seats

for specific minorities/women in the legislature. They are used in countries as diverse as Colombia ('black communities'), Croatia (ethnic minorities), India (scheduled tribes and castes), Jordan (Christians and Circassians), Niger (Tuareg) and Pakistan (women and non-Muslims). Representatives from these reserved seats are usually elected in the same manner as other representatives, but are sometimes elected only by members of the particular minority community designated in the electoral law/constitution.⁹ Article 51 of the Constitution of Pakistan illustrates a constitutional set-up of reserved seats in the legislature and its integration into the overall electoral scheme (see box 4).

Box 4. Reserved seats in the National Assembly of Pakistan

Article 51 of the Constitution of Pakistan

National Assembly

(1) There shall be three hundred and forty-two seats of the members in the National Assembly, including seats reserved for women and non-Muslims.

(1A)

(3) The seats in the National Assembly referred to in clause (1), except as provided in clause (2A), shall be allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital as under:

	General Seats	Women	Total
Balochistan	14	3	17
The North-West Frontier Province	35	8	43
The Punjab	148	35	183
Sindh	61	14	75
The Fed. Adm. Tribal Areas	12	–	12
The Federal Capital	2	–	2
Total	272	60	332

(2A) In addition to the number of seats referred to in clause (1A), there shall be in the National Assembly, ten seats reserved for non-Muslims.

...

(4) For the purpose of election to the National Assembly—

(a) the constituencies for the general seats shall be single member territorial constituencies and the members to fill such seats shall be elected by direct and free vote in accordance with the law;

- (b) each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (1A);
- (c) the constituency for all seats reserved for non-Muslims shall be the whole country;
- (d) members to the seats reserved for women which are allocated to a Province under clause (1A) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates;

- (e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

Source: Constitution of Pakistan; table redrawn by the author.

Opinions on the usefulness of reserved seats differ. On the one side it is considered to

Representation of minority groups or women can be encouraged by systems of reserved seats or quotas, although opinions on the usefulness of reserved seats differ. The design of the voting process within the legislature can ensure minority influence on issues of concern.

be a normative good to represent minority groups; on the other it has been argued that designing structures which give rise to a representative legislature without overt manipulation of the electoral system is the better strategy since reserved seats may cause resentment on the part of the majority population and create mistrust between different cultural groups.

5.1.3. Candidate quotas

Candidate quotas are generally applied to increase the representation of women. They specify the minimum percentage of candidates for elections that must be women and apply to political parties' lists of candidates for election. Candidate quotas are predominately regulated in electoral laws but not in the constitution.

International IDEA's *Electoral System Design: The New International IDEA Handbook* (2005)¹⁰ provides more detailed information on reserved seat and candidate quotas. With regard to women's representation in the legislature, International IDEA has published another Handbook which is worth exploring—*Women in Parliament: Beyond Numbers* (1998, rev. 2005).

5.1.4. Double majority voting

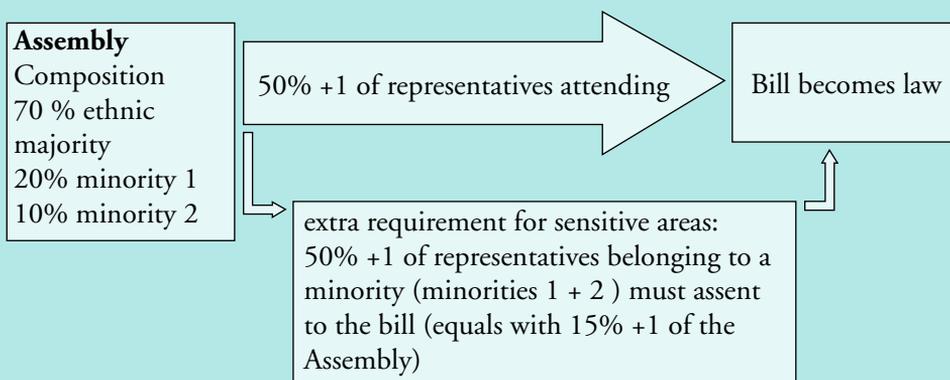
Beyond its composition, designing the voting process within the legislature can ensure minority influence on particularly sensitive issues of concern, such as language, culture and so on: the constitution might require both an ordinary majority *and* within that majority also a majority of minority members sitting in the legislature on such issues. Double majority voting offers minorities a veto power against the ordinary majority rule. Box 5 illustrates the concept of double majority voting in the former Yugoslav Republic of Macedonia (FYROM), but it can be also found in Belgium (with regard to laws affecting the boundaries of the linguistic communities).

Box 5. The concept of double majority voting in the former Yugoslav Republic of Macedonia

Double majority voting in the legislature

Constitution of Macedonia Article 69 (2)

For laws that directly affect culture, use of language, education, personal documentation, and use of symbols, the Assembly makes decisions by a majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who belong to communities not in the majority in the population of Macedonia. Any dispute regarding the application of this provision is resolved by the Committee on Inter-Community Relations.



5.1.5. A bicameral legislature

Representation can also be enhanced by disaggregating the power of the legislature, horizontally, by introducing a second chamber, or vertically by creating regional legislatures. Territorial units constitute the most prevalent representational base for second chambers around the world.

Establishing a second legislative chamber may be another option to allow constitution builders to accommodate different forms of representation in the legislature. Whereas in the first chamber—the lower house, congress or assembly—representation often is proportional and population-based, with each member (ideally) representing the same number of citizens, class, territorial or

interest group representation customarily dominates the principles on which the the second chamber—the upper house or senate—is formed. A bicameral legislature is a common model of constitutional design, adopted by around 80 countries worldwide

Historically, constitution builders have introduced bicameral systems to address the separation of interests between noblemen and commoners. As the second chamber in the United Kingdom, the House of Lords captures that dichotomy, although the British government has drastically curtailed its power over the decades, transforming the chamber into an almost advisory body. In addition to the United Kingdom, partly ‘aristocratic’ second houses still exist in some countries (e.g. Lesotho).

Recently, second chambers have reserved representation for certain societal groups. For example, elected and appointed members of traditional ethnic groups constitute the House of Chiefs in Botswana. Although the House of Chiefs has limited legislative powers, Parliament must consult it on tribal matters and on proposed changes to the constitution. In Morocco, trade unions and industrial and agricultural representatives select two-fifths of the members of the second chamber. In Ireland, the cultural, educational, agricultural, labour, industrial and commercial, and administration and social service sectors select 70 per cent of the members of the second chamber. In Malawi, about one-third of the members of the second chamber are chiefs, elected by a caucus of chiefs in the respective districts, and another third are selected from a list of candidates nominated from interest groups (women’s organizations, the disabled, the health, education, farming and business sectors, trade unions), as well as society (reputable persons) and religion.

However, territorial units constitute the most prevalent representational base for second chambers around the world. In all federal bicameral states, representation in states, provinces or regions determines membership of the second chamber. The same holds true for roughly a quarter of unitary states.

In recent years, several countries have introduced a second legislative chamber as part of their constitutional reforms (the Czech Republic, Poland). At the same time, other countries have abolished their second chambers (Croatia, Kyrgyzstan, Senegal). Thus whether to have a second chamber and what kind of second chamber is an appropriate design option again depend on the specific context.

Table 2 summarizes the rationales in favour of a bicameral or unicameral legislature.

Table 2. The rationales for a bicameral or unicameral legislature

Bicameral legislatures may ...	Unicameral legislatures may ...
<ul style="list-style-type: none"> increase forms of representation or at least provide a more convenient and flexible institutional solution than attempting to house alternative representation under a single institutional roof 	<ul style="list-style-type: none"> provide greater accountability since legislators cannot blame the other chamber if legislation fails to pass, or if citizens' interests are ignored
<ul style="list-style-type: none"> hinder the passage of hastily drafted laws motivated by sudden impulses; allows for more deliberations and additional review 	<ul style="list-style-type: none"> enact proposed legislation more efficiently
<ul style="list-style-type: none"> avoid simple majority tyranny 	<ul style="list-style-type: none"> allow the passage of straightforward laws to implement important agendas and avoids them being watered down through too many compromises
<ul style="list-style-type: none"> provide enhanced oversight control of the executive 	<ul style="list-style-type: none"> be easier to monitor by the people since fewer legislators are sitting
<ul style="list-style-type: none"> provide more responsiveness to powerful interests. When power is divided, as in a bicameral system, the lobbyists of powerful interests must win the support of a larger number of leaders. 	<p>The transparency of unicameral systems may reduce the influence of lobbyists of powerful interests.</p>

To effectively provide viable representation of different interests through a second chamber, two criteria are worth considering when designing a bicameral legislature: first, the method by which the constitution outlines selection to the second chamber; and, second, the powers and competences that the constitution assigns to the second chamber. If the same electoral system applies for both chambers, the second chamber will simply reinforce the majority in the first chamber. This is even more likely if elections occur simultaneously. Thus, meaningful disaggregation of legislative power demands a distinct system of selection for the second chamber. The actual powers assigned by the constitution to the second chamber also determine the extent of legislative disaggregation. In assessing the powers of the second chamber, this chapter focuses not on its relative powers compared to those of other branches of government

To provide viable representation of different interests through a second chamber, the method by which members of the second chamber are selected and its powers and competences should both be considered.

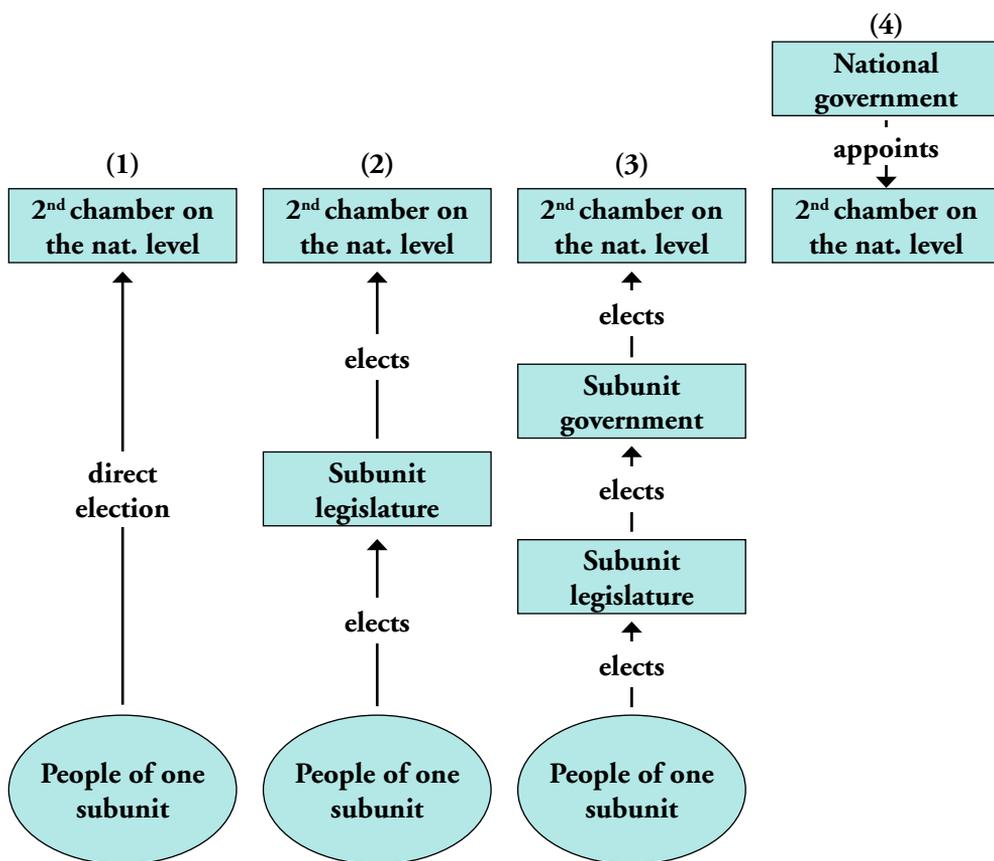
(the US Senate approves Supreme Court justices and high executives, for instance) but on the qualitative involvement of the second chamber in exercising legislative functions such as passing a bill or amending the constitution.

The selection of members to the second chamber

Essentially four methods of selecting members to the second chamber exist.

1. Representatives of subunits (states or regions), elected directly by the people of that subunit, compose a number of second chambers (Argentina, Australia, Indonesia, Italy, Nigeria, Switzerland, the United States). Direct elections have come in two forms. In Nigeria, for instance, the Constitution divides subunits into three senatorial electorates; for each electorate, the candidate with the highest vote wins the seat. In Australia, by contrast, the people elect six members per state through a proportional system; the six candidates with the highest number of votes become senators.
2. In a number of countries, the legislatures of the subunits elect representatives, though not necessarily members, to the second chamber (Austria,¹¹ Ethiopia¹², India¹³). Again, two different variations exist. In some countries, a majority vote in the legislature of the subunit determines the members of the second chamber; consequently, majority parties in the subunit legislature (either alone or as a coalition) can elect their members exclusively. Certain countries have avoided such results by employing a proportional method: political parties represented in the subunit legislature select their candidate who then represents the subunit in the second chamber (e.g. if each subunit has three seats in the second chamber, the three strongest parties sitting in the subunit legislature qualify for selection). France offers a variation on this method: senators are elected by an electoral college composed of representatives from the respective (quasi-) legislative assemblies of various levels of government (national level, level of *départements*, level of regions, municipality level). In fact, 95 per cent of the members of the electoral college come from the municipality level.
3. In yet other countries, state *governments* appoint members to the second chamber (e.g. Germany).
4. Based on nominations by state governments, the federal government appoints members to the second chamber (Canada).

Figure 5. The selection of members of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: United Nations Development Programme, 2007).

The various methods of selecting members of the second chamber can divide the loyalties of members. The relevant question becomes whose interests the members represent or whose interests the public will perceive the members as representing. Directly elected members of the second chamber (column (1) of figure 6) may serve rather as representatives of the people than of the sub-national government; thus they are unlikely to formulate collective regional views and are more inclined to represent the interests of their political parties. By contrast, members elected from the subunit legislature (column (2)) often form an institutional link to the sub-national government, a link that can allow members to support both regional and national interests together. Yet dual mandates result in dual responsibilities, which might limit the members' effectiveness on behalf of either interest. Creating a strong link to local government through the composition of the second chamber may strengthen the relevance of local government politics at the national level.

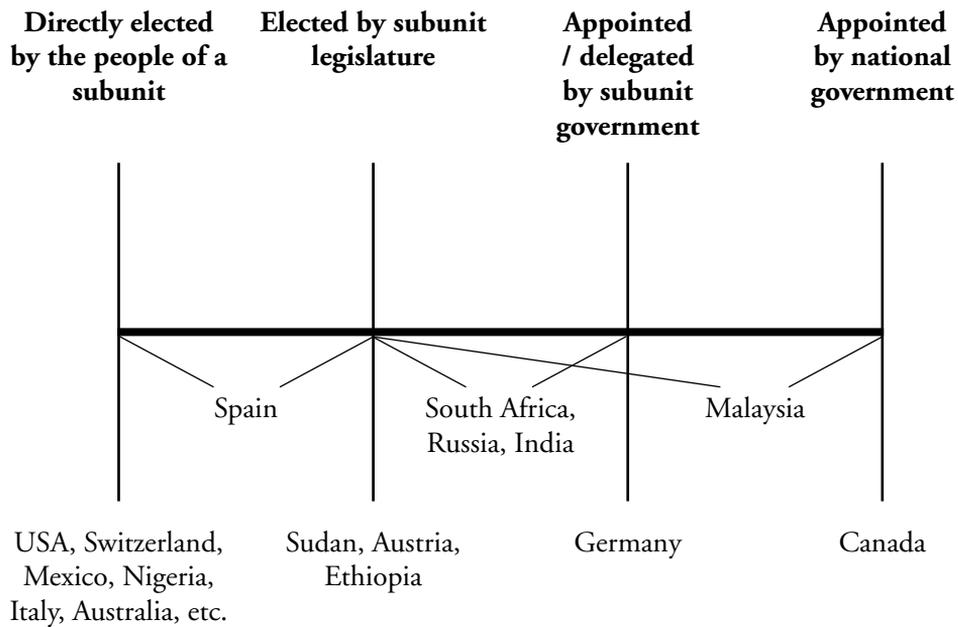
The different methods of selecting members to the second chamber can divide the loyalties of members. The relevant question becomes whose interests the members represent or whose interests the public will perceive the members as representing.

If state governments appoint and instruct members to the second chamber (column (3)), they will primarily represent the views of those governments, essentially acting as bureaucrats, not representatives of the people. When the national government appoints members to the second chamber (column (4)), the members lack political

credibility as spokesmen for the subunits; both constituents and regional governments will view the representatives as mere agents of the national government.

Given these competing costs and benefits, several countries have combined two or more voting methods to various degrees. While South Africa (60 per cent : 40 per cent), Russia (50 per cent : 50 per cent) and India (95 per cent : 5 per cent) combined categories (2) and (3), Spain (80 per cent : 20 per cent) opted for categories (1) and (2), and Malaysia (37 per cent : 63 per cent) combined categories (2) and (4). Applying several categories at once not only mitigates some of the dynamics discussed above; the approach also allows representatives of the second chamber to accommodate various political actors simultaneously.

Figure 6. Examples of the selection of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: UNDP, 2007).

If the subunit electorate directly elects members to the second chamber, a distinct method of allocating seats needs to apply vis-à-vis the first chamber if a different kind of representation is envisaged. Often, each subunit features the same number of representatives, regardless of size or population. Critics argue that this type of seat allocation in the second chamber infringes the democratic principle that the legislative process at the national level should represent each individual citizen equally. In Switzerland,¹⁴ for example, 23 senators from the smallest cantons (representing just 20 per cent of the population) hypothetically could veto *any* legislative decision.

Creating a strong link to local government through the composition of the second chamber may strengthen the relevance of local government politics at the national level.

The assignment of legislative competences to the second chamber

Participation in the legislative process

Since one of the reasons for creating second chambers is to increase the type of representation in the legislature, the question arises how the constitution addresses the existence of different views and interests between the first and second chambers. Should the second chamber be designed as a true veto player whose consent to legislation is required in whatever case, or only if specific interests are at stake? Or is the role of the second chamber rather consultative to allow for a broader discussion introducing additional views without having the power to block or delay decisions? Or does it have no role at all? In most countries, the law-making process will include the second chamber—whether in an advisory role, to delay the passage of legislation, or to wield a veto. Some systems allow the second chamber to initiate legislation—though often only legislation that directly affects the interests of the subunits (South Africa) and not finance bills.

One of the reasons for creating second chambers is to increase the type of representation in the legislature. How can the constitution address the existence of different views and interests between the first and second chambers? In most countries, the law-making process will include the second chamber, whether in an advisory role, to delay the passage of legislation, or to wield a veto.

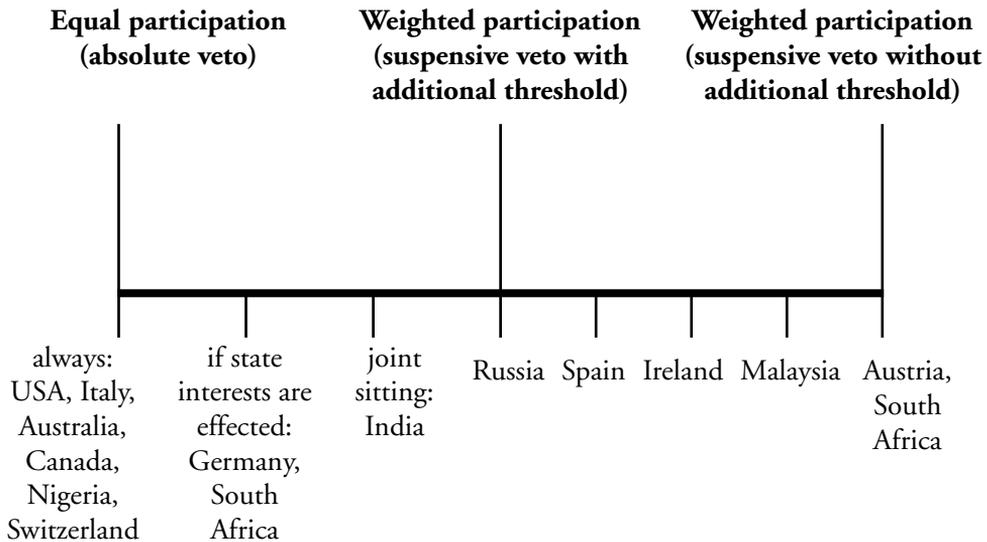
Next to an absolute veto that allows the second chamber to block the process, various shades of impact can be identified.

1. Upon rejection by the second chamber, for a piece of legislation to pass, the first chamber must vote again in favour of the bill (Austria and South Africa concerning bills not affecting the interests of states).
2. Other constitutions also require a second round of voting, but only after a period of time has elapsed (one year in Malaysia). The idea here is to create space for public discussion and new perspectives. This model only delays the legislative process; it does not impose a higher threshold for the first chamber to

overcome.

3. Referendums have also resolved disputes. In Ireland, a vote by the second chamber striking down a bill—if supported by one-third of the first chamber as an issue of national importance—triggers a referendum through which citizens decide whether the legislation becomes law.
4. A fourth model permits the first chamber to override the second chamber's veto either with a two-thirds majority (Russia) or at a voting percentage that matches the second chamber's rejection of the bill (Germany concerning bills not affecting the interests of the states).
5. Finally, other models resolve second-chamber dissent through a joint sitting of both chambers, with the second house permitted a reduced presence (India and Nigeria (concerning finance bills)).

Figure 7. Examples of the legislative powers of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: UNDP, 2007).

In cases where the second chamber possesses absolute veto power, three different strategies to end the stalemate are used:

- *Absolute veto followed by a referral to a mediation committee.* Once a bill has been rejected by the second chamber, a mediation committee consisting of an equal number of members from both houses is formed and tries to hammer out a compromise bill for each house to adopt. If the mediation committee does not find a way out of the deadlock after a certain period of time or number of sittings, the bill will lapse (as in Germany and South Africa with regard to bills that affect the interest of the states; similar in Switzerland).

- *Absolute veto followed by a shuttle system.* After rejection by the second chamber, the disputed bill shuttles between the two chambers until each house has adopted them in the same form, or the bill fails (Canada, Italy, Nigeria, the USA).
- *Absolute veto followed by the dissolution of both chambers.* Inter-cameral disagreement can yield drastic results in Australia: in the case of a deadlock, and if the second chamber fails twice to pass a bill coming from the first chamber, a double dissolution may be precipitated and national elections called for members of both houses.

Participation of the second chamber in the constitutional amendment process

In amending the constitution, the second chamber often exercises greater authority—in the form of an absolute veto—than when passing ordinary legislation. Some constitutions, however, require the second chamber’s consent only when the amendment affects the interests of subunits (Austria, South Africa). Constitutions can also combine other requirements with qualified majority consent by both chambers (see section 5.3 on the dispersal of substantive tasks).

5.1.6. Legislatures at different levels of government

Constitution builders may create different types of representation not only by adding a second chamber at the national level, but also by providing legislatures at different levels of government. Especially in a diverse country, minorities at the national level may be accommodated through the opportunity to be prominently represented in a regional legislative body and to enact legislation reflecting the specific customs or interests of specific regions. Figure 8 illustrates how legislative representation at a regional level may support the accommodation of different interests. The left-hand figure shows a country where the relevant legislation falls within the authority of the national level. Regardless of the different views in the different regions of the country, the national law applies throughout all the four regions regardless of the differences between majority opinion within the different regions. As a result, the decision taken is unfavourable to almost half of the entire population (199 out of 400). In contrast, if the legislative authority over the pertinent issue is transferred to the sub-national (regional) legislatures (see the right-hand figure), the decisions taken are only unfavourable to less than one-quarter (98 out of 400). Consider the following example. In country X there are two religious groups, one dominant in the northern part of the country, the other in the south. In line with the religious culture of the group prevalent in the northern part, the majority of people living there want to restrict the selling of alcohol in supermarkets. In contrast, the majority of people in the south are more liberal and prefer to be able to buy alcohol

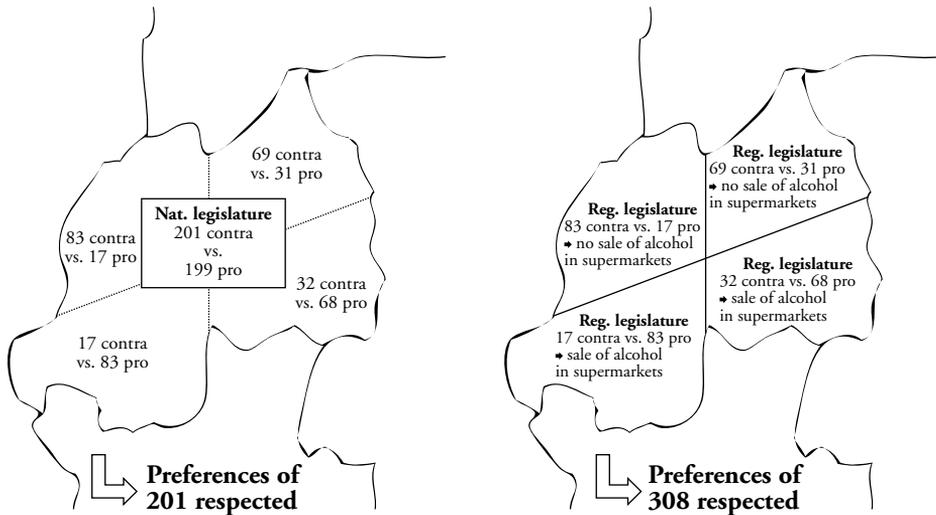
Constitution builders may create different types of representation not only by providing legislatures at different levels of government. Especially in a diverse country, minorities at the national level may be accommodated through the opportunity to be prominently represented in a regional legislative body and to enact legislation reflecting the specific customs or interests of specific regions.

in supermarkets. If the legislative power to regulate this issue is at the national level, one group might be outvoted by the other. However, if regional legislatures in the respective regions decide about the issue, a larger number of people can live according to their preferences.

Figure 8. Legislative representation at a regional level

Decision making at the national level

Decision making at the regional level



Three related factors determine the degree and extent of the actual shift of legislative powers to different levels of government (see also chapter 7 of this Guide, on decentralization): (a) the authority that the constitution allocates to the legislatures at the regional or local level; (b) the kind of legislative authority and supremacy in specific areas of regulation: is there exclusive or concurrent authority to enact law, and which level's law prevails in case of overlap and conflict?; and (c) the legal autonomy of the regional or local legislatures.

(1) Scope of authority

The allocation of powers to legislative subunits depends on the diversity of a particular country.

The allocation of powers to legislative subunits depends on the diversity of a particular country. The devolution of powers in many policy areas depends on the circumstances and the balance of interests at stake.

Many criteria—geographical, historical, religious, economic and demographic—have significantly influenced the negotiators of constitutions, determining the degree of actual decentralization of legislative powers. Some subject matters—international relations, national defence,

currency and citizenship—are typically reserved to the national level, but the devolution of powers in many policy areas depends on the circumstances and the balance of interests at stake. In Brazil, India and South Africa, the constitution also distributes specific powers to a third, local, level of government.

(2) Variations in the form of distributing legislative authorities

A constitution might assign legislative authority exclusively to the national or sub-national levels. Such an allocation, however, confronts two challenges. First, particularly after a violent conflict caused by the marginalization of certain regions, competing factions will probably not agree to assign power exclusively to any level of government. The second challenge to the exclusive allocation of power is more practical: relying only on exclusive powers may ignore the fact that there is often inevitably a subject matter and jurisdictional overlap in many areas of regulation. Many constitutions, in a bid for flexibility, have opted to distribute legislative powers concurrently between national and regional governments.

Concurrent powers can operate in different ways. Given the vertical overlap of concurrent powers between national and regional legislatures, the question of which regulation prevails will arise. Generally, the constitution prioritizes the national legislature. Regional critics may argue, with some force, that areas of concurrent jurisdiction are simply areas where national legislation predominates and in the long run pre-empts regional legislation. But certain conditions can attach to national priority: the German Constitution, for example, grants supremacy only to national legislation that is ‘necessary’ and ‘in the national interest’: *‘[I]f and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’*¹⁵

How will legislative powers be distributed between national and regional governments? Given the vertical overlap of concurrent powers between national and regional legislatures, the question will arise which regulation prevails.

Other constitutions hold differently. Canada provides one single notable exception to national supremacy: where provincial and national law conflict—as laws concerning old-age pensions have done—provincial law prevails.¹⁶ Another approach empowers the national legislature to draft a national framework while allowing regional governments to fill in details according to local circumstances (sometimes referred to as framework legislation). Other constitutions have adopted a third approach to sorting out concurrent powers, essentially permitting both levels of government to regulate simultaneously. Only where national and regional legislation directly conflict will constitutional dispute resolution measures take effect, as applied by judges on a case-by-case basis (Sudan).

The Constitution of South Africa provides a very diligently drafted set of provisions on how to settle potential conflicts in the functional areas where concurrent powers apply (see box 6).

Box 6 of the Legislature Chapter

Art. 146 of the Constitution of South Africa

Conflicts between national and provincial legislation

- (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4 [concurrent powers].
- (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
 - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
 - (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
 - (c) The national legislation is necessary for—
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
 - (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - (b) impedes the implementation of national economic policy.
- (4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.
- (5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.
- (6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
- (7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.
- (8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

Source: Constitution of South Africa (1996) as of 2007. Available at www.constitutionnet.org

(3) Legal autonomy of dispersed legislative authorities

The third determinant of vertical disaggregation of legislative powers is the degree to which the constitution protects the allocation of authority. In some countries, the national legislature has delegated authority to subunit legislatures and thus may revoke that authority unilaterally with the required quorum. While revoking legislative authority might give rise to political resistance, there are no legal obstacles to such a reversal. Even if the text of the constitution protects the vertical dispersal of legislative power, such provisions might provide little solace if only national actors—without the participation of subunit representatives—may amend the constitution. Actual legal protection requires sub-national consent to any reorganization of powers away from subunit legislatures.

In some constitutional settings—even if the constitution legally protects against the unilateral revocation of dispersed legislative powers—national institutions may override regional legislation in particular circumstances. Even so there may be certain constraints on this power—for example, the South African national government may override provincial legislation that threatens national unity or national standards.

How will the constitution protect the allocation of authority to regional legislatures? In some constitutional settings national institutions may override regional legislation in particular circumstances.

5.2. Legislative oversight

One measure of legislative power is the authority to oversee other branches of government, particularly the executive. Aside from political control—manifested in actually appointing or voting no confidence in the chief executive—legal control or at least quasi-legal control also can exist: the constitution might, for example, empower the legislature to initiate legal investigations, including the ability to subpoena officials of the executive branch, up to and including a legislative role in impeachment proceedings. Other tools of legislative oversight—such as summons and investigations into the work of the executive—are more closely related to the legislative routine.

One measure of legislative power is the authority to oversee other branches of government, particularly the executive. There are forms of political control—manifested in actually appointing or voting no confidence in the chief executive—and legal or quasi-legal control: the constitution might, for example, empower the legislature to initiate legal investigations and take a role in impeachment proceedings.

5.2.1. Votes of no confidence

The legislature's power to censure the head of government as part of the political setting can be designed in various ways to channel potential dynamics. Several constitutions add some restrictions to the legislature's

The legislature's power to censure the head of government by a vote of no confidence can be designed in various ways to channel potential dynamics.

competence to withdraw its confidence from the Prime Minister. In Russia, the President may reject Parliament's vote, and Parliament then can proceed by expressing a vote of no confidence again three months later. Other options include the dismissal of the Prime Minister only after s/he has been in post for a set period of time, or the legislature can dismiss only a limited number of cabinets per term.¹⁷ Some constitutions go even a step further, requiring that the no-confidence vote needs to be 'constructive', meaning that the majority dismissing the Prime Minister must simultaneously select a new one (Germany,¹⁸ Hungary,¹⁹ Lesotho,²⁰ Poland,²¹ Spain²²). As a result, a motion of no confidence does not automatically force either the resignation of the Cabinet or a new election. Instead, the Prime Minister may continue as the leader of a minority government if the opposition is unable to agree on a successor. In a system with a dual executive (Poland), a constructive vote of no confidence might have two implications. It potentially permits the President greater leeway in the initial appointment of the Prime Minister/Cabinet, since s/he is harder to remove. On the other hand, after the vote of no confidence, the President is sidelined in the process of establishing a new government.

5.2.2. Impeachment

Impeachment is another way of controlling the executive branch. In contrast to the political control exercised by a vote of no confidence, impeachment authorizes the removal of the head of the executive on the basis of his/her legal wrongdoing. In presidential systems where the political removal of the head of the executive by the legislature is not part of the institutional arrangements, impeachment becomes of specific relevance. In general, two factors should be considered: (a) the type of offence that can trigger an impeachment procedure and (b) the involvement of other branches in that procedure. Some constitutions limit the initiation of impeachment to severe offences such as high treason. Others have much broader provisions, only requiring a violation of the constitution or any other law while in office (Hungary). At one extreme is Tanzania, where presidential conduct that lowers the esteem in which the office of president is

Impeachment means the removal of the head of the executive on the basis of legal wrongdoing. Some constitutions limit the initiation of impeachment to severe offences such as high treason. Others have much broader provisions. Vague and/or broad thresholds risk making impeachment a political tool.

held can trigger impeachment. Such vague and/or broad thresholds risk transforming impeachment into a political tool, particularly if the decision rests solely with the legislature (Moldova). Generally, however, the judiciary plays the role of gatekeeper, either by ruling on the constitutionality of the President's behaviour or by participating in the work of the investigation committee.

5.2.3. Summons/investigation

Most constitutions offer the opportunity to question the executive and force it to explain its policies. Some even provide clear time frames in which interpellations need to be answered (Albania).²³ In a number of constitutions, the legislature can conduct an independent investigation of the executive. In some countries, if requested by a certain

number of its members (usually between 10 per cent and 30 per cent), the legislature is constitutionally obliged to set up an investigatory committee. A relatively low threshold permits the opposition in the legislature to initiate investigation into the executive. This can be an important tool of control in those systems in which the executive's origin and survival vest in the legislative majority which may have an interest in backing and protecting 'its' government. In other countries a somewhat weaker form of control applies: the legislature has to address another institution (for example, an Ombudsman Commission) that has been generally set up to investigate the executive upon complaints (Papua New Guinea).

There is no democratic governmental system in place in which the legislative branch does not sustain its legitimacy directly from the people.

5.3. Checks on the legislature/legislative autonomy

In contrast to the executive in a parliamentary system, there is no democratic governmental system in place in which the legislative branch does not sustain its legitimacy directly from the people (at least one elected chamber). Governmental systems that rely (at least in part) on direct elections for the executive leaders increase executive powers and/or de-link the executive from the legislature's control. The institutional dependency of the legislature vis-à-vis the executive occurs rather on a smaller scale and in distinct areas. Four forms of institutional dependency/interference common to many national legislatures are discussed below: dissolution of the legislature (section 5.3.1); external appointments to the legislature (section 5.3.2); control over the financing necessary to fund the work of the legislature (section 5.3.3); and immunity for acts undertaken within the normal scope of the legislature's work (section 5.3.4). Some constitutions allow the electorate itself to check on the legislature beyond regular election day. The following discussion excludes substantive dispersal of legislative power—which encompasses, for instance, drafting laws and amending the constitution.

The legislature can be dependent on the executive branch if it can be dissolved; if the executive branch can appoint members to the legislature; if the executive must approve the legislature's requests for financing; and to the extent to which members of the legislature are immune from prosecution.

5.3.1. Dissolution of the legislature

The ability to dissolve the legislature constitutes a particularly invasive infringement of institutional autonomy. Dissolution comes in three forms (in addition to self-dissolution), the boundaries of which depend on its source. First, dissolution can be a mandatory aspect of a specific process. In Belgium and the Netherlands, for instance, the introduction of a constitutional amendment triggers the immediate dissolution of the sitting legislature. After the holding of new elections, however, the newly elected legislature must approve any amendment by a two-thirds majority. Another institution, predominantly the executive, initiates the second form of dissolution. It might occur either after a legislature's vote of no confidence in ministers of the executive branch (Peru) or the

Prime Minister (Estonia), or as a result of the legislature's failure to form a government (Germany). And, although the executive initiates dissolution, specific legislative action or inaction triggers the process. By clearly defining the circumstances under which dissolution is appropriate, constitution builders can protect against the executive using dissolution as a coercive device. The third form entrusts the authority to dissolve the legislature entirely to other actors. Some constitutions grant the President discretion to dissolve the legislature (e.g. India).

By clearly defining the circumstances under which dissolution of the legislature is appropriate, constitution builders can protect against the executive using dissolution as a coercive device.

5.3.2. External appointments to the legislature

A constitution that permits the executive—rather than voters—to appoint members to the legislature reduces the institutional autonomy and independence of the legislature. Different types of appointment power exist, having varying influences and effect on legislative action. The first category of appointment powers only influence the legislative function minimally because appointees either lack voting rights (children of the King of Belgium in the Belgian Senate) or are members of a largely ceremonial second chamber, only exercising advisory functions (Lesotho). The second category of appointment powers permits greater influence, as appointees sit in a second chamber that does impact upon legislative functions, though the second chamber is subsidiary to the first (Ireland, Malaysia). In the third category, the executive appoints members to a second chamber

that substantially influences the legislative process, perhaps by wielding an absolute veto (Canada, Italy) or, in a unicameral system, appoints some members of the legislative assembly (Gambia). This third category represents the greatest breach of institutional autonomy by power of appointment.

A constitution that permits the executive—rather than voters—to appoint members to the legislature reduces the institutional autonomy and independence of the legislature. Different types of appointment power exist.

5.3.3. Control over the legislature's own finances

The power to tax and spend is an integral part of legislative autonomy. Executives that must approve requests from the legislature for funding (Cameroon, Laos, Russia) can exert significant leverage over the work of the legislature.

5.3.4. Legislative immunity

To secure the institutional autonomy of the legislature, immunity should extend to its members. The threat of legal repercussions can stifle its members' ability to speak, debate and vote freely, which can harm the law-making process significantly. In many countries, only the legislature itself can remove legislative immunity (Estonia). Other countries vest the power to revoke legislative

To secure the institutional autonomy of the legislature, immunity should extend to its members.

immunity in the judiciary (e.g. Guatemala), and this is another strong form of protection.

5.3.5. Recall by the electorate

Next to inter-institutional checks, certain constitutions allow the electorate to recall its representatives in the legislative assembly prior to the end of its term. In general, there are two different types of recall, full recall and mixed recall. The latter refers to the process in which the citizenry is involved only in one of the steps, either initiating it or deciding on it in a referendum. The former means that both the initiative and the final decision rest exclusively with the citizenry. With regard to the legislature, this type of recall is more common than the mixed type. (It is only available in Uganda only as part of an impeachment procedure.)

Conceptually, the recall procedure is associated with the idea that representatives in the legislature must remain accountable to the people who elected them.

Requirements for a total recall vary considerably. Whereas certain countries permit the respective constituency to recall his/her legislative representative individually (Bolivia, Ecuador, Ethiopia, Nigeria, Venezuela), others only allow a vote for the dissolution of the entire legislature by referendum (e.g. Liechtenstein).

The recall procedure is associated with the idea that representatives in the legislature must remain accountable to the people who elected them.

In general, three different aspects determine the setting of a recall.

- (a) the threshold of support that a popular petition must achieve (ranging between 10 per cent (Ecuador) and 50 per cent + 1 (Nigeria) of the registered electors in the constituency;
- (b) the type of majority and the voter turnout required for enforcing the recall, ranging from a simple majority of votes (Micronesia) via an absolute majority of votes (Ecuador) or a vote equal to or greater than the number of voters who elected the officer in question as long as the voter turnout reaches at least 25 per cent (Venezuela) to a majority of registered electors in the constituency concerned (Nigeria); and
- (c) the period of time for a revocation. How soon after elections and how closely to the next election can petitions be tabled? In Bolivia, the recall can only be attempted once per term and only after half of the term has elapsed, and not during the last year of the term. In Ecuador, similar regulations apply: a petition can only be tabled after the first year and before the last year of the term.

Various arguments in favour of and against recall are raised. From the critic's perspective, a recall is a highly polarizing mechanism which not only causes serious confrontation but also disrupts the normal work of elected representatives during their mandate. In its favour, it is argued that the procedure encourages close oversight of members of Parliament on the part of the citizens, thereby creating an effective mechanism of vertical accountability.

A recall is a highly polarizing mechanism which causes serious confrontation and disrupts the normal work of elected representatives. In its favour, it is argued that it encourages close oversight of members of Parliament on the part of the citizens, thus creating an effective mechanism of vertical accountability. Recall has to balance the principles of participation and effective governance.

In the end, recall has to balance the principles of participation and effective governance. Achieving this balance is difficult, and failure to achieve it might lead to extreme consequences. As stated in *Direct Democracy: The International IDEA Handbook*: ‘On the one hand, if recall is very easy to initiate, this may lead to the trivialization of the recall. On the other hand, tough requirements may make it ineffective as citizens may feel discouraged from using it because of the difficulty of meeting the legal requirements needed to remove a public official through a vote.’²⁴

6. Substantive powers of the legislature

There are basically two groups of legislative powers, law-making powers and other powers. With regard to the former, constitution builders have to determine how far other branches of government may have the authority to interfere with responsibilities traditionally controlled by the legislature. Second, the constitution may provide for limited legislative authority in policy areas that are traditionally controlled by other branches of government, such as declaring a state of emergency, waging war, or granting pardon or amnesty.

A legislature has law-making powers and other powers. Constitution builders have to determine how far other branches of government may have the authority to interfere law-making responsibilities that are traditionally controlled by the legislature.

6.1. Law-making powers

The central function of a legislature is making laws. Absolute law-making authority, free from interference from any other governmental actors, symbolizes the sovereignty of the British Parliament. This monopoly in law-making hardly exists any longer, as most constitutions disperse law-making authority in various ways.

Generally, five categories of external interference in law-making authority exist: (a) the first limits the exclusivity of law-making power by distributing portions of it to the executive; (b) the second relates to the authority to initiate legislation—if the constitution assigns that power exclusively to the executive branch, the legislature may not frame or craft but only consider legislation, a significant loss of authority; (c) a third category focuses on blocking legislative initiatives either directly through a presidential veto or indirectly by referring a bill to the judiciary or to the electorate through referendum; (d) next to the executive, citizens might also intervene in law-making by initiating either a rejective or an abrogative referendum; and (e) judicial review is the last category—the judiciary reviews the constitutionality of laws either before or after enactment.

6.1.1. Limitation of exclusive law-making power

Constitutions may permit the legislature to delegate certain law-making powers to the executive branch. Because the legislature itself controls and may revoke at any time the delegation of such authority, the dispersal of legislative authority is purely political (Croatia). Other constitutions give the executive law-making authority only in exceptional circumstances, such as a state of emergency or when the legislature is not in session. If not confirmed by the legislature within a certain period of time, however, such decrees commonly lapse (e.g. Brazil). Alternatively, a constitution may permit the executive to issue decrees with the force of law in particular policy areas, thus circumventing the legislature altogether. This power merges the executive and legislative functions and constitutes an extreme form of aggregation in the executive. Law-making by referendum represents an extreme form of dispersing legislative power. In certain countries, the constitution authorizes citizens to initiate a legislative process by introducing a draft bill on specific issues and subjects at bill to a referendum prior to promulgation if it is not adopted by the legislature (e.g. Latvia²⁵).

The legislature's law-making power may be limited by distributing portions of it to the executive branch; by sharing authority to introduce legislation with the executive and/or the citizens through agenda initiatives or referendum; by enabling the President to influence, impede or block it; or by providing for judicial review.

6.1.2. Limitations on the power to introduce laws

Law-making powers include the ability to introduce legislation. In most constitutions, the legislature holds unlimited authority to initiate the law-making process in all matters, and sometimes even exclusively (the USA). In many countries, however, the authority to introduce bills is at least in part shared with the executive and/or the citizens through agenda initiatives. A constitution may limit this right of the legislature either generally or concerning specific policy areas. For instance, the executive might have the exclusive capacity to introduce budget laws, international treaties or trade and tariff legislation. This authority might extend to other policy areas as well (Brazil, Chile, Columbia). Such a 'gatekeeping' function enables the executive to maintain the status quo in particular policy areas.

6.1.3. Presidential veto powers

After the legislature passes a bill, many constitutions enable the President to influence, impede or block it. The President may apply either a political or a legal check. S/he may (a) reject a bill strictly for political reasons, or (b) challenge the constitutionality of a law. Political vetoes are more common in presidential and semi-presidential systems where the electorate, rather than the legislature, elects the President directly. If the legislature can overrule a veto by a majority vote equal to or greater than the majority by which the bill in question was originally passed (Botswana, India, Turkey), then the presidential veto is weak and only amounts to a right of delay. If the threshold required for the legislature to overrule the veto rises, however, then the presidential veto becomes more

substantial. Higher thresholds can vary significantly, from an absolute majority (Peru), to a 60 per cent majority (Poland), to a 67 per cent majority (Chile) of all members of the legislature who are *present*, to a 67 per cent majority of the *full* membership (Egypt). Depending on the composition of the legislature and the strength of the opposition, a presidential veto might equate to a *de facto* absolute veto that can block all legislative initiatives if applied. A *de jure* absolute veto rarely exists; where it does, it usually applies only to limited policy areas (e.g. Cyprus).

In addition to a so-called ‘package veto’ that allows the President to register only a yes or no opinion, a ‘partial veto’ permits him/her to object to portions of a bill. The partial veto arguably engages the President more closely in the law-making process by authorizing a more limited interjection into the details of legislation. That limited intervention cumulatively permits great influence over the final form of legislation.

Another option allows the President to broaden the spectrum of approval required for a proposed law to be passed, which can give the President significant influence in the law-making process.

A constitution may authorize the President to challenge the constitutionality of a bill by forwarding it to the appropriate court for review (Croatia, South Africa). Here, the President’s concern over the constitutionality of the law delays and—if it is supported by the appropriate court—ends the process on legal instead of political grounds.

6.1.4. Citizens’ power to reject bills or repeal laws

Certain constitutions give citizens the authority either to reject a bill before its promulgation (Switzerland) or to demand a law’s abrogation by rejective/abrogative referendum on its own initiative. In Uruguay,²⁶ a petition for an abrogative referendum must be initiated within one year after the law’s promulgation. Italy, in turn, only allows for such an initiative after the law has been in force for at least one year. All the variations have in common that citizens have a say in the law-making process beyond periodic elections, thereby dispersing powers from the representative legislature.

6.1.5. Judicial review

While a presidential veto and the citizens’ power to reject bills or even repeal laws generally represent a political dispersal of legislative power, a constitution may also permit the legal dispersal of legislative power in the form of judicial review. Although this is clearly a legal control, practitioners should not underestimate the political dimension inherent in constitutional review. A striking example is the South African Constitutional Court’s decision on the unconstitutionality of the death penalty. Although the South African Constitution nowhere mentions the death penalty, the Constitutional Court struck down the relevant provision in the Criminal Procedural Law on the basis of human rights values, international and comparative precedents, and judicial pragmatism.²⁷

Constitutions have permitted judicial review prior to the promulgation of a law if the executive so requests (see above). Other countries have required that the legislature refer the law to the relevant judicial institution prior to enactment (France). Most common is constitutional review after the enactment of a law. Some constitutions provide the opportunity to challenge a law in abstracto (Germany). In still other countries, a court can review the constitutionality of a law only if it is challenged during a specific case or controversy at trial.

6.2. Powers to amend the constitution

Traditionally, only the legislature can amend the constitution. Most countries adhere to that principle today, even if the constitutions of some countries require the approval of three levels of legislative institutions (the national legislature—including both the first and the second chamber—and the legislative assemblies of the sub-national units (Mexico, Nigeria, Russia, the USA)). The amendment procedure generally requires a higher voting threshold that is often equal to the threshold required to overcome a presidential veto (if it exists). In those countries, the veto usually only delays the eventual passage of the amendment, since it does not require a higher threshold. But other amendment procedures also exist: in Italy, for instance, a constitutional amendment requires only an absolute majority in both chambers. Yet just 20 per cent of members of the legislature may call for a referendum unless overruled by a two-thirds majority in both chambers. Such a process remains a legislative-centric method of amending the constitution and thus disperses legislative powers minimally. In many countries, constitutional amendments have to be approved in a referendum (Guatemala, Switzerland). In France, the President may waive this requirement if supported by a 60 per cent majority in the legislature.

6.3. Other powers of the legislature

In quite a few decision-making processes that are traditionally under the control of the executive, constitutions involve the legislatures to various degrees. Increasing the extent of the legislature's impact in issues such as declaring a state of emergency, declaring war, granting a pardon or an amnesty strengthens its powers.

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6.3.1. State of emergency

The constitutional questions of *who* declares a state of emergency and *by what method* both offer different degrees of involvement of institutions other than the executive. A constitution can delineate clearly those occasions—and only those occasions—when the government can declare a state of emergency, such as invasion or natural catastrophe. But the drafters of constitutions may want to leave room for discretion: consider for instance threats to public health or internal order. Attempting to articulate all such

circumstances will probably prove impossible and unwise. Someone must determine when a threat level rises to the level of an emergency; and, to avoid abuse, someone else must be empowered to evaluate that determination. In some constitutions, this power is left entirely with the executive, sometimes subject to internal executive control. For example, in Peru's Constitution prior approval by the Cabinet before the chief executive can declare an emergency is required. In other countries, the legislature is not involved in the actual decision-making process, but it requires retroactive parliamentary support within a defined period of time (Malawi). The constitutions of Ethiopia and Fiji mandate prior parliamentary approval before the executive may declare a state of emergency. The Constitution of Mongolia states that only Parliament may declare a state of emergency—which constitutes the broadest authority of the legislature. Only if Parliament is in recess can the President act, but such a declaration lasts for only seven days and lapses if Parliament remains passive.

Declaring a state of emergency can arguably aggregate power like no other executive act, removing many checks to unilateral action. Many post-conflict countries have suffered severely from emergency rule applied in an abusive way. Wary of that eventuality, many drafters of constitutions have overcompensated by mandating overly cautious prerequisites for a declaration of a state of emergency to be valid. In true emergencies, the absence of functioning institutions can make it impossible to meet prerequisites. In Haiti, for example, any declaration of an emergency recently required the countersignature of the Prime Minister and all other government ministers—in addition to an immediate determination by Parliament concerning the scope and desirability of the President's decision. Also recently, under the Haitian Constitution, only foreign invasion and civil war—but not a natural disaster—constituted a state of emergency. Because of this restrictive wording and the exigencies of the situation—including an unprecedented earthquake and the death of many ministers and parliamentarians—the Haitian government ignored the applicable constitutional provisions and declared a state of emergency anyway, protecting sovereignty but forced to disregard the principles of the rule of law.

Declaring a state of emergency can arguably aggregate power like no other executive act. Many drafters of constitutions have thus mandated overly cautious prerequisites for a declaration of a state of emergency.

6.3.2. Granting amnesty/power of pardon

Another function traditionally exercised by the executive is the right to grant pardons or an amnesty. In post-conflict scenarios, constitutional regulations for transitional justice that also include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. Amnesty as part of transitional justice after violent conflict is not covered in this chapter. Instead, it looks at provisions on granting amnesty and pardon that are meant to be applied during the ordinary course of constitutional life. But even in this context the power to grant amnesty/pardon is sensitive and carries the potential to influence the administration of justice on a large

scale if used unwisely. Thus, identifying the proper balance of actors involved in the process of granting amnesty/pardon is crucial. Also here, various constitutional options are available, ranging from exclusive executive authority to grant amnesty (Burkina Faso, the Czech Republic) or pardons (Georgia, Kenya), to the complete exclusion of the executive in amnesty decisions (Hungary). Between these extremes, the array of

options includes both the executive and the legislature exercising parallel pardon and amnesty powers (Mozambique 1990) or joint powers requiring both the executive and the legislature to approve amnesty or pardons (Indonesia, South Korea); or even other arrangements with additional requirements—in Greece, amnesty is available only for political crimes and only if approved by both the executive and the legislature.

In post-conflict scenarios, constitutional regulations that include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. The power to grant amnesty or pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely.

7. Conclusion

Constitutions around the globe offer a wide variety of options to structure and empower the legislature. This variety witnesses the constant demand to establish a democratic setting beyond a simplistic majority rule. Accommodating various groups with distinct interests in the body that is meant to represent the people is the challenge to be met by the drafters of a constitution in designing the legislature. Disaggregating legislative power within the legislature is not an end in itself, but allows for a more accurate reflection and inclusion of diversity beyond majority rule.

Table 3. Issues highlighted in this chapter

Issues	Questions
1. System of government	<ul style="list-style-type: none">• Shall the choice and the survival of the head of government depend on the legislature?• Or, if the functions of a head of state and head of government are held by one person, shall that person depend on the will of the legislature (Botswana, South Africa)?• Or, in a dual executive, where substantive executive powers are shared between a directly elected head of state and a head of government, what role shall the legislature have in the selection/dismissal of the head of government? Shall the legislature be involved in the selection procedure? Shall the right of dismissal fall within the exclusive competence of the legislature?• Or shall the head of the executive (being the head of state and the head of government) be separated from the legislature and directly elected by the people?

<p>2. Designing the composition of the legislature: electoral systems, reserved seats, candidate quotas, external appointments</p>	<ul style="list-style-type: none"> • According to which electoral system shall the legislature be composed? Shall there be a simple plurality system or a proportional representation system or a mixture of the two? • In the case of proportional representation systems, shall there be a minimum threshold for representation? • Shall there be reserved seats for minorities and women, and if so, how should those seats be filled? • Shall there be candidate quotas for women? • Shall the legislature be exclusively elected by the people or shall some seats be filled through appointments (in a unicameral legislature)?
<p>3. Designing the voting procedure</p>	<ul style="list-style-type: none"> • Shall all laws in the legislature be passed by a simple/absolute majority of members or shall there be a double majority voting system with regard to some sensitive issues in order to protect minorities?
<p>4. Second legislative chamber</p>	<ul style="list-style-type: none"> • Shall the national legislature be composed of one or two chambers? If there is a second legislative chamber, who shall be represented in it? Territorial units or chiefs and elders, or interest groups, or a mixture of the three? • How should members of the second chamber be selected? Shall they be elected by the respective groups or from the people in the territorial units or shall they be appointed by the national government or a mixture of both? • If the second chamber represents territorial units, shall all units be represented equally (e.g. two members per region regardless of the size and population of the regions)? • What are the powers of the second chamber in relation to the first chamber? • With regard to the legislative process, shall both chambers have equal powers (absolute veto of the second chamber)? Or shall the second chamber only be able to delay the process? Or shall it be determined depending on the subject?

5. Decentralization of legislative powers	<ul style="list-style-type: none"> • From a vertical perspective, shall there be legislatures at various levels of government in the country? • If so, what kind of powers shall be transferred to the lower level of governments? • How shall legislative powers be shared? Shall there be exclusive powers for the regional level or even the local level of government? Or shall there be concurrent powers, or shared powers? Which regulation prevails in the case when both the national level and the regions regulate? • What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?
6. Institutional powers of the legislature	<ul style="list-style-type: none"> • Shall the legislature have the power to dismiss the head of government for political reasons? • Shall the legislature have the exclusive power to dismiss the head of the executive for legal wrongdoings (impeachment)? Or shall it at least be involved in the impeachment process? • Shall the legislature have the power to summons members of the executive or even start investigations? • Shall the legislature have some immediate control with regard to the composition of the Cabinet?
7. Institutional checks on the legislature	<ul style="list-style-type: none"> • Shall the legislature be subject to dissolution before the end of its term? • If yes, shall the dissolution be based on prior legislative (in) action or shall it be at the full discretion of the head of the executive? • Shall there be the opportunity for citizens to recall members of the legislature under specific circumstances?
8. Law-making powers of the legislature	<ul style="list-style-type: none"> • Shall the legislature be the sole law-maker or should there be the opportunity for the executive to legislate by decree in certain areas? • Shall the legislature be the only relevant actor in the legislative process? Or shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas? • Shall the executive have the right to question the constitutionality of a bill before it becomes law?
9. Other legislative involvement	<ul style="list-style-type: none"> • Shall the legislature be involved in declaring a state of emergency? • Shall the legislature be involved in declaring war? • Shall the legislature be involved in granting pardons/an amnesty?

Notes

- ¹ See Mainwaring, S. and Shugart, M. S., 'Juan Linz, Presidentialism, and Democracy: A Critical Appraisal', *Comparative Politics*, 29/4 (1997), pp. 449–71.
- ² Linz, J. J., 'The Perils of Presidentialism', *Journal of Democracy*, 1/4 (1990), pp. 51–69.
- ³ Horowitz, D., 'Constitutional Design: Proposals Versus Processes', in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford and New York: Oxford University Press, 2002), pp. 15–36.
- ⁴ Carey, J. and Shugart, M. S., *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992).
- ⁵ Ellis, A. and Samuels, K., *Making Presidentialism Work: Sharing and Learning from Global Experience. A Summary of the International IDEA/UNAM Workshop* (Stockholm: International IDEA, 2011).
- ⁶ Böckenförde, M. et al., *Max Planck Manual on Different Forms of Decentralization*, 3rd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2008).
- ⁷ Payne, J. M. et al., *Democracies in Development: Politics and Reform in Latin America* (Washington, DC: Inter-American Development Bank, International IDEA et al., 2007).
- ⁸ International IDEA, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005).
- ⁹ International IDEA, *Electoral System Design*.
- ¹⁰ International IDEA, *Electoral System Design*.
- ¹¹ Article 34 of the Constitution of Austria (1920) as of 2008.
- ¹² Article 61 of the Constitution of Ethiopia (1995).
- ¹³ Article 80 and Fourth Schedule of the Constitution of India (1950) as of 2005.
- ¹⁴ In Switzerland, each of the cantons (the name for states in Switzerland) is represented in the second chamber by two members, regardless of size and population. Three of those cantons, however—for historical reasons—are divided into half-cantons; each of the six half-cantons is represented by one member only. Thus 20 cantons are represented by two members, and one member each represents six half-cantons.
- ¹⁵ Article 72 of the Constitution of Germany (1949) as of 2010.
- ¹⁶ Article 94 A of the Constitution of Canada (the Constitution Acts 1867 to 1982, current consolidation) as of 2008.
- ¹⁷ Article 87 of the Constitution of Ukraine (1996) as of 2004.
- ¹⁸ Article 67/Article 68 of the German Basic Law (1949) as of 2009.
- ¹⁹ Article 39 A of the Constitution of Hungary (1949) as of 2007.
- ²⁰ Article 87 (8) of the Constitution of Lesotho (1993).
- ²¹ Article 158 (1) of the Constitution of Poland (1997).

- ²² Article 113 of the Constitution of Spain (1978) as of 1992.
- ²³ Article 80 of the Constitution of Albania (1998).
- ²⁴ International IDEA, *Direct Democracy: The International IDEA Handbook* (Stockholm: International IDEA, 2008), p. 123.
- ²⁵ Article 78 of the Constitution of Latvia (1922) as of 2005.
- ²⁶ Article 79 of the Constitution of the Oriental Republic of Uruguay (1966) as of 1996.
- ²⁷ See *State v. Makwanyane & Anr*, Case no. CCT/3/94.

Key words

Systems of government; Presidential system; Parliamentary system; Mixed system; Semi-presidential system; Electoral system; Reserved seats; Candidate quotas; Bicameral legislature; Types of legislative representation; Dual majority voting; Decentralization of legislative powers/representation; Legislative oversight; Impeachment; Vote of no confidence; Impeachment; Summons; Investigation; Dissolution of the legislature; External appointments to the legislature; Financial autonomy; Legislative immunity; Recall by the electorate; Presidential veto; Judicial review; State of emergency; Granting Amnesty/pardon; Law-making powers

Additional resources

- **Agora Portal for Parliamentary Development**

<<http://www.agora-parl.org/>>

The Agora Portal for Parliamentary Development is a multilateral initiative that seeks to share knowledge on parliamentary development. The website offers a network for coordinating donor and practitioner information and queries, with resources from and options to contact experts. The website also provides a virtual library on parliamentary development, knowledge modules including multimedia features, and a calendar that lists forthcoming events on parliamentary development.

- **UNDP Democratic Governance Focus on Parliamentary Development**

<http://www.undp.org/governance/focus_parliamentary_dev.shtml>

Parliamentary development is one focus area of the United Nations Development Programme (UNDP)'s Democratic Governance Group. The UNDP provides technical assistance to build the capacity of legislators and promote institutional reform. The website offers key publications as well as resources and programmes regarding developing parliamentary structures and functions within the government as a whole.

- **Southern African Development Community Parliamentary Forum**

<<http://www.sadcpf.org/index.php>>

The Southern African Development Community (SADC) Parliamentary Forum is a regional inter-parliamentary body composed of 13 parliaments in the SADC region. The Forum's mission is to provide a platform for parliaments and parliamentarians to promote and improve regional integration and to facilitate communication among practitioners in the region to communicate best practices on parliamentary development. The website provides reports and other key documents on the Forum's area of expertise, a model law on AIDS, and contact information on the parliaments of the member countries.

- **Inter-Parliamentary Union**

<<http://www.ipu.org/english/home.htm>>

The Inter-Parliamentary Union (IPU) is an international organization funded by its member parliaments and associate members. The organization works in close cooperation with the United Nations and seeks, amongst other things, to establish standards for representative democracies and to provide assistance to countries working to develop their own parliamentary system. The website compiles key documents, guides, questionnaires, project documents and other publications.

- **UNDP Democratic Governance Focus on Electoral Systems and Processes**

<http://www.undp.org/governance/focus_electoral.shtml>

Electoral systems and processes are one of the focus areas of the UNDP's Democratic Governance Group. The UNDP aims to assist strategically throughout the electoral cycle in order to achieve free and fair elections. The website compiles resources such as guides and brochures on developing democratic electoral systems.

- **Peace Building Initiative Electoral Processes and Political Parties**

<<http://www.peacebuildinginitiative.org>>

Electoral processes and political parties represent one of the thematic areas of the Peace Building Initiative, which is a project of HPCR International, in partnership with the United Nations Peacebuilding Support Office and in cooperation with the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University. The main goal of the initiative is to build and share knowledge and experience of peace building among relevant actors and to present a diversity of perspectives on the understanding of peace building. The website offers resources and case studies on elections around the world, as well as information on the formation and activities of political parties and other relevant actors in the field.

- **Council of Europe Venice Commission**

<<http://www.venice.coe.int/default.asp?L=E>>

The European Commission for Democracy through Law is an advisory body to the Council of Europe on constitutional matters as well as an independent legal think tank that deals with crisis management, conflict prevention and constitution building. It is dedicated to promoting European legal ideals, including democracy, human rights and the rule of law, by advising nations on constitutional matters. The website offers country-specific opinions and comparative studies on European constitution-building processes, elections and political parties.

- **ACE**

<http://aceproject.org/ero-en/index_html?filter&topic=&country=&type=Essays and Papers>

The ACE Electoral Knowledge Portal—a joint initiative of International IDEA, the Electoral Institute of Southern Africa (EISA), Elections Canada, the Federal Electoral Institute of Mexico, the International Foundation for Electoral Systems (IFES), the United Nations Department of Economic and Social Affairs (UNDESA), the UNDP and the UN Electoral Assistance Division (UNEAD)—is an online knowledge repository that offers a wide range of services related to electoral knowledge, assistance and capacity development. The website contains in-depth articles, global statistics and data, an Encyclopedia of Elections, information on electoral assistance, observation and professional development, region- and country-specific resources, daily electoral news, an election calendar, quizzes and expert networks.

- **Governance and Social Development Resource Centre**

<<http://www.gsdr.org/>>

The Governance and Social Development Resource Centre (GSDRC), established by the UK Department for International Development (DFID) in 2005, seeks to share knowledge across agencies and to provide information to support international development projects and programme planning, policymaking and other activities in the area. The website comprises a document library and different research services, as well as topic and gateway guides.

- **National Democratic Institute**

<<http://www.ndi.org/>>

The National Democratic Institute (NDI) is a non-profit, non-partisan organization which seeks to support democratic institutions worldwide through citizen participation, openness and accountability in government. The website offers a library of key documents as well as other publications.

- **Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights**

<<http://www.osce.org/odhr>>

The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization which aims to offer a forum for political negotiations and decision making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation. Funded by its member states, the organization puts the political will of the participating states into practice through its network of field missions. The website contains multimedia resources, news services, databases and a documents library.

Glossary

Absolute veto	A type of veto that blocks a decision and cannot be overruled by any other political actor
Amnesty/pardon	The excusing of political and non-political criminal offences against a government and the removal of related penalties
Bicameral legislature	A legislature composed of two chambers or houses
Candidate quotas	A mechanism, either voluntary or set out in law, which requires that a certain proportion of the candidates standing in an election must be from a specific group of people, such as an ethnic group, gender, religious group or linguistic group
Checks and balances	A system that allows each branch of government to exercise limited control over other branches in order to ensure proper and legal behaviour, as well as a balance of political powers and dynamics
Constitutional review (also judicial review)	The powers of a court to decide upon the constitutionality of an act of the legislature or the executive branch and invalidate the act if it is determined to be contrary to constitutional provisions or principles
Decentralization	The dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration, for example, to the regional, provincial or local levels. Decentralization is thereby understood as a territorial concept. The three core elements of decentralization are administrative decentralization, political decentralization, and fiscal decentralization.

Dissolution	The formal dismissal of the legislature. Dissolution comes in three forms (in addition to self-dissolution), the boundaries of which depend on its source. It can be a mandatory aspect of a specific process, initiated by another institution, or introduced by other actors.
Double majority voting	A voting process that requires two majorities, first an ordinary majority and second a majority within the minority members sitting in the legislature. The procedure is often used on sensitive issues.
Electoral system	The part of the electoral law and regulations which determines how parties and candidates are elected to a representative body. Its three most significant components are the electoral formula, the ballot structure, and the district magnitude.
External appointments	The authority of the executive to appoint members to the legislature thereby diminishing the institutional autonomy and independence of the legislature
First Past The Post system	An electoral system in which the candidate who receives more votes than any other is elected
Full recall	In constitutions providing for full recall, both the initiative and the final decision rest exclusively on the citizenry
Impeachment	The process of bringing legal charges against a high constitutional authority, public official or judge, which authorizes their removal
Investigation	A tool of legislative oversight which allows the legislature to carry out a systematic or formal inquiry into activities of the executive branch. This power is usually exercised through a committee or special commission.
Judicial review/ constitutional review	The powers of a court to decide upon the constitutionality of an act of the legislature or the executive branch and invalidate that act if it is determined to be contrary to constitutional provisions or principles
Legislature	The legislature is one of the three <i>branches of government</i> . Its most prominent tasks are the making and changing of laws, and the approval of the national budget.
Mediation committee	A committee consisting of an equal number of members from both chambers of the legislature that tries to compose a compromise bill for each house to adopt
Mixed recall	In a mixed recall, the citizenry is involved only in one of the steps of the process of recall, either initiating it or deciding on it in a referendum.

Mixed system	A design of the executive branch that in some way combines aspects of the <i>presidential</i> and <i>parliamentary systems</i>
Package veto	Allows the President to accept or reject a bill as a whole
Parliamentary system	The institutional design of the government in which the head of government is elected by the legislature and is accountable to it
Partial veto	Permits the President to reject portions of a bill without blocking the entire bill
Presidential system	The institutional design of the government in which the head of state and head of government are typically the same individual who is directly elected by the people for a fixed term
Presidential veto	The competence of the President to block legislative policymaking. The President may reject a bill strictly for political reasons, or challenge the constitutionality of a law.
Proportional representation	A system of electing members of the legislature in which the number of seats allocated to a particular party is determined by the percentage of the popular vote won by that party
Recall	The competence of the electorate to recall its representatives in the legislature or the executive branch prior to the end of their term. Depending on the involvement of the citizens, a distinction is made between full recall and mixed recall.
Reserved seats	Seats set aside for specific minorities and/or women in the legislature. Representatives from these reserved seats are usually elected in the same manner as other representatives, but are sometimes elected only by members of the particular minority community designated in the electoral law/constitution.
State of emergency	A temporary period during which extraordinary powers are granted, usually to the executive branch, in order to deal with extenuating circumstances that are deemed an emergency
Summons	A tool of legislative oversight which allows the legislature to submit questions which the executive branch is compelled to answer
Unicameral legislature	A legislature composed of one chamber or house
Veto	The ability of an official or body to block, impede, or delay decision making or the passage of legislation
Veto players	Political actors and institutions, such as second legislative chambers, or presidents, that have the ability to veto, for example, legislative action

Vote of no confidence

The competence of the legislature to withdraw its support from the government and/or individual executive officials and thus effect their removal. In some legislatures a ‘constructive’ vote of no confidence is required, in which a new Prime Minister is designated before the passage of a vote of no confidence.

About the author

Markus Böckenförde is currently the Leader of the Advisory Team to the Policy Planning Staff at the Federal Ministry for Economic Cooperation and Development and Senior Researcher at the German Development Institute. From 2009 until April 2011, he was Programme Officer and in part Acting Programme Manager for the Constitution Building Programme at International IDEA, Stockholm. Before joining IDEA, he was the Head of the Africa Project and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg (2001–2008). In 2006–2007 he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995 to 1997 he was research assistant to Justice Professor Helmut Steinberger, the German delegate to the Venice Commission (the Council of Europe’s advisory body on constitutional matters).

Dr Böckenförde holds a law degree and a PhD from the University of Heidelberg and a Master of Laws degree from the University of Minnesota as well as the equivalent of a Bachelor degree in political science (University of Freiburg). He has been involved in the constitution-building processes of Sudan and Somalia, working together with the relevant constitutional assemblies, and has been otherwise involved in the processes in Afghanistan and Nepal. He has published widely in the area of constitutional law and constitution building and is the co-author of several Max Planck Manuals used as training materials for Max Planck projects. He has worked as a consultant for the UNDP, the German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ; now the Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ), the German Foreign Office, the Konrad Adenauer Foundation and the Friedrich Ebert Foundation.

International IDEA at a glance

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.

