

# POST-CONFLICT CONSTITUTION DRAFTER'S HANDBOOK



## NOTE FOR USERS

The Public International Law & Policy Group's (PILPG) Post-Conflict Constitution Drafter's Handbook is intended to assist drafters of constitutions in post-conflict situations. The Handbook draws from PILPG's experience in facilitating post-conflict constitution drafting processes, as well as comparative state practice, and is based upon analysis of over 150 constitutions from post-conflict and stable states.

The Handbook is divided into sixteen chapters, each of which covers a core section in post-conflict constitutions. The chapters include: the Preamble, State Structure and Devolution of Powers, the Executive, the Legislature, the Judiciary, International Legal Obligations, the Electoral System, Financial Matters and the Central Bank, Human Rights, Minority Rights, Women's Rights, Defense and Security, the Role of Religion, Customary Law, Natural Resources, and Extraordinary Measures.

Within each chapter, the Handbook describes core provisions and provides sample language that may be used as a basis for constitutional provisions. In some instances, the Handbook provides several options that the drafter may choose from. The sample language is identified as "Option One" and "Option Two." In others, the Handbook provides optional language that drafters may include. In those instances the sample language is identified as "Optional."

The intent of this handbook is to provide the drafter with options in structuring constitutional provisions. Since every post-conflict situation is unique, the drafter may change certain elements to enhance the constitution's relevance and applicability to a particular context. The purpose of the sample language is merely to provide options from ratified constitutions to assist the drafter.

The Handbook also contains two annexes. Annex I provides a list all of the constitutions cited in the footnotes and a link to their location on the World Wide Web. Annex II provides a compilation of all the sample language.

PILPG is committed to supporting constitution drafters in fulfilling their roles, and, upon request, can provide additional assistance in considering particular provisions and language.

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**CHAPTER I: PREAMBLE AND BASIC PRINCIPLES**

States typically begin their constitutions with a preamble and provisions that outline the general principles underlying the constitution. Preambles typically: (1) declare state sovereignty; (2) describe national identity; (3) explain the means to achieve citizenship; and (4) establish official symbols, holidays, and languages.

**Identification of the State**

The constitution may identify the type of government, the boundaries of the state that it governs, and the manner in which the borders may be altered.<sup>1</sup> Many constitutions also include a provision declaring the independence and sovereignty of the state. Such a declaration may include language providing that state sovereignty is inalienable, indivisible, and non-transferable.<sup>2</sup> This provision may also indicate the source of sovereignty, which commonly derives from and is vested in the people.<sup>3</sup>

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<sup>1</sup> For instance, the Albanian constitution provides that “Albania is a parliamentary republic.” ALBANIA CONST. art. 1. Similarly, the Eritrean Constitution provides that “The territory of Eritrea consists of all its territories, including the islands, territorial waters and airspace, delineated by recognised boundaries.” ERITREA CONST. art. 1. Additional examples include Georgia, Portugal, and Pakistan. “The territory of the state of Georgia shall be determined as of 21 December 1991. The territorial integrity of Georgia and the inviolability of the state frontiers, being recognised by the world community of nations and international organisations, shall be confirmed by the Constitution and laws of Georgia.” GEORGIA CONST. art. 2(1). “1. Portugal shall comprise that territory on the European mainland which is historically defined as Portuguese, and the Azores and Madeira archipelagos. 2. The law shall define the extent and limits of Portugal’s territorial waters, its exclusive economic zone and its rights to the adjacent seabed. 3. Without prejudice to the rectification of borders, the state shall not dispose of title to any part of Portuguese territory or of the sovereign rights that it exercises thereover.” PORTUGAL CONST. art. 5. The Pakistani Constitution lists Pakistani provinces and territories and provides that the Pakistani state comprises “such States and territories as are or may be included in Pakistan, whether by accession or otherwise.” PAKISTAN CONST. art. 1(2).

<sup>2</sup> “The sovereignty of the Republic of Croatia is inalienable, indivisible and untransferable.” CROATIA CONST. art. 2. “The sovereignty of the Republic of Macedonia is indivisible, inalienable, and nontransferable.” MACEDONIA CONST. art. 1. “The sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law.” Kosovo Const. art. 2. “Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.” AFGHANISTAN CONST. art. 1. “Kuwait is an Arab State, independent and fully sovereign. Neither its sovereignty nor any part of its territory may be relinquished.” KUWAIT CONST. art. 1. “The Union may not cede its sovereignty or relinquish any part of its territories or waters.” UNITED ARAB EMIRATES CONST. art. 4. “A sovereign Muslim State, attached to its national unity and to its territorial integrity, the Kingdom of Morocco intends to preserve, in its plenitude and its diversity, its one and indivisible national identity.” MOROCCO CONST. preamble; “The Republic of Yemen is an Arab, Islamic and independent sovereign state whose integrity is inviolable, and no part of which may be ceded.” YEMEN CONST. art. 1. “The State practises its sovereignty on its territory and shall not give up its sovereignty or any part of its territory.” QATAR CONST. art. 2.

<sup>3</sup> Such language may be found in the constitutions of Eritrea, Latvia, Croatia, the Czech Republic, Kenya, South Sudan, and Iraq. “In the State of Eritrea, sovereign power is vested in the people and shall be exercised pursuant to the provisions of this Constitution.” ERITREA CONST. art. 1. “The sovereign power of the State of Latvia is vested in the people of Latvia.” LATVIA CONST. art. 2. “Power in the Republic of Croatia is derived from the people and belongs to the people as a community of free and equal citizens.” CROATIA CONST. art. 1. “The people are the source of all power in the State . . . .” CZECH REPUBLIC CONST. art. 2. “Sovereignty is vested in the people . . . .”

**Sample Language: State Identity****Type of Government**

**[State] is a [type of government (*e.g.*, parliamentary republic)].**

**Sovereignty**

**[State] is an independent, sovereign state. Sovereignty is inalienable, indivisible, non-transferable, and is derived from and vested in the people of [State].**

**Borders**

**The borders of [State] are [geographic description of boundaries].  
Borders may only be altered in accordance with international law, by peaceful means and by agreement.**

**Supremacy of the Constitution**

Some constitutions include a provision affirming that the constitution is the supreme law of the land, and any laws inconsistent with the constitution have no force.<sup>4</sup> Including such a provision may prevent provincial or municipal governments from enacting laws inconsistent with constitutional principles.

**Sample Language: Supremacy of the Constitution**

**This Constitution is the supreme law of [State]. Any laws inconsistent with this Constitution shall be void.**

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SOUTH SUDAN CONST. art. 2. "1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. 2. The people may exercise their sovereign power either directly or through their democratically elected representatives." KENYA CONST. art. 1. "The law is sovereign. The people are the source of authority and legitimacy . . . ." IRAQ CONST. art. 5.

<sup>4</sup> For instance, the Armenian Constitution declares that "The Constitution of the Republic shall have supreme legal force and the norms thereof shall apply directly." ARMENIA CONST. art. 6. Similarly, the constitution of Zimbabwe provides that "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law is, to the extent of the inconsistency, be void." ZIMBABWE CONST. art. 3. Other examples include South Africa, Kenya, and Iraq. "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." SOUTH AFRICA CONST. art. 2. "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." KENYA CONST. art. 2. "First: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void." IRAQ CONST. art. 13.

## National Identity

Post-conflict states with diverse populations comprised of multiple ethnic groups often include a provision describing the state's national identity. In defining national identity, constitutions may acknowledge the variety of ethnicity within the state, while simultaneously noting the commonality and unity of the state's citizens.<sup>5</sup>

Some post-conflict states with a significant Arab presence recognize a connection to the Arab Nation in the constitution's preamble. States may refer to their citizens as part of the Arab Nation, acknowledge the Arab character of the state, or recognize the state's membership in the Arab League.<sup>6</sup>

### Sample Language: National Identity

**[State] is a state of many ethnicities and nationalities. [State] belongs to all who live in it, united by our diversity, common history, purpose and destiny, and committed to working together to promote the good governance and the welfare of all citizens.**

### Optional for States with Significant Arab Presence

#### **Option 1: Affirm Connection to Arab Nation**

**The Arab majority in [State] considers itself to be an inseparable part of the larger Arab Nation.**

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<sup>5</sup> "The independence of the state and the integrity of its territory, dignity of the individual, human rights and freedoms, social justice, constitutional order, pluralism, national identity and inheritance, religious coexistence, as well as coexistence with, and understanding of Albanians for, minorities are the bases of this state, which has the duty of respecting and protecting them." ALBANIA CONST. art. 3. "[P]roud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation." KENYA CONST. preamble. South Sudan "is a multi-ethnic, multi-cultural, multi-lingual, multi-religious and multi-racial entity where such diversities peacefully co-exist." SOUTH SUDAN CONST. art. 1(4).

<sup>6</sup> The Preamble of the Algerian Constitution provides that the state is "an Arab land." ALGERIA CONST. preamble. The preamble of the Lebanese Constitution provides that Lebanon is "Arab in its identity." LEBANON CONST. preamble. The Saudi Arabian Constitution provides that the state is a "sovereign Arab Islamic state." SAUDI ARABIA CONST. art. 1. The Iraqi Constitution provides that the state is a "member in the Arab League and is committed to its charter." IRAQ CONST. art. 3. "The Sultanate of Oman is an independent, Arab, Islamic, fully sovereign state . . ." OMAN CONST. art. 1. "To deepen the bonds of togetherness with the Arab and Islamist Ummah, and to reinforce the bonds of fraternity and of solidarity with its brother peoples." MOROCCO CONST. preamble. "The Republic of Yemen is an Arab, Islamic and independent sovereign state . . . The Republic of Yemen confirms its adherence to the . . . Charter of the Arab League." YEMEN CONST. arts. 1, 6. "The Republic of Tunisia is a part of the Great Arab Maghreb, an entity which it endeavors to unify within the framework of mutual interests." TUNISIA CONST. art. 2 (subject to revision as of 2012). "Algeria, being a land of Islam, an integral part of the Great Maghreb, an Arab land . . ." ALGERIA CONST. preamble.

**Option 2: Acknowledge Arab Character of State**  
**[State] is Arab in its identity.**

**Option 3: Declare Membership in the Arab League**  
**[State] is a member of the Arab League and is committed to its charter.**

### **Influence of Shari'a**

States with a Muslim population may consider whether to include a constitutional provision referencing *Shari'a* and its relationship to legislation. States with a predominately Muslim population have often included a provision naming *Shari'a* as the primary source of legislation or as a source of law.<sup>7</sup> The language of the preamble could be very specific as to the relationship between *Shari'a* and domestic law or it could be broader and more nuanced.<sup>8</sup>

#### **Sample Language: *Shari'a***

**Option 1: Specific Connection to *Shari'a***  
**Islam is the official religion of the state and the people and *Shari'a* is the principle source of legislation.**

**Option 2: Nuanced Reference to *Shari'a***  
***Shari'a* is a source of inspiration for legislation.**

**Option 3: Broad Reference to *Shari'a***  
**The principles of *Shari'a* will be a basis for legislation.**

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<sup>7</sup> NISRINE ABIAD, SHARIA, MUSLIM STATES, AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY 47 (2008).

<sup>8</sup> For instance, the Saudi Arabian Constitution includes *Shari'a* as a source of law used in conjunction with "the premise of justice, consultation, and equality." SAUDI ARABIA CONST. art. 8. The Iraqi Constitution provides that "Islam is the official religion of the State and is a foundation source of legislation," and further declares that "[n]o law may be enacted that contradicts the established provisions of Islam." IRAQ CONST. art. 2. "Islamic Shari'a is the source of all legislation." YEMEN CONST. art. 3; "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan . . . No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." AFGHANISTAN CONST. arts. 2, 3.

## International Obligations

Interest and involvement in international relations has increased for post-conflict states.<sup>9</sup> States often declare a commitment to international legal obligations, ideals, and conventions.<sup>10</sup> Additionally, post-conflict states often condemn or declare their intention to prevent terrorism or other negatively viewed activities.<sup>11</sup>

### Sample Language: International Obligations

**[State] shall observe the principles of neighborliness.**

**[State] shall uphold its obligations under international law.**

**In accordance with its obligations under [international law/specific treaty], [state] will seek to combat and prevent terrorism, transnational crime, and other threats to international or regional security.**

**[State] commits to the maintenance of international peace and security through adherence to the UN Charter, [regional organization], and the general principles of customary international law.**

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<sup>9</sup> Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA ONLINE JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 170 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1559002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559002); Vijayashri Sripati, *The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 411 (Dec. 2008).

<sup>10</sup> The Iraqi Constitution does this generally by providing that it “shall observe the principles of good neighborliness” and “respect its international obligations.” IRAQ CONST. art. 8. More specifically, “Yemen confirms its adherence to the UN Charter, the International Declaration of Human Rights, the Charter of the Arab League, and principles of international Law which are generally recognized.” YEMEN CONST. art. 6. “The State shall respect international pacts and execute all international agreements, pacts and treaties to which it is a party.” QATAR CONST. art. 6. “The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.” AFGHANISTAN CONST. art. 7. “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill . . . . Foreign policy . . . shall be conducted . . . with the view to achieving . . . promotion of international cooperation, specially within the United Nations family, African Union and other international and regional organizations, for the purposes of consolidating universal peace and security, respect for international law, treaty obligations and fostering a just world economic order.” SOUTH SUDAN CONST. arts. 9(3), 43.

<sup>11</sup> “The state shall prevent all kinds of terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants.” AFGHANISTAN CONST. art. 7. “The State shall undertake to combat terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field for terrorist activities.” IRAQ CONST. art. 7.

## Citizenship

Most post-conflict constitutions address citizenship in one of two ways: (1) by noting that citizens have both rights and duties of citizenship, or (2) by describing specific citizenship requirements.<sup>12</sup> If the state elects to detail requirements for citizenship in its constitution, this section may include the means by which individuals qualify for citizenship. Typical ways to gain citizenship are being born in the state, having one or both parents as citizens, or being naturalized as a citizen.<sup>13</sup> Some states also include provisions addressing citizenship through marriage.<sup>14</sup>

### Sample Language: Citizenship

#### **Option 1: Rights and Duties of Citizenship**

**All citizens of [state] are equally entitled to the rights, privileges, and benefits of citizenship, and equally subject to the duties and responsibilities of citizenship.**

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<sup>12</sup> The Zimbabwean Constitution sets forth specific qualifications to acquire citizenship (see footnote 16). ZIMBABWE CONST. art. 4. South Africa's Constitution, however, is much more general. "(1) There is a common South African citizenship. (2) All citizens are (a.) equally entitled to the rights, privileges and benefits of citizenship; and (b.) equally subject to the duties and responsibilities of citizenship; (3) National legislation must provide for the acquisition, loss and restoration of citizenship." SOUTH AFRICA CONST. art. 3. "(1) Every citizen is entitled to . . . the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution." KENYA CONST. art. 12. "The citizens of Afghanistan, man and woman, have equal rights and duties before the law." AFGHANISTAN CONST. art. 22.

<sup>13</sup> The Zimbabwean Constitution provides that "a person who, immediately before the appointed day, was or was deemed to be a citizen by birth, descent or registration is, on and after that day, be a citizen of Zimbabwe by birth, descent or registration . . ." ZIMBABWE CONST. arts. 4-74. The Kenyan Constitution also provides more detailed requirements: "14. (1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen . . . . (4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth . . . . 15. (2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen. (3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen." KENYA CONST. arts. 14, 15. In Iraq, the constitution specifies that citizenship can be acquired from an Iraqi father or mother. "First: Iraqi citizenship is a right for every Iraqi and is the basis of his nationality. Second: Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi." IRAQ CONST. art. 18.

<sup>14</sup> Kenya's constitution provides that "13. (3) Citizenship is not lost through marriage or the dissolution of marriage . . . 15. (1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen." KENYA CONST. arts. 13, 15. The Mexican Constitution allows citizenship by naturalization for "foreigners married to Mexicans who live within national territory and fulfill all legal requisites." MEXICO CONST. art. 30(b)(2).

**Option 2: Citizenship Requirements**

**Any person who was born in [state], born to a parent who is a [state] citizen, or who has been naturalized as a citizen of [state], shall be considered a [state] citizen.**

**Sample Language: Marriage****Option 1: Citizenship Through Marriage**

**A person who has been married to a citizen for a period of [X] years is entitled on application to be registered as a citizen.**

**Official State Capital, Flag, Anthem, Symbol, and Holidays**

Some constitutions specify the state's capital city, the official flag, symbol, national anthem, holidays, and, occasionally, currency.<sup>15</sup> Other constitutions, however, merely provide that future legislation will finalize these matters.<sup>16</sup> If such provisions are detailed in the constitution, the descriptions are typically simple and straightforward.<sup>17</sup>

**Sample Language: Official State Capital, Flag, Anthem, Symbol, and Holidays****Option 1: Specify Official State Capital, Flag, Anthem, Symbol, and Holiday(s) in the Constitution**

**The capital city of [state] is [Capital City].**

<sup>15</sup> For instance, the Maldives Constitution specifies the national holiday, currency, capital, and describes the flag. MALDIVES CONST. arts. 12-15. Similarly, the Myanmar Constitution provides images of the national flag and seal, and also specifies the anthem and capital. MYANMAR CONST. art. 437-440. By contrast, the Afghan Constitution specifies the capital and anthem and describes the flag and insignia, leaving the regulation of flag and insignia use to the law. AFGHANISTAN CONST. arts. 19-21.

<sup>16</sup> For instance, the Iraqi constitution specifies the capital city but leaves the other matters to law. IRAQ CONST. arts. 11, 12. Similarly, in Qatar, "The law stipulates the design of flag of the State, its slogan, its merit sashes, ensignias and the wording of the national anthem. The law stipulates the financial and banking system of the State and defines its official currency." QATAR CONST. arts. 3, 4. "(5) Details concerning the state emblem, the national flag, the state seal, and the national anthem and their use will be set out in a law." SLOVAKIA CONST. art. 9.

<sup>17</sup> "(2) The national flag is red with a two-headed black eagle in the center. (3) The seal of the Republic of Albania presents a red shield with a black, two-headed eagle in the center. At the top of the shield, in gold color, is the helmet of Skanderberg. (4) The national anthem is 'United Around Our Flag.' (5) The National Holiday of the Republic of Albania is Flag Day, November 28. (6) The capital city of the Republic of Albania is Tirana. (7) The form and dimensions of the national symbols, the content of the text of the national anthem, and their use shall be regulated by law." ALBANIA CONST. art. 14. "(1) The national anthem is 'La Congolaise.' (2) The Motto of the Republic is 'Unity - Work - Progress.' (3) The Seal of the State and Coat of Arms of the Republic shall be defined by law. (4) The official language is French. (5) The functional national languages are Lingala and Munukutuba. (6) The Capital of the Republic of the Congo is Brazzaville." REPUBLIC OF THE CONGO CONST. art. 3.

**The national flag is [description of flag].**

**The [seal/symbol] of [state] is [description of the seal/symbol].**

**The national anthem of [state] is [title of national anthem].**

**The national holiday[s] of [state] [is/are] [title and date of national holiday(s)].**

**Option 2: Leave Specific Determinations of Official State Capital, Flag, Anthem, Symbol, and Holidays to Law**

**Determination of the capital city, national holidays, the form and dimensions of the national flag and symbols, the content of the text of the national anthem, and their use shall be regulated by law.**

### **Official State Language**

In post-conflict states, the decision to designate one or more languages as official state languages may be important to maintaining stability. In states where one language is predominant, constitutions may mandate one official language.<sup>18</sup> In states where multiple languages are spoken, however, constitutional acknowledgement of an official language may lead to friction or conflict because of a perceived marginalization of individuals who speak the non-official language.<sup>19</sup> In such instances, states often recognize one or more official languages,<sup>20</sup> often while also providing protections to the use of other languages,<sup>21</sup> or recognize the equality of all languages.<sup>22</sup>

<sup>18</sup> For instances, Turkey's constitution provides that "(1) The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish." TURKEY CONST. art. 3. Similarly, the Albanian constitution provides that "1. The official language in the Republic of Albania is Albanian", and the Maldives Constitution provides that "The national language of the Maldives is Dhivehi." ALBANIA CONST. art. 14. MALDIVES CONST. art. 11.

<sup>19</sup> Drew Mecham, *Language, Conflict and Security*, REPORT OF A CONFERENCE HELD AT THE PRINCE ALWALEED BIN TALAL CENTRE OF ISLAMIC STUDIES, UNIVERSITY OF CAMBRIDGE, 26 (Apr. 2010), *available at* <http://www.cis.cam.ac.uk/Language%20Conflict%20&%20Security%20Report.pdf>.

<sup>20</sup> The South African Constitution recognizes eleven official languages: "(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages." SOUTH AFRICA CONST. art. 6.

<sup>21</sup> The Constitution of the Democratic Republic of Congo provides, "(4) The official language is French. (5) The functional national languages are Lingala and Munukutuba." REPUBLIC OF CONGO CONST. art. 3. "(1) The national language of the Republic is Kiswahili. (2) The official languages of the Republic are Kiswahili and English. (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice. (2) A person belonging to a cultural or linguistic community has the right, with other members of that community— (a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society." KENYA CONST. art. 7, 44. The constitutions of Iraq and Afghanistan outline official languages and provide specific protections. The Iraqi constitution provides: "First: The Arabic

**Sample Language: Official State Language**

**Option 1: Mandate One or More Official Language(s)**  
**[Language(s)] shall be the official state language[s].**

**Option 2: Mandate Official Language(s), but Protect All Languages**  
**[Language(s)] shall be the official state language[s], but the protection of all languages in [State] is guaranteed, and citizens of [State] have the right to educate their children in their mother tongue.**

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language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac, and Armenian shall be guaranteed in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions. Second: The scope of the term “official language” and the means of applying the provisions of this article shall be defined by a law and shall include: A. Publication of the Official Gazette, in the two languages; B. Speech, conversation, and expression in official domains, such as the Council of Representatives, the Council of Ministers, courts, and official conferences, in either of the two languages; C. Recognition and publication of official documents and correspondence in the two languages; D. Opening schools that teach the two languages, in accordance with the educational guidelines; E. Use of both languages in any matter enjoined by the principle of equality such as bank notes, passports, and stamps. Third: The federal and official institutions and agencies in the Kurdistan region shall use both languages. Fourth: The Turkomen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population. Fifth: Each region or governorate may adopt any other local language as an additional official language if the majority of its population so decides in a general referendum.” IRAQ CONST. art. 4. “From amongst Pashto, Dari, Uzbeki, Turkmani, Baluchi, Pachaie, Nuristani, Pamiri and other current languages in the country, Pashto and Dari shall be the official languages of the state. In areas where the majority of the people speak in any one of Uzbeki, Turkmani, Pachaie, Nuristani, Baluchi or Pamiri languages, any of the aforementioned language, in addition to Pashto and Dari, shall be the third official language, the usage of which shall be regulated by law. The state shall design and apply effective programs to foster and develop all languages of Afghanistan. Usage of all current languages in the country shall be free in press publications and mass media. Academic and national administrative terminology and usage in the country shall be preserved.” AFGHANISTAN CONST. art. 16.

<sup>22</sup> The Eritrea Constitution recognizes “[t]he equality of all Eritrean languages is guaranteed.” ERITREA CONST. art. 4.

**CHAPTER II: SELECTING A STATE STRUCTURE AND DEVOLVING POWER**

Post-conflict states frequently restructure the state and develop a new system for devolving powers. These new systems seek to reflect the values of the post-conflict state, restore stability, and prevent future conflict. Several factors are relevant for a state's consideration when deciding which type of state structure will best meet the needs of the people. Drafters may consider, among other things, the cause of the conflict, the final status of conflict-affected territories, human rights, and other factors unique to the new state.

Most states select a unitary or federal structure. In a unitary state, power is centralized within the central government, with local authorities holding authority over issues of local importance. In a federal state, powers are devolved to provincial and local levels of government, with key governance powers reserved to the central government. The unitary and federal structures are inherently flexible, and may be designed to meet the needs of the state. In rare instances, states elect to establish a confederation. Confederations are comprised of states or entities that come together for a common purpose, with limited governing powers at the level of the confederation. Because governing powers at the confederal level are limited, confederations tend to be less stable forms of government.

Once states select a structure, they typically establish the powers reserved to the central government and the powers devolved to provincial or local governments. Similar to state structure, the allocation of powers between the state and the provincial or local governments is unique to each state, and frequently recognizes territorial or historical considerations. In developing constitutional provisions addressing devolution of power, states often consider issues including: (1) the territorial delineation of provinces; (2) whether to devolve power symmetrically or asymmetrically; (3) how to distribute powers between state and provincial governments; (4) procedures to allow provincial governments to assume powers over time; (5) whether to provide the state with the power to develop framework legislation and/or legislation to harmonize provincial laws; (6) means to foster cooperation between the state and provincial governments; (7) dispute resolution mechanisms; and (8) restrictions on constitutional amendments regarding state structure.

## Unitary State

Unitary states concentrate government powers in a single, central government entity.<sup>1</sup> The central government can decentralize or delegate powers to provincial or local administrative units.<sup>2</sup> However, in most instances, the central government retains the ultimate authority to dictate the scope of these powers, or to abolish them altogether.<sup>3</sup> The development of provincial and local administrative units allows the central government to tailor the administration of policies to specific geographic or cultural areas.<sup>4</sup> Provincial or local governments, however, will not be represented in the central government.<sup>5</sup>

### Sample Language: Unitary State

**[State], with its territory and nation, is a unitary state.**

## Federations

Unlike unitary states, federal systems have at least two levels of government: a central government and provincial governments.<sup>6</sup> Tiers of government are established initially through constitutional provisions, though constitutions can also provide for modification of the system through other means, such as legislation.<sup>7</sup> Both the central and provincial governments share the authority to govern, with each typically holding authority over different matters, and provincial governments are represented at the central level.<sup>8</sup> Federal systems vary widely in their methods of distributing political authority, and therefore can be tailored to the needs of each state.<sup>9</sup>

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<sup>1</sup> GREGORY S. MAHLER, *COMPARATIVE POLITICS: AN INSTITUTIONAL AND CROSS-NATIONAL APPROACH* 184 (1995).

<sup>2</sup> United States Agency for International Development, *Democratic Decentralization Programming Handbook*, 9 (June 2009).

<sup>3</sup> GREGORY S. MAHLER, *COMPARATIVE POLITICS: AN INSTITUTIONAL AND CROSS-NATIONAL APPROACH* 30 (1995).

<sup>4</sup> United States Agency for International Development, *Democratic Decentralization Programming Handbook*, 9 -10 (June 2009).

<sup>5</sup> United States Agency for International Development, *Democratic Decentralization Programming Handbook*, 19 (June 2009).

<sup>6</sup> RONALD WATTS, *COMPARING FEDERAL SYSTEMS* 8 (1999).

<sup>7</sup> EDWARD SCHNEIER, *CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN* 177 (2006).

<sup>8</sup> United States Agency for International Development, *Democratic Decentralization Programming Handbook*, 19 (June 2009).

<sup>9</sup> United States Agency for International Development, *Democratic Decentralization Programming Handbook*, 19 (June 2009).

**Sample Language: Federal State**

**[State] is a federal state.**

**Confederations**

Confederations exist when two or more pre-existing states join to form a common government for limited, constitutionally-established purposes. In this scenario, sovereign state governments create a central government, but reserve the balance of power for the state governments. Each state government has its own constitution, laws, and government institutions. These states coexist under a confederal constitution and parliament and enter into treaties or contracts with other sovereign states as a common unit.<sup>10</sup> A confederation's functions can be adapted according to the needs of the member states.<sup>11</sup> Confederations tend to be unstable, and may serve as a phase in the process towards full independence of the parties.<sup>12</sup>

**Sample Language: Confederation**

**State of [Confederation] is a union of [names of joined states].  
[Confederation] shall have its own constitution, law, and government  
institutions. All powers not specifically allocated to the central  
government shall be reserved to the states.**

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<sup>10</sup> This type of arrangement was proposed for Cyprus in the Annan Plan. The Annan Plan proposed a federation of two states, the Greek Cypriot State and the Turkish Cypriot State, joined together by a minimal federal governmental apparatus. This model was influenced by the Swiss Confederation in which the Swiss people have extensive rights of co-determination, due to the Federal Act on Political Rights of December 17, 1976. In this adaptation, United Cyprus would have had its own constitution, flag, national anthem and Greek Cypriots and Turkish Cypriots would have been ensured representation, either equal or according to population, in the federal institutions.

<sup>11</sup> For instance, the former State Union of Serbia and Montenegro was based on the equality of the two member states, the state of Serbia and the state of Montenegro. However, the common governmental apparatus was weak. The common parliament's jurisdiction was limited to the implementation of international conventions, defence matters, borders, immigration and asylum, the budget, and national symbols. Moreover, the two member states were able to independently become members of international organizations (where membership is not contingent in international personality). Moreover, the two member states were able to conclude international agreements, as long as the agreements were not contrary to the interests of the Union or of the other member state.

<sup>12</sup> In the State Union of Serbia and Montenegro, the constitution expressly provided that after three years either of the parties may undertake a referendum to dissolve the confederation. In May 2006, Montenegro exercised this right and became an independent state following its successful referendum on independence.

## Devolution of Powers

Following the selection of a state structure, states typically consider the appropriate system for devolving power. Similar to state structure, the system for devolving power may be flexibly adapted to the needs of the state to promote stability and effective governance. As an initial step, states may delineate or redraw provincial boundaries. In choosing which powers to devolve and the process for devolving those powers, post-conflict states often consider: (1) the powers that will be exercised by the central government and/or provincial governments; (2) whether to devolve powers asymmetrically; (3) the establishment of a process to allow provincial governments to assume powers over time; (4) whether to provide the central government the power to promulgate framework legislation and/or legislation to harmonize provincial laws; (5) whether to establish institutions to foster cooperation between the central and provincial governments; (6) the methods for resolving disputes between the two levels of government; and (7) any necessary restrictions on constitutional amendments that alter the fundamental relationship between the central and provincial governments.

### *Delineating Provinces*

In structuring the state, it may be necessary to identify the number of provinces that make up the state, as well as the criteria to be used in delineating their boundaries. In instances where provincial divisions already exist, states may retain these divisions, particularly if changing them would destabilize the state. When delineating provinces, states often use criteria such as geography and economic viability or identity-based criteria such as ethnicity, language, and religion.<sup>13</sup> For instance, most federal states create provinces based on criteria related to historical and group identity, as geography and economics can become matters of contention.<sup>14</sup>

Constitutions may include a list of the provinces comprising the state, but typically do not include the criteria utilized to establish them.<sup>15</sup> In instances where

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<sup>13</sup> “Local government councils shall be established by law taking into account but not limited to the following criteria: (a) size of territory; (b) population; (c) economic viability; (d) common interest of the communities; and (e) administrative convenience and effectiveness.” SOUTH SUDAN CONST. art. 165(4). “The number, area, divisions and related provincial organizations as well as number of offices shall be regulated on the basis of population, social and economic conditions, as well as geographical location.” AFGHANISTAN CONST. art. 136.

<sup>14</sup> Sujit Choudhry and Nathan Hume, *Federalism, Devolution, and Secession: From Classical to Post-Conflict Federalism*, COMPARATIVE CONSTITUTIONAL LAW 356-57 (2011).

<sup>15</sup> “The Union is delineated and constituted by seven Regions, seven States and the Union territories as follows: (a) Kachin State; (b) Kayah State; (c) Kayin State; (d) Chin State; (e) Sagaing Region; (f) Taninthayi Region; (g) Bago Region; (h) Magway Region; (i) Mandalay Region; (j) Mon State; (k) Rakhine State; (l) Yangon Region; (m) Shan

the provinces are listed in the constitution, a constitutional amendment is necessary to change those boundaries.

### Sample Language: Delineating Provinces

**The provinces of [State] are: [list of provinces].**

#### *Distribution of Powers between Central and Provincial Governments*

Regardless of the state structure selected, many post-conflict constitutions include provisions that expressly describe: (1) the powers exercised exclusively by the central government; (2) the powers held by the central government, but which may be shared or assumed by provincial governments; (3) the powers exercised exclusively by the provincial governments; and (4) the powers not specifically allocated to the central or provincial governments.

#### Powers Exercised Exclusively by Central Government

While no set formula exists for the allocation of powers between the central and provincial governments, the central government typically exercises exclusive power over foreign affairs, the armed services and national security, monetary policy, customs and duties, communications, interregional transportation, debt management, immigration and naturalization, and management of the national economy.<sup>16</sup>

#### Sample Language: Exclusive Powers of Central Government

**The central government of [state] shall have exclusive control over matters relating to: [foreign affairs; armed services and national security; immigration and naturalization; communications; transportation; international commerce and trade].**

#### Powers Exercised Exclusively by Provincial Governments

Similar to the powers allocated to the central government, there is no set formula for allocating powers to the provincial governments. However, provincial

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State; (n) Ayeyawady Region; and (o) Union territories.” MYANMAR CONST. art. 49. The Kenyan Constitution also provides a list of its counties, to which powers are devolved. KENYA CONST. art. 6(1) (1st schedule). The Pakistani Constitution lists Pakistan’s territories in the first article. PAKISTAN CONST. art. 1. The Ukrainian and Italian Constitutions also lists their states’ territories. ITALY CONST. art. 131; UKRAINE CONST. art. 133.

<sup>16</sup> These powers are allocated to the central government in the following agreements: Constitution of Bosnia and Herzegovina (1995) and Bougainville Peace Agreement (2001). See also BRAZIL CONST. art. 21; IRAQ CONST. art. 110; ITALY CONST. art. 117; MALAYSIA CONST. 9th schedule, list 1.

governments are typically granted powers to ensure effective governance and provision of services within their provinces. Such powers may include education, health, social welfare, police powers, local taxes, and regional transportation. Oversight of natural resource extraction, production, and management are also often devolved to provinces.<sup>17</sup>

### **Sample Language: Exclusive Powers of Provincial Governments**

**Provincial governments of [State] shall retain exclusive control over matters relating to: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].**

#### Powers Held by Central Government and Shared with Provincial Governments

Central and provincial governments often share powers over areas that have both a provincial and a statewide impact. Such power-sharing promotes effective provincial governance, while recognizing instances in which central government involvement may be necessary. These areas include: taxation, environmental policy, health, social welfare, education, housing, transport and traffic regulations, police and prison administration, and natural resources.<sup>18</sup>

### **Sample Language: Shared Powers**

**The central government of [state] shall exercise joint competencies with the provincial governments over matters relating to: [health; social welfare; education; housing; transportation and traffic regulations; police and prison administration; natural resources].**

#### Powers Not Specifically Allocated

In addition to detailing which powers are delegated to central and provincial governments, many post-conflict constitutions also specify whether powers not specified in the constitution fall under the jurisdiction of the central or provincial governments.<sup>19</sup> This facilitates efficient operation of such powers and provides clarity for government officials over who has the responsibility to exercise them.

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<sup>17</sup> These powers are allocated to the regional governments in the following agreements: Bougainville Peace Agreement (2001). *See also* BRAZIL CONST. art. 25; IRAQ CONST. sec. 5; MALAYSIA CONST. 9th schedule, list 2; UKRAINE CONST. title 11.

<sup>18</sup> The Brazilian, Iraqi, and Malaysia Constitutions enumerate shared competencies. BRAZIL CONST. arts. 23-24; IRAQ CONST. arts. 112, 114; ITALY CONST. art. 117; MALAYSIA CONST. 9th schedule, list 3.

<sup>19</sup> "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal

### Sample Language: Powers Not Specifically Allocated

#### **Option 1: Residual Powers to Central Government**

**All powers not expressly assigned in this Constitution shall fall under the jurisdiction of the central government.**

#### **Option 2: Residual Powers to Provincial Governments**

**All powers not expressly assigned in this Constitution shall fall under the jurisdiction of the provincial governments.**

<b>Summary: Distribution of Powers</b>		
<i>Powers Maintained by Central Government</i>	<i>Powers Devolved to Provincial Governments</i>	<i>Powers Shared by Central and Provincial Governments</i>
<ul style="list-style-type: none"> <li>• Foreign affairs</li> <li>• The armed services and national security</li> <li>• Monetary policy</li> <li>• Customs and duties</li> <li>• Communications and transportation</li> <li>• Debt management</li> <li>• Immigration and naturalization</li> <li>• International commerce and trade</li> </ul>	<ul style="list-style-type: none"> <li>• Education</li> <li>• Social welfare</li> <li>• Health</li> <li>• Police powers</li> <li>• Local taxes</li> <li>• Regional transportation</li> <li>• Natural resources</li> </ul>	<ul style="list-style-type: none"> <li>• Health</li> <li>• Social welfare</li> <li>• Education</li> <li>• Housing</li> <li>• Transport and traffic regulations</li> <li>• Police and prisons administration</li> <li>• Natural resources</li> </ul>

#### *Asymmetrical Devolution of Powers*

Post-conflict states may devolve additional power to a particular region or province in recognition of the region's need for autonomy or powers of self-governance. In unitary states, such devolution may take the form of special autonomy arrangements.<sup>20</sup> Autonomy arrangements grant a region or territory control over its affairs, and typically do not impact the region's participation in

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government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute." IRAQ CONST. art. 115. "The regions have exclusive legislative power with respect to any matters not expressly reserved to state law." ITALY CONST. art. 117.

<sup>20</sup> For instance, the Autonomous Republic of Crimea within the unitary state of Ukraine. UKRAINE CONST. title 10.

national institutions. In federal states, provinces may be granted different levels of authority to promote their autonomy.<sup>21</sup> Such powers may include cultural or educational policies, issues related to economic or natural resource development, limited international relations, and increased representation in the central government.

Options for varying the degree of autonomy include: (1) granting the entity a local assembly able to legislate on all matters related to local affairs; (2) granting the entity its own autonomous government with legislative, executive, and judicial branches;<sup>22</sup> and (3) granting the region certain powers during a transitional period before the final status of the region is determined.

### **Sample Language: Asymmetrical Devolution of Powers**

**[Territories] have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.**

**The court of [Territory] shall adopt decisions and resolutions mandatory for execution in the [Territory].**

**The following issues shall be under the authority of [Territory]: [list of issues].**

**[Territories] shall effect normative regulation in the following matters: [list of matters].**

**During the transitional period, [Region] shall have the authority to govern [matters], until national law indicates otherwise.**

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<sup>21</sup> For instance, in Spain "historical communities" such as Navarre, Catalonia, and the Basque Country have more powers than other autonomous communities, partly to deal with their distinctness and to appease nationalist leanings, partly out of respect of privileges granted earlier in history. SPAIN CONST. Chap. III Likewise, Italy has several regions and provinces with asymmetric autonomy. ITALY CONST. art. 116. Throughout the Malaysian Constitution, the regions Sabah and Sarawak are given asymmetrical autonomy. MALAYSIA CONST. Indian federalism is asymmetric, and makes special provisions for certain states as per their accession or statehood deals. *See generally* INDIA CONST.

<sup>22</sup> The Bougainville Peace Agreement signed between Bougainville and Papua New Guinea on August 31, 2001 provides for an autonomous government. The separate powers and functions of this government and the national government are specifically detailed so as to prevent future conflict. The national government's powers and functions include: defense, foreign relations, immigration, central banking, currency, international civil aviation, shipping and trade, post, telecommunications and the cross-boundary fish stocks. The autonomous government is responsible for all the known and identifiable powers not reserved specifically for the national government.

*Phased Assumption of Powers*

Following the end of a conflict, provincial governments are frequently limited in their ability to govern effectively. Provincial officials may lack the capacity to govern, infrastructure may be damaged, and resources may be scarce, making it difficult for provincial governments to assume all of their powers at once. To facilitate effective governance during the post-conflict period, states may implement a phased approach to the assumption of powers by provincial governments. A phased approach requires the establishment of criteria and a roadmap for provinces to allow them to assume additional powers. Such criteria may include a certain time frame or attaining a certain level of economic development. The assessment of this criteria might include an evaluation process, starting with a panel of experts to determine if criteria have been met, followed by a vote in a legislative body.<sup>23</sup>

**Sample Language: Assuming Powers over Time**

**All provinces may assume power and responsibility after [one/three/five] year[s] over the following powers following the entry into force of this Constitution: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].**

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<sup>23</sup> “(1) The Autonomous Communities may assume competences in the following: 1) organization of their institutions of self-government; 2) alterations of the municipal boundaries contained within its area, and in general the functions which belong to the State Administration concerning local corporations and whose transfer is authorized by the legislation on Local Governments; 3) regulation of the territory, urbanism, and housing; 4) public works of interest to the Autonomous Community in its own territory; 5) railways and highways whose itinerary runs completely in the territory of the Autonomous Community and within the same boundaries and transportation carried out by these means or by cable; 6) ports of refuge, recreational ports, airports, and generally those which do not carry out commercial activities; 7) agriculture and livestock raising in accord with the general regulations; 8) woodlands and forestry; 9) activities in matters of environmental protection; 10) water projects, canals, and irrigation systems of interest to the Autonomous Community and mineral and thermal waters; 11) fishing in inland waters, hunting, and river fishing; 12) interior fairs; 13) promotion of the economic development of the Autonomous Community within the objectives marked by the national economic polity; 14) handicrafts; 15) museums, libraries, and conservatories of interest to the Autonomous Community; 16) monuments of interest to the Autonomous Community; 17) promotion of culture, research, and, when applicable, the teaching of the language of the Autonomous Community; 18) promotion and regulation of tourism within its territorial area; 19) promotion of sports and adequate utilization of leisure; 20) social assistance; 21) health and hygiene; and 22) the custody and protection of its buildings and installations, the coordination and other functions with respect to local police forces under the terms an organic law shall establish. (2) After five years have elapsed and through the reform of its statutes, the Autonomous Communities may then expand their competences within the framework established in Article 149.” SPAIN CONST. art. 148. “Upon the initiative of the region concerned, after consultation of local administrations, state law may assign further particular forms and conditions of autonomy to other regions according to the principles laid down in Art. 119; such forms and conditions shall concern the matters specified in Art. 117 (3) as well as the matters listed in paragraph 2 of the same article under the letters l) - with regard to the organization of the offices of the justices of the peace only -, n), and s). The law, based on an agreement between the state and the region concerned, needs the approval of the chambers with a majority of their members.” ITALY CONST. art. 116(3).

**Criteria Used:**

**To assume these powers and responsibilities, the provinces must fulfill certain objective criteria established by law. Such law shall include requirements relating to [the size of the population/the maturity of the public administration and infrastructure/the degree of economic development/a determination of financial capability].**

**Evaluation of Criteria:**

**Upon a decision of the province(s) to assume additional powers, a panel of independent experts appointed by the [Constitutional Court] shall determine whether the objective criteria have been met.**

**The decision of the experts shall be forwarded to the [Assembly]. The [Assembly] must approve the assumption of power by a resolution adopted by a majority of its members.**

**The decision of the [Assembly] may be appealed to the [Constitutional Court].**

*Adoption of Framework Legislation for Provincial Governments*

Some post-conflict constitutions provide that the central government may adopt framework legislation regarding powers that are in its exclusive competence and/or powers that are shared with provincial governments.<sup>24</sup> Framework legislation provides a framework for provincial legislation; while provinces are permitted to draft their own legislation, it must be based on the framework set by the central government. Such legislation promotes cohesion among provincial legislation and provides guidance for implementation. Consistent with this guiding framework, provincial governments may then adopt implementing legislation and policies.

**Sample Language: Framework Legislation**

**With respect to those powers within the exclusive competence of the central government and those powers shared between the central and provincial governments, the central government may adopt legislation that establishes national policy and guidance on particular matters.**

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<sup>24</sup> AUSTRIA CONST. art. 12; BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 28.

**The provincial governments are then permitted to enact implementing policies and legislation that are consistent with that framework.**

*Harmonization of Provincial Legislation*

To promote consistency in laws and policies on issues of national importance, constitutions may provide the central government with authority to adopt legislation that harmonizes the laws and policies of provincial governments with central government laws and policies. Such provisions typically provide for the use of harmonizing legislation in specific circumstances only and often require that all harmonizing legislation be approved by a set percentage of the legislature.

**Sample Language: Harmonization of Provincial Legislation**

**When it is necessary in the general interest of the state, the central government may enact legislation that harmonizes the law and policies of the provinces, even in the case of matters over which the power and authority is shared with the central government.**

**The decision to harmonize legislation in this manner shall require the support of [X] of the [Assembly].**

*Cooperation Between Central and Provincial Governments*

A post-conflict constitution may also include provisions that promote cooperation between the central government and provincial governments in the administration of their exclusive and shared powers and increase the level of interaction between the governments. One potential model for cooperation is to provide for provincial liaisons to the central government and central government liaisons to the provinces.

**Sample Language: Cooperation between Central and Provincial Governments**

**The central government shall have a Special Representative for each province as prescribed by law. The Special Representative shall serve as a liaison between the central government and the province and shall be permitted to observe the sessions of the provincial legislature. The appointment procedures, terms of service and additional duties and**

**functions of these representatives shall be prescribed by law of the [central/provincial] government[s].**

**Each province shall also appoint a Special Representative. This Special Representative shall serve as a liaison between the provincial government and the central government and shall be permitted to observe the session of the [Assembly]. The appointment procedures, terms of service and additional duties, and functions of these representatives shall be prescribed by law of the [central/provincial] government[s].**

### *Dispute Resolution Procedures*

Many post-conflict constitutions specify that disputes between the central government and provincial governments regarding the constitutionality of activities, laws, powers, or policies of the other may be brought to a constitutional court for resolution.<sup>25</sup> The constitution may also describe who may file such complaints. This language may appear in the section describing allocation of powers or the chapter describing the jurisdiction of the Constitutional Court.

### **Sample Language: Dispute Resolution**

**The [Constitutional Court] may decide disputes between the central and provincial governments concerning the constitutional status, powers, or functions of any of those governments, their departments, and agents.**

**The [Constitutional Court] may review the constitutionality of any national or provincial legislation upon application by a member of the [Assembly] or provincial legislature for an order declaring that all or part of a law is unconstitutional.**

### *Constitutional Amendments Regarding State Structure Relationship*

Many post-conflict constitutions contain a chapter describing how to amend the constitution. This language often establishes a higher approval standard for passing a constitutional amendment that alters the fundamental relationship between the central and provincial governments. This higher standard may take

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<sup>25</sup> Article 131 of the Indian Constitution provides the Supreme Court with original jurisdiction in disputes “between the Government of India and one or more States.” INDIA CONST. art. 131. *See also* ITALY CONST. art. 127; UKRAINE CONST. art. 144.

the form of an increased percentage of the vote in the legislature required to pass the amendment or requiring that the changes be submitted to a public referendum. Such a standard ensures that a larger national dialogue takes place before significant changes occur in the powers exercised by either the central or provincial governments.

### **Sample Language: Constitutional Amendments**

**An amendment to this Constitution which changes the inherent relationship between the central government and the provinces shall require [X] vote of the Assembly and provincial legislatures/ approval by [X] of eligible voters in a public referendum].**

**CHAPTER III: STRUCTURING THE EXECUTIVE BRANCH**

The executive branch of government plays an important role in any stable democratic state. In post-conflict states, the executive branch is especially important because it is a crucial component in shaping the government. In recognition of the importance of the executive, post-conflict states typically enshrine clear and detailed provisions on such matters in their constitutions.

Most constitutions include the following elements in designing the states' executive branches: (1) the structure of the executive branch; (2) the powers and functions; (3) the role of the cabinet or council of ministers; (4) the selection of the president or prime minister; (5) the removal of the president or prime minister; (6) the term of office; (7) eligibility for the position of president or prime minister; and (8) the oath of office.

**Structure of Executive Branch Systems**

There are three basic executive branch systems: presidential, parliamentary, and mixed.<sup>1</sup> In a presidential system, the president is the singular authority within the executive branch. In a parliamentary system, the prime minister and the parliament represent multiple parties and opinions within the executive branch. States with a mixed form of government combine a parliament and prime minister with a president.

In deciding which structure is most appropriate for a new government, post-conflict states frequently consider factors such as: (1) the strength of the central government; (2) the desired level of checks and balances, the ability of each branch of the central government to monitor and limit the activities of the other branches; (3) the extent of the trauma and conflict that the society has undergone; (4) the presence of established and dominant personalities and groups in the political arena; and (5) the need for compromise and flexibility.<sup>2</sup> These factors help determine which system of government fits the state's needs.

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<sup>1</sup> For instance, the United States has a presidential system, the United Kingdom has a parliamentary system, and France has a mixed presidential/parliamentary system.

<sup>2</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 178 (1998), available at [http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/).

*Presidential System*

In a presidential system, the president acts as the chief political executive of the federal government and is directly elected by the people.<sup>3</sup> The president possesses the sole power to appoint a cabinet and manage the affairs of the executive branch.

The presidential system has many advantages for post-conflict states. Presidential systems ensure the separation of powers between different branches of the central government. Effective separation of powers limits the potential that one branch of government will dominate the government. Direct election of the president increases his or her accountability to voters, and allows him or her to serve as a unifying force within the state. A unifying presence may be particularly positive in a state with significant ethnic or linguistic diversity. A presidential system may also increase stability and continuity in public policy.

Presidential systems also have potential disadvantages. In a state with multiple ethnic groups, presidential systems may limit the likelihood that members of minority groups will hold the position of president. This may limit the extent to which minority groups feel represented in the executive branch. In addition, presidential systems are widely associated with Western democracies, and may lack legitimacy in states that do not identify with Western states. The presidential system also has fewer “checks and balances” on the executive. Checks and balances refer to the ability of each branch of the central government to monitor the activities of the other branches.<sup>4</sup>

**Sample Language: Presidential System**

**The state shall have one president.**

**The President shall be the Head of State and the representative of the state abroad.**

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<sup>3</sup> The United States, Afghanistan, South Sudan, and Brazil all use this presidential structure of the executive branch.

<sup>4</sup> For a detailed discussion on the different systems, see Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 185-6 (1998); Oona A. Hathaway, *The Case for Promoting Democracy Through Export Control*, 33 HARVARD JOURNAL OF LAW & PUBLIC POLICY 18-19 (2010), available at [http://digitalcommons.law.yale.edu/fss\\_papers/830](http://digitalcommons.law.yale.edu/fss_papers/830); Alfred Stephan and Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism Versus Presidentialism*, 46 WORLD POLITICS (Oct. 1993), available at [http://www.hcs.harvard.edu/~skach/docs/worl\\_poli.pdf](http://www.hcs.harvard.edu/~skach/docs/worl_poli.pdf). Of all countries that have presidential democratic structures, only four, the United States, Colombia, Venezuela, and Costa Rica, have maintained continuous democracies for longer than thirty years.

**The President shall work cooperatively with the government and Parliamentary Assembly to ensure the regular and efficient functioning of the state.**

*Parliamentary System*

In a parliamentary system, like the United Kingdom, the prime minister serves as the chief executive of the parliamentary government and head of the cabinet. The populace elects the legislature (generally the parliament), which in turn elects the prime minister.

There are many advantages to parliamentary systems. First, parliamentary systems facilitate the inclusion of all groups within the legislature and the executive. Cabinet members are usually drawn from the legislature, enabling the inclusion of all political parties represented in the legislature in the executive.<sup>5</sup> In deeply divided societies, such inclusion can be critical to supporting a stable, sustainable government.<sup>6</sup>

In addition, parliamentary systems are flexible because coalitions can be formed to change the government on the floor of the legislature without a general election.<sup>7</sup> Also, many parliamentary systems enable elections to be called at any time, rather than be subject to the fixed terms common to presidential systems.<sup>8</sup> This facilitates accountability, as the prime minister can be removed from office at any time. Moreover, by making the executive dependent upon the confidence of the legislature, parliamentary systems foster greater government accountability to the people. There is not only greater public control over the policy-making process, but also greater transparency in the way in which decisions are made.

Parliamentary systems have proven to be more sustainable for new democracies than presidential systems. Of the many states that became independent in the three decades following the end of World War II, all continuously democratic states have parliamentary systems.<sup>9</sup>

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<sup>5</sup> It is common for cabinets to be a coalition of several different parties.

<sup>6</sup> South Africa's "grand coalition" government allows the significant political parties to be represented in the cabinet and take part in executive decision-making. Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 178 (1998).

<sup>7</sup> For instance, a discredited government may be dismissed from office by the parliament itself. This type of dismissal occurred in Ecuador in 1994.

<sup>8</sup> The United Kingdom, Canada, and Australia are instances of this type of parliamentary system.

<sup>9</sup> "The statistics are illuminating: of the 93 new democracies that gained their independence between 1945 and 1979, all of the 15 countries which remained democratic throughout the 1980s were parliamentary rather than presidential

However, parliamentary systems are also faced with potential disadvantages. While more efficient, parliamentary systems may be less stable over the short-term than presidential systems. Governing coalitions support the parliamentary system may collapse, and the government may dissolve if the executive loses the legislature's support.<sup>10</sup> Parliamentary systems may also limit individual accountability because the collective cabinet, rather than a single figure, takes responsibility for decisions.

### Sample Language: Parliamentary System

**The [Legislature/Parliament/National Assembly] shall elect the Prime Minister.**

**The Prime Minister shall have day-to-day responsibility for the management of the central government and execution of federal laws.**

**The Prime Minister determines and is responsible for the general guidelines of policy.**

**The Prime Minister conducts the proceedings of the central government in accordance with the rules of procedure adopted by the government and approved by the [President].**

### *Mixed Presidential/Parliamentary System*

A third option for executive structure is the mixed presidential/parliamentary system of government.<sup>11</sup> States with a mixed form of government combine a parliament and prime minister with a president. The president is elected directly by voters, while the cabinet is drawn from and subject to the confidence of the

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systems, including some of the developing world's most successful democracies like India, Botswana, Trinidad and Tobago and Papua New Guinea. Conversely, all the new presidential democracies from this period suffered some form of democratic breakdown." Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 178 (1998).

<sup>10</sup> "Decision-making deadlock was in part responsible for the breakdown of power sharing under Cyprus's 1960 Constitution. The latter period of the National Party's participation in South Africa's government of national unity in 1996 is a more recent instance of the potential for such arrangements to result in deadlock and to then have the potential to undermine the very unity that they were intended to stimulate." Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 178 (1998).

<sup>11</sup> This system may also be called a semi-presidential system. For instance, France, Portugal, Finland, Poland, and Sri Lanka have mixed forms of government structures.

legislature. In some states, however, the prime minister and the cabinet members are drawn from outside of the legislature. This model is common in the states of the former Soviet Union and has been effective in some post-conflict democracies.

An advantage of the mixed form of government is that it contains the positive elements of both the presidential and parliamentary systems, such as the directly elected president and the prime minister, who is subject to the majority of the legislature.<sup>12</sup> This system may also lead to greater consensus because it requires the two executive officers to agree before making important decisions.

The disadvantage of this system is that a lack of mutual consensus may lead to deadlock between the two executive officers. This potential for a stand-still is especially present when the division of responsibility between the president and prime minister is not clear and where the timing and sequencing of elections differs between the upper and lower house of the legislature.

### **Sample Language: Mixed Presidential/Parliamentary System**

**The President of the Republic shall be elected by an [absolute majority/simple majority] of the votes cast.**

**The President shall act on the advice of the Prime Minister.**

**Of the Ministers, one shall be the Head of the Government and of the Cabinet of Ministers, one shall be the Prime Minister.**

**On the proposal of the Prime Minister, the President shall appoint the other members of the government and terminate their appointments.**

***Optional:* The President of the Republic shall appoint as the Prime Minister the member of Parliament who is most likely to command the confidence of Parliament.**

### **Powers and Functions**

The executive's powers and functions differ depending on the executive system chosen. In a presidential system, the president has exclusive executive

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<sup>12</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 186 (1998).

power. In a parliamentary system, the prime minister has fewer executive powers.<sup>13</sup>

### Sample Language: Powers and Functions

#### **The [President/Prime Minister] protects and upholds this Constitution as the foundation of the state's legal order.**

States grant presidents and prime ministers two broad categories of powers in their constitutions: (1) domestic powers; and (2) foreign powers.

#### *Domestic Powers*

The executive is generally granted many domestic powers. Such powers may include: (1) signing, promulgating, and executing laws;<sup>14</sup> (2) vetoing legislation passed by the legislature;<sup>15</sup> (3) declaring a state of emergency;<sup>16</sup> (4) conferring titles, orders, and decorations;<sup>17</sup> (5) granting individual pardons and amnesties;<sup>18</sup> (6) appointing state officials and judges;<sup>19</sup> (7) announcing elections; (8) calling referenda;<sup>20</sup> and (9) dissolving the legislature.<sup>21</sup>

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<sup>13</sup> In the United States Constitution, Article II, Section 2 provides that “[t]he executive Power shall be vested in the President of the United States of America,” whereas, in the Australian Constitution, Chapter I, Part I, Article 2 declares, “[a] Governor-General appointed by the Queen shall be Her Majesty’s representative in the Commonwealth, and shall have and may exercise . . . such powers and functions of the Queen as Her Majesty may be pleased to assign to him.” UNITED STATES CONST. art. II(2). AUSTRALIA CONST. Chap. I, Part I, art. 2.

<sup>14</sup> Article 84 of the Brazilian Constitution provides that the president has the power to “sanction, enact, and cause the publication of law.” BRAZIL CONST. art. 84. Article 10 of the French Constitution provides that the president “shall promulgate Acts of Parliament.” FRANCE CONST. art. 10.

<sup>15</sup> Article 84 of the Brazilian Constitution grants the President of the Republic the power to “veto bills of law, wholly, or partially.” BRAZIL CONST. art. 84. The Guatemalan Constitution’s Article 183 provides the president with the right to veto laws issued by the Congress. GUATEMALA CONST. art. 183.

<sup>16</sup> Article 101(e) of the South Sudan Constitution provides that the president shall be responsible for “declar[ing] and terminat[ing] a state of emergency.” SOUTH SUDAN CONST. art. 101(l). Article 64 of Afghanistan’s Constitution states that the President has the duty to both “proclaim as well as terminate the state of emergency with the endorsement of the National Assembly.” AFGHANISTAN CONST. art. 64.

<sup>17</sup> SOUTH SUDAN CONST. art. 101(l); IRAQ CONST. art. 70.

<sup>18</sup> Many constitutions vest the duty of granting individual pardons and confirming death sentences with the president or prime minister. For instance, Article 72 of India’s Constitution provides the president with the power to grant pardons and to “suspend, remit, or commute the sentence of any person convicted of any offence (a) in all cases in where the punishment of sentence is by a Court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death.” INDIA CONST. art. 72. In the French Constitution’s Article 17, the president “is vested with the power to grant individual pardons.” FRANCE CONST. art. 17. South Sudan’s Constitution Article 101(h) provides the president with the power to “confirm death sentences, grant pardons, and remit convictions or penalties.” SOUTH SUDAN CONST. art. 101(h).

<sup>19</sup> Subject to many different specific procedures, many constitutions provide the executive with the power to appoint state officials, judges, and cabinet members. In the United States’ Constitution, Article II, Section 2 states that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other

**Sample Language: Domestic Powers****Essential Powers:**

**The [President/Prime Minister] signs into law bills and regulations passed by the [Legislature/Parliament/National Assembly].**

**The [President/Prime Minister] promulgates laws.**

**The [President/Prime Minister] executes laws.**

**The [President/Prime Minister] can veto legislation passed by the Legislature. The [President/Prime Minister's] veto can be overridden by [one-half/two-thirds] of the [Legislature/Parliament/National Assembly].**

**The [President/Prime Minister] declares a state of emergency, effective upon the approval of [one-half/two-thirds] of the [Legislature/Parliament/National Assembly].**

**The [President/Prime Minister] confers titles, orders, and decorations.**

**The [President/Prime Minister] grants individual pardons and amnesties.**

**The [President/Prime Minister] appoints state officials and judges.**

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public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States.” UNITED STATES CONST. art. II(2). Likewise, in Afghanistan’s Constitution, Article 64 provides that the president shall “[a]ppoint the Ministers, the Attorney General, the Head of the Central Bank, the National Security Director as well as the Head of the Red Cross” along with the Justices of the Supreme Court, foreign political ambassadors, judges, and officers of the armed forces, police, and national security. AFGHANISTAN CONST. art. 64.

<sup>20</sup> In France’s Constitution, Article 11 says that the president may “submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation.” FRANCE CONST. art. 11.

<sup>21</sup> Where constitutions grant the executive power to dissolve the National Assembly/Parliament, they often specify when this can happen. “[T]he President may not . . . dissolve the Croatian Parliament if the impeachment proceedings against him for violation of the Constitution have been instituted.” CROATIA CONST. art. 103. In contrast, Article 62(c) of the Czech Constitution grants the president the power to dissolve the Chamber of Deputies with no restrictions. CZECH REPUBLIC CONST. art. 62(c). Article 48 of the Latvian Constitution grants the president the power to propose the dissolution of Parliament and the Parliament then votes on the proposed dissolution. LATVIA CONST. art. 48.

**Optional Powers:**

**The [President/Prime Minister] announces elections.**

**The [President/Prime Minister] calls referenda.**

**The [President] can dissolve the Parliamentary Assembly, after consultation with and approval from the [Prime Minister], and in accordance with this Constitution.**

**The [President/Prime Minister] dissolves the Legislature.**

*Domestic Powers in a Mixed Presidential/Parliamentary System*

In a mixed presidential/parliamentary executive system, domestic powers and functions are allocated between the president and prime minister in much the same way as in presidential or parliamentary systems.<sup>22</sup>

**Sample Language: Domestic Powers (Mixed System)**

**The President shall be responsible to Parliament for the due execution and performance of the powers and functions of the Office of President under the Constitution and under any other law.**

**The President shall declare states of emergency within the state in accordance with the provisions of the Constitution.**

**The President shall preside at ceremonial sittings of Parliament.**

**The President shall summon, adjourn, and dissolve Parliament.**

**The President shall appoint the Prime Minister, the other ministers of the Cabinet of Ministers, and deputy ministers.**

**The President shall act in a manner consistent with the provisions of the Constitution or written laws.**

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<sup>22</sup> In the French Constitution, executive domestic powers and functions are allocated between the President of the Republic and the prime minister. For instance, Article 17 of the French Constitution vests the power to grant individual pardons with the President of the Republic, and Article 21 provides the prime minister with the power to make appointments to civil and military posts. FRANCE CONST. arts. 17, 21.

**The President shall act in accordance with international law and custom.**

**The President may grant full or conditional pardons.**

**The Prime Minister shall direct the operation of the Cabinet of Ministers.**

**The Prime Minister shall be responsible for national defense.**

**The Prime Minister shall ensure the implementation of legislation.**

**The Prime Minister shall determine the number of ministers and ministries and the assignment of subjects and functions to ministers.**

### *Foreign Affairs Powers*

The executive's foreign affairs powers may include: (1) representing the state abroad;<sup>23</sup> (2) negotiating the terms of treaties;<sup>24</sup> (3) appointing ambassadors and envoys;<sup>25</sup> and (4) accrediting and receiving foreign ambassadors and envoys.<sup>26</sup>

### **Sample Language: Foreign Affairs Powers**

**The [President/Prime Minister] represents the state abroad.**

**The [President/Prime Minister] negotiates the terms of treaties.**

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<sup>23</sup> In Article 183, the Guatemalan Constitution provides that the president is responsible for "direct[ing] foreign policy and international relations." GUATEMALA CONST. art. 183. Article 119 of the Yemeni Constitution lists the first duty of the president as representing the state of Yemen both internally and abroad. YEMEN CONST. art. 119.

<sup>24</sup> In Section 99 of Argentina's Constitution, the president is vested with the power to "conclude[] and sign[] treaties, concordats, and other agreements required for the maintenance of good relations with international organizations and foreign powers" as well as to "receive[] their ministers and admit[] their consuls." ARGENTINA CONST. art. 99. As in the Argentine Constitution, often the executive is responsible for negotiating the terms of treaties and signing them into effect.

<sup>25</sup> According to Article 35 of the Mauritania Constitution, the president is responsible for "accredit[ing] ambassadors and special envoys from foreign powers." MAURITANIA CONST. art. 35. Similarly, in Article 115 of the Maldives' Constitution, the president is required "to appoint members of diplomatic missions to foreign countries and international organizations." MALDIVES CONST. art. 115.

<sup>26</sup> In Article 115, the Maldives Constitution provides that it is the president's duty "to receive and recognize the credentials of diplomatic and consular representatives of foreign countries and other parties and to accept their letters of recall." MALDIVES CONST. art. 115. Article 2 of the United States Constitution provides that the president "shall receive Ambassadors and other public Ministers." UNITED STATES CONST. art. 2.

**The [President/Prime Minister] appoints ambassadors and envoys.**

**The [President/Prime Minister] accredits and receives ambassadors and envoys.**

*Commander-in-Chief*

Many post-conflict constitutions grant the executive power as the Commander-in-Chief of the armed forces.<sup>27</sup> The Commander-in-Chief generally has discretion over the appointment and dismissal of armed forces personnel.<sup>28</sup> The Commander-in-Chief may also have the power to declare war.<sup>29</sup> In addition, some constitutions include provisions for a national security council to advise the Commander-in-Chief on issues of security and defense.<sup>30</sup>

Many constitutions provide that the Commander-in-Chief of the armed forces may exercise powers with the consent of the prime minister, the legislature, or some other governing body.<sup>31</sup>

**Sample Language: Commander-in-Chief**

**The [President/Prime Minister] of the state shall be Commander-in-Chief of the armed forces.**

**The Commander-in-Chief has the power to appoint and dismiss armed forces personnel.**

**The Commander-in-Chief has the power to declare war with the consent of the [Legislature/Parliament/National Assembly].**

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<sup>27</sup> Articles 168 and 169 of the Albanian Constitution provide that the president is the General Commander of the Armed Forces who appoints the Commander of the Armed Forces upon proposal of the prime minister. ALBANIA CONST. arts. 168-169. Article 9 of the Azerbaijan Constitution provides that the president is the Commander-in-Chief of the Armed Forces. AZERBAIJAN CONST. art. 9.

<sup>28</sup> In Albania, the president, as General Commander of the Armed Forces, has the discretion to appoint and dismiss the Commander of the Armed Forces upon proposal of the prime minister. ALBANIA CONST. art. 169(2).

<sup>29</sup> In Croatia, the president, who is also the Commander-in-Chief of the armed forces, can declare war and conclude peace. CROATIA CONST. art. 99.

<sup>30</sup> Article 168 of the Albanian Constitution provides for such an advisory body; however, it does not include requirements for the selection of the National Security Council. ALBANIA CONST. art. 168.

<sup>31</sup> In Section 99, the Argentine Constitution declares that the president, as Commander-in-Chief, has the power to grant ranks to military officers and declare war with the consent and approval of the Senate and the Congress, respectively. ARGENTINA CONST. art. 99. Under the Mexican Constitution's Article 89, the president can only declare war on behalf of the Mexican United States after the Congress has passed a law declaring war. MEXICO CONST. art. 89.

***Optional:* The [National Security Council/Cabinet] shall advise the Commander-in-Chief on issues of national security and defense.**

## **Role of the Cabinet or Council of Ministers**

Many states include provisions for a cabinet or council of ministers whose role is to advise the executive on important state matters.<sup>32</sup> Constitutions may also require a balanced representation on the cabinet or council of ministers of different groups.<sup>33</sup> Constitutions commonly list the ministries or cabinet positions within the executive branch.

### **Sample Language: Role of the Cabinet or Council of Ministers**

**The [President/Prime Minister] shall appoint a [Cabinet/Council of Ministers] who are charged with the direction and control of the matters for which they are responsible.**

**The ministries have the authority to create administrative rules and regulations.**

#### **Ministries:**

**Ministry of Foreign Affairs**

**Ministry of Defense**

**Ministry of Justice**

**Ministry of the Interior**

**Ministry of Oil/Natural Resources**

**Ministry of Finance**

**Ministry of Education**

**Ministry of Public Works**

**Ministry of Health**

**Ministry of Trade/Commerce**

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<sup>32</sup> In the Indian Constitution, Articles 74 and 75 provide for a Council of Ministers, led by the prime minister, to direct and advise the president. The president is bound to act in accordance with the Council's advice. INDIA CONST. arts. 74-75. Similarly, in the Chilean Constitution, Article 33 provides for ministers of state, who are the "direct and immediate collaborators of the President of the Republic in governing and administering the State." CHILE CONST. art. 33.

<sup>33</sup> For instance, in Belgium, the Council of Ministers is appointed and must include an equal number of Dutch and French-speaking members. BELGIUM CONST. art. 99. In Switzerland, the Parliament elects the federal government's members, taking into account certain conditions that serve to allocate posts between cantons, linguistic groups, and political parties. SWITZERLAND CONST. art. 168.

**Ministry of Communication**  
**Ministry of Displacement and Migration**  
**Ministry of Culture**  
**Ministry of Water Resources**  
**Ministry of Labor**  
**[And any other ministries created by the government]**

### **Selection and Removal of the Cabinet or Council of Ministers**

Constitutions often specify the processes for selection and removal of members of the cabinet or council of ministers. In many states, the executive nominates or appoints the cabinet or council of ministers.<sup>34</sup> In mixed systems, constitutions generally identify whether the president or prime minister fulfills this function.

Granting power of selection exclusively to the executive may result in all ministers belonging to the same political party, ethnicity, or geographic region. Thus, some constitutions require the legislature to approve nominations.<sup>35</sup> Approval of legislature also encourages appointment based on expertise rather than corruption, favoritism, or nepotism.

Some constitutions, such as Costa Rica's constitution, grant the executive the power to remove the cabinet or council of ministers at will.<sup>36</sup> Other constitutions, such as those of Japan and South Africa, require the resignation of cabinet members upon a vote of no confidence by the legislature.<sup>37</sup>

#### **Sample Language: Selection and Removal of the Cabinet or Council of Ministers**

**Cabinet members shall be appointed by the [President/Prime Minister].**

***Optional:* [Cabinet members] must be approved by [two-thirds/more than one-half] of the [Legislature/Parliament/National Assembly].**

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<sup>34</sup> Article 64 of the Afghanistan Constitution provides that the president chooses the ministers. AFGHANISTAN CONST. art. 64. In contrast, Articles 114 and 115 of Ukraine's Constitution require the president to appoint the prime minister with the approval of more than one-half of the legislature. The prime minister then submits a Cabinet of Ministers, which the president has the authority to approve. UKRAINE CONST. arts. 114-115.

<sup>35</sup> The following are instances of European states that require Parliament's approval of nominated ministers: Albania, Czech Republic, Croatia, Greece, Italy, Macedonia, Slovakia, Slovenia, and Switzerland.

<sup>36</sup> COSTA RICA CONST. art. 139.

<sup>37</sup> JAPAN CONST. art. 69; SOUTH AFRICA CONST. art. 102.

***Optional:*** If the [simple majority/two-thirds] of the [Legislature] passes a motion of no confidence in the [Cabinet], the member[s] of the [Cabinet] must resign.

***Optional:*** [Cabinet members] may be removed at the discretion of the [President/Prime Minister].

### **Selection of the President or Prime Minister**

Post-conflict constitutions commonly include the process by which the president or prime minister will be selected. Usually, the president or prime minister is selected through direct election by the people or through appointment or election by the legislature.<sup>38</sup> The manner in which the president or prime minister is selected shapes political competition, the role of political parties, and the eventual structure of the political system and the government.<sup>39</sup>

For more detailed discussion of selection of the executive(s), please see Chapter VI: Building an Electoral System (Procedure for Electing the Executive).

#### **Sample Language: Selection of the President or Prime Minister**

**The election of the [President/Prime Minister] shall be under the terms prescribed by the Electoral Law.**

**The [President/Prime Minister] shall be elected by universal, free, direct, and secret ballot, and by an absolute majority of votes cast.**

**The [President/Prime Minister] shall be elected by the legislature.**

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<sup>38</sup> Article 7 of the French Constitution requires that the president be elected by an absolute majority of votes cast. FRANCE CONST. art. 7. Article 54 of the German Constitution, on the other hand, provides that the federal president is elected by a Federal Convention consisting of the members of the legislative body and “an equal number of members elected by the parliaments of the *Länder* according to the principles of proportional representation.” BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 54.

<sup>39</sup> For instance, the same number of popular votes could lead either to a coalition government or to a government where a single party has majority control, depending on how the president or prime minister is selected. See Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 178 (1998).

## Removal of the President or Prime Minister

Many states' constitutions include procedures in the event that the executive is not able to fulfill his duties. The most common reasons for removal of the executive are disability, death, or impeachment.

### *Disability or Death of the Executive*

State constitutions typically provide for situations in which the executive is subject to a temporary disability, a permanent disability, and death. For a short-term disability, most constitutions designate another state official to assume presidential powers.<sup>40</sup> If the disability is permanent, or if the president or prime minister dies, constitutions often require new elections.<sup>41</sup>

### **Sample Language: Disability or Death of the President or Prime Minister**

**In the case that the [President/Prime Minister] is temporarily unable to fulfill his or her duties, the [Vice President] shall temporarily assume his or her duties.**

**In the case that the [President/Prime Minister] is unable to fulfill his or her duties due to permanent disability or death, new elections shall be called in accordance with the law.**

**If it is unclear whether the [President/Prime Minister] is able to fulfill his or her duties, the [Council of Ministers/Cabinet] shall make a determination on the [President/Prime Minister]'s fitness.**

### *Impeachment of the Executive*

Many constitutions contain provisions for impeachment of the executive to address instances in which the executive is accused of misconduct. Generally, impeachment processes are limited to willful actions that undermine the

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<sup>40</sup> Article 7 of the French Constitution grants the Senate president the power to perform the president's duties in the case of the president's temporary disability. FRANCE CONST. art. 7. Article 64 of the Austrian Constitution grants this power to the Federal Chancellor. AUSTRIA CONST. art. 64.

<sup>41</sup> AUSTRIA CONST. art. 64.

constitution or the sovereignty of the state.<sup>42</sup> Many state constitutions require that a certain proportion of the legislature first give notice of an intention to move for removal of the executive before the impeachment process is actually implemented.<sup>43</sup>

### Sample Language: Impeachment of the Executive

**The [Legislature/Parliament/National Assembly] shall have the power to impeach the [President/Prime Minister].**

**[One-third/one-half/two-thirds] of the [Legislature/Parliament/National Assembly] may introduce a motion to impeach the [President/Prime Minister].**

**If [X] of the [Legislature/Parliament/National Assembly] vote to impeach the [President/Prime Minister], he or she shall immediately abdicate the office.**

**New [presidential/executive] elections must be called within [X] days in accordance with the law.**

### Term of Office

Many constitutions include provisions indicating the length of time for which the executive may remain in office and the number of opportunities for re-election or re-appointment.<sup>44</sup> The terms of office range from as short as one year to as long as seven years.<sup>45</sup> Most commonly, state constitutions provide for a four-

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<sup>42</sup> Some European states, such as Germany and Slovakia, incorporate into their Constitutions provisions for removing the president in the case that he or she violates certain principles. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 61. SLOVAKIA CONST. art. 106.

<sup>43</sup> In the Pakistani Constitution, Article 47 requires that at least one-half of the legislature give written notice of its intention to move for the president's removal before beginning the impeachment process. PAKISTAN CONST. art. 47. In Article 11 of the Philippines' Constitution, the impeachment provision requires one-third of the members of the House of Representatives to approve the Articles of Impeachment before the impeachment trial can begin before the Senate. PHILIPPINES CONST. art. 11. Article 12 of the Irish Constitution requires that a proposal for impeachment may only be adopted "upon a resolution of that House supported by not less than two-thirds of the total membership thereof." IRELAND CONST. art. 12.

<sup>44</sup> SWITZERLAND CONST. art. 152; Article 127(2) of the Polish Constitution allows the president to hold a maximum of two five-year terms. POLAND CONST. art. 127(2).

<sup>45</sup> Article 85(1) of the Italian Constitution provides that Italy's president serves seven years, while Article 176 of the Swiss Constitution provides that Switzerland's federal president is elected by the Parliament for a term of one year. ITALY CONST. art. 85(1). SWITZERLAND CONST. art. 176.

or five-year presidential term.<sup>46</sup> Longer terms of office allow for greater continuity, while shorter terms make it easier to remove officials whom the populace disapproves of.

### Sample Language: Term of Office

**The [President/Prime Minister] shall be [elected/appointed] for a term of [four/seven] years.**

**No individual may serve more than [two/three] terms as [President/Prime Minister].**

### Eligibility

Constitutions usually provide that candidates for the executive office must be of a certain age and citizenship.<sup>47</sup> Additionally, in some states, the executive may be precluded from holding any other office.<sup>48</sup> Constitutions may also preclude the executive from holding an official office in any political party.<sup>49</sup>

### Sample Language: Eligibility

**The [President/Prime Minister] must be at least [30/40] years of age.**

**The [President/Prime Minister] must be a citizen of the State.**

**The [President/Prime Minister] may not serve in a leadership position of a political party, or any other appointed or elected office, while serving as [President/Prime Minister].**

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<sup>46</sup> For instance, Kenya, Brazil, Iraq, and the United States provide for Kenya four-year terms. Tanzania, Afghanistan, and Germany provide for five-year terms.

<sup>47</sup> Article 127(3) of the Polish Constitution requires presidential candidates to be Polish citizens of at least 35 years of age. POLAND CONST. art. 127(3). Article 39 of the Tanzanian Constitution requires the president to be at least 40 years old. UNITED REPUBLIC OF TANZANIA CONST. art. 39. A presidential candidate in Israel is required to be at least 30 years of age. ISRAEL CONST. art. 33.

<sup>48</sup> Article 55 of the German Constitution provides that the federal president cannot be a member of the government or a legislative body while in office. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 55. Similarly, in the Colombian Constitution, Article 197 excludes presidential candidates who held any of a list of high-ranking government positions in the year prior to running for presidential office. COLOMBIA CONST. art. 197.

<sup>49</sup> “The President shall suspend his membership in political parties and other public associations that pursue political goals for the whole term of office.” BELARUS CONST. art. 86. Similarly, the Italian Constitution says, “the presidency is incompatible with any other office.” ITALY CONST. art. 84. *See also* ALBANIA CONST. art. 89; TURKEY CONST. art. 101.

**The [President/Prime Minister] may not be a member of any other branch of government or of the government of a [region/governorate].**

**The [President/Prime Minister] may not hold any other salaried office, or engage in any trade or profession, or belong to the management or advisory board of any enterprise conducted for profit.**

## **Oath of Office**

Some constitutions require that the executive, upon assuming office, take an oath swearing loyalty to the constitution or state.<sup>50</sup> States may also specify whether the oath may be taken without religious affirmation.<sup>51</sup>

### **Sample Language: Oath of Office**

**Before assuming his or her duty, the [President/Prime Minister] shall take a solemn oath before the [Legislature/Parliament/National Assembly] swearing loyalty to the State and to the Constitution.**

**The content of the official oath shall be provided by law.**

**If the [President/Prime Minister] refuses to take the oath or takes it with a reservation, he or she shall be regarded as not having been elected.**

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<sup>50</sup> Article 94 of the Croatian Constitution requires the president to take an oath swearing loyalty to the Constitution. CROATIA CONST. art. 94. Similarly, Article 81 of the Estonian Constitution includes the exact oath the president is required to swear to the Estonian people before the Parliament. ESTONIA CONST. art. 81.

<sup>51</sup> In 1998, Gerhard Schroeder became Germany's first chancellor to pass on the Bible and simply affirm his oath. Article 136 of the German Constitution provides that "[n]o one may be compelled to take part in any ecclesiastical act or ceremony, or the use of any religious form of oath." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 136.

**CHAPTER IV: DESIGNING THE LEGISLATURE**

The legislative branch allows for the recognition and accommodation of the diverse interests of a state and its people. The two most common types of state legislatures are bicameral and unicameral. A bicameral legislature consists of two chambers, whereas the unicameral legislature consists of only one. Some commentaries argue that unicameral systems are better suited for smaller, non-federal, culturally and ethnically homogeneous states, while other commentaries argue that bicameral legislatures better serve larger, federal states.<sup>1</sup> A bicameral system may also provide a more balanced perspective on public policy, a particular concern when a state has one dominant political party.<sup>2</sup>

Constitutions usually address the following provisions in describing the legislative branch: (1) structure; (2) powers and functions; (3) committees; (4) term of office and eligibility; (5) dissolution; and (6) additional options.

**Structure of the Legislative Branch**

Constitutions often set forth the structure of the legislative branch. Generally, the structure is either bicameral or unicameral. Regardless of the structure, states usually select a Speaker to each chamber or house of the legislature.

**Sample Language: Structure of the Legislative Branch**

**Legislative power in [State] shall be vested in the [Legislature/National Assembly].**

*Unicameral*

Unicameral legislatures are usually more efficient and less expensive than bicameral legislatures.<sup>3</sup> However, the absence of a second chamber limits the

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<sup>1</sup> Edward R. Rakhimkulov, *The Relative Pros and Cons of the Second Chamber in the Ukrainian Context* (2005).

<sup>2</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 220-23 (1998), available at [http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/).

<sup>3</sup> National Democratic Institute for International Affairs, *One Chamber or Two? Deciding Between a Unicameral and Bicameral Legislature*, 3 (1996).

exercise of checks and balances or separation of powers within the legislature, and often makes minority voices more difficult to hear.<sup>4</sup>

Unicameral legislatures are common in small, ethnically and socially homogenous states where the problem of balance of political powers is less difficult to solve. However, as unicameral systems can also act as a unifying force for a state in a post-conflict divisive atmosphere, these systems may be an attractive alternative for states with divisions along regional or ethnic lines.<sup>5</sup>

### Sample Language: Unicameral

**The [Legislature] shall have one [chamber].**

**The [chamber] shall have [X] members.**

### *Bicameral*

Constitutions in a bicameral system usually allocate distinct responsibilities and rights to each chamber to create a stronger system of checks and balances. In addition, the composition of the chambers and the manner in which representatives are elected usually differ.<sup>6</sup>

A bicameral system, such as in Switzerland, is generally an effective method to combine proportional representation with recognition of other internal concerns of local governments, geographic regions, ethnic groups, and underrepresented

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<sup>4</sup> Nevertheless, some constitutions, such as the Constitution of Denmark, address the issue of checks and balances by requiring that a law pass referendum for confirmation. In Poland, the Sejm considers bills in the course of three readings. The readings involve presentations by the movers, exchanges of questions and answers between the movers and the deputies, debates on the merits, and the introduction of possible amendments. In Sweden, which has a unicameral parliament, the Riksdag implemented various reforms as substitutes for the positive features of bicameralism. These include: (1) procedural rights being given to a minority of the Riksdag, (2) members not being required to live in the areas that they represent, (3) the electoral system being reformed so that parties meeting the threshold of 4% nationally, and 12% in a constituency, receive the same proportion of Riksdag seats as they do votes, and (4) the comparatively large size of the Riksdag as a unicameral legislature, meaning that it is well populated to provide a sufficient number of parliamentarians to sit on its range of committees. Tania Weise, *Playing House—The Theory of Bicameral Parliament*, INSTITUTE FOR PUBLIC POLICY RESEARCH, 7 (2003).

<sup>5</sup> For instance, a new Turkish Constitution was approved in 1982, reestablishing the unicameral parliament to restore control of the government and public order after violence claimed over 2,000 lives. Turkey has a unicameral National Assembly elected under a system of proportional representation. TURKEY CONST. arts. 7, 77-79.

<sup>6</sup> In Brazil, Australia, and Switzerland, for instance, each state or region enjoys equal representation (irrespective of its population) in the upper Chamber, and representation in the lower Chamber is proportional to each region's population. However, other federal states, notably Germany, India, and Spain, have changed this arrangement such that the various units of the federation are all guaranteed some, but not equal, representation in one of the Chambers, depending on their status and population. Trevor L. Brown, *An Examination of Bicameralism vs. Unicameralism in Federal and Unitary States*.

constituencies.<sup>7</sup> Another advantage of bicameral systems is that these systems allow the state as a whole and its individual territories or regions to be represented simultaneously in the legislative process.<sup>8</sup>

### Sample Language: Bicameral

**The [Legislature] shall have two houses. The upper house shall be called the [Senate/Other Name] and the lower house shall be called the [Assembly/Other Name].**

**The [upper house] shall have [X] members. Members shall be elected every [4-9] years.**

**The [lower house] shall have [X] members. Members shall be elected every [2-5] years.**

***Optional:* Seats in the lower house shall be allocated among electoral districts based on the population of each district, in accordance with the Election Law.**

***Optional:* Every district shall be guaranteed at least one seat in the upper house.**

#### *Selection of the Speaker*

Regardless of whether constitutions create a bicameral or unicameral system, most provide for the selection of a speaker for each chamber or house of the legislature. Speakers serve as the leader of their respective chamber or house and oversee its rules and procedures.<sup>9</sup> Typically, constitutions include the manner in which the speaker will be selected and the speaker's duties.<sup>10</sup> Speakers commonly oversee the functioning of the legislature, represent the legislature to other branches of government, call extraordinary sessions of parliament, and perform other duties as defined by law.

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<sup>7</sup> Edward R. Rakhimkulov, *The Relative Pros and Cons of the Second Chamber in the Ukrainian Context*, (2005).

<sup>8</sup> Trevor L. Brown, *An Examination of Bicameralism vs. Unicameralism in Federal and Unitary States*.

<sup>9</sup> The speaker may also be called the President, Talman, Marshall, etc. Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 220-23 (1998).

<sup>10</sup> Article 89 of the Slovak Constitution enumerates the Chairman of the National Council's responsibilities. SLOVAKIA CONST. art. 89.

### Sample Language: Speaker

**The [Legislature] shall, by a [one-half/two-thirds] majority, select from its members, a Speaker.**

***Optional:* The Speaker shall be responsible for the efficient functioning of the [Legislature].**

***Optional:* The Speaker shall represent the [Legislature] to other branches of government.**

***Optional:* The Speaker shall call extraordinary sessions of [Legislature] as is necessary and prescribed by law.**

***Optional:* The Speaker shall perform other duties as defined by law and [Legislature] regulations.**

### Powers and Functions

In a democratic political system, the legislature is the main representative body that reflects the political will of the people at the national level. Its representative character helps ensure accountability while also considering the interests of diverse groups. Accordingly, post-conflict constitutions commonly grant the legislature the power to represent the goals and interests of the people, to propose legislation, and to approve legislation.<sup>11</sup> Many constitutions also prescribe that the rules and general sessions of the legislature are to be determined by law.<sup>12</sup>

Constitutions also set forth the responsibilities of the legislature. These responsibilities may include: (1) electing the prime minister (in a parliamentary system);<sup>13</sup> (2) passing laws and other administrative measures;<sup>14</sup> (3) passing

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<sup>11</sup> For instance, in Article 55 of the South Sudanese Transitional Constitution, article 55 declares, “[t]he National Legislature represents the will of the people of South Sudan and shall foster unity and nationhood, exercise legislative functions, oversee the Executive, and promote the decentralized system of government.” SOUTH SUDAN CONST. art. 55.

<sup>12</sup> The Polish Constitution’s Article 112 reserves the organization and conduct of the House of Representatives for later specification in rules of procedure adopted as law. POLAND CONST. art. 112. Article 10 of the Swedish Constitution also reserves all specific provisions regarding the Parliament for enumeration by law. SWEDEN CONST. art. 10.

<sup>13</sup> ISRAEL CONST. art. 54; FINLAND CONST. art. 47.

<sup>14</sup> YEMEN CONST. art. 2; BANGLADESH CONST. art. 65.

constitutional amendments;<sup>15</sup> (4) deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state;<sup>16</sup> (5) approving a budget for the institutions of the state;<sup>17</sup> (6) ratifying treaties signed by the prime minister or president;<sup>18</sup> (7) overseeing government administration;<sup>19</sup> (8) overseeing government regulatory and spending powers;<sup>20</sup> and (9) impeaching the executive for violating the constitution, committing a crime, or breaching his/her oath.<sup>21</sup>

Normally, constitutions require a simple majority of votes in the legislature to pass a bill. However, in certain situations, a specific number of legislators may be required to meet the quorum required to pass a new law.<sup>22</sup>

### Sample Language: Powers and Functions

**The [Legislature] shall be the primary institution of state government charged with representing the goals and interests of the people of the State.**

**The [Legislature] shall approve legislation by a [simple majority] vote.**

**Members of the [Legislature] may initiate legislation.**

**Rules for the [Legislature] shall be established by law and must be approved by [two-thirds] of the [Legislature].**

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<sup>15</sup> SOUTH AFRICA CONST. art. 44.

<sup>16</sup> BOSNIA AND HERZEGOVINA CONST. art. 4, para. 4; PAKISTAN CONST. art. 78.

<sup>17</sup> GREECE CONST. art. 72; INDIA CONST. art. 112.

<sup>18</sup> COSTA RICA CONST. art. 121.

<sup>19</sup> COLOMBIA CONST. art. 135, para. 6.

<sup>20</sup> SOUTH AFRICA CONST. art. 55(2); AUSTRIA CONST. arts. 51, 52(1); FINLAND CONST. art. 47.

<sup>21</sup> LITHUANIA CONST. art. 74; ARGENTINA CONST. sec. 53.

<sup>22</sup> In Bangladesh, Article 75 of the Constitution provides that a majority of votes will constitute a decision in Parliament as long as at least 60 Members of Parliament are present. BANGLADESH CONST. art. 75. Similarly, in Section 78 of Argentina's Constitution, a bill can become law if it is passed by a simple majority in each house of the Congress. ARGENTINA CONST. art. 78. In Bosnia and Herzegovina, legislative decisions are passed by a majority of legislators present and voting; however, "delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If these efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity." BOSNIA AND HERZEGOVINA CONST. art. IV(3).

**The [Legislature] shall publish a complete record of its deliberations and shall, save in exceptional circumstances in accordance with its rules, deliberate publicly.**

**General sessions of the [Legislature] shall be determined by law.**

**The [Legislature] shall be responsible for passing laws and administrative measures.**

*Optional:* **The [Legislature] shall be responsible for passing constitutional amendments.**

*Optional:* **The [Legislature] shall by [one-third/ one-half/ two-thirds] vote, remove the [President or Prime Minister] for gross violation of the Constitution, breach of oath, or upon disclosure of the commitment of a felony.**

*Optional:* **The [Legislature] shall be responsible for deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state.**

*Optional:* **The [Legislature] shall be responsible for approving a budget for the institutions of the state.**

*Optional:* **The [Legislature] shall be responsible for ratifying treaties signed by the [President or Prime Minister].**

*Optional:* **The [Legislature] shall be responsible for overseeing government administration.**

*Optional:* **The [Legislature] shall be responsible for overseeing government regulatory and spending powers.**

*Optional:* **The [Legislature] shall be responsible for all other powers assigned by this Constitution.**

**Sample Language: Powers and Functions (Parliamentary System)**

**The [Legislature] shall be responsible for electing the [Prime Minister] and the [Council of Ministers] [by secret ballot].**

## Committees

When describing the legislative branch, many constitutions include the legislative procedures and provisions allowing the legislature to establish both permanent (“standing”) committees and temporary (“ad-hoc”) committees.<sup>23</sup> These committees review bills thoroughly before they are considered by the entire legislature. Many legislatures maintain standing committees on issues of ongoing importance to society, such as law and justice, finance and treasury, health, and education.<sup>24</sup> However, constitutions also frequently grant the legislature power to create temporary, ad-hoc committees to address other issues as they arise.

### Sample Language: Committees

**The [Legislature] shall establish committees. Each committee shall be charged with overseeing assigned areas of law.**

**After their first reading, bills must be sent to the appropriate committee for review.**

**Committees have a duty to thoroughly vet each piece of legislation.**

**After committee review, legislation shall be returned to the Parliament for a vote.**

***Optional:* The [Legislature] shall include the following committees: [agriculture], [appropriations], [armed services], [budget], [education], [energy], [finance], [foreign affairs], [judiciary], [rules], and [others].**

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<sup>23</sup> Since its 1994 elections, Sweden's 16 committees play an important role because every matter must be referred to a committee before it is approved. *Parliamentary System*, SMORGASBORD: THE SHORTCUT TO SWEDEN available at <http://www.sverigeturism.se/smorgasbord/smorgasbord/society/government/parlament.html>.

<sup>24</sup> In Sweden, the 16 standing committees are the Constitution, Finance, Taxation, Administration of Justice, Laws, Foreign Affairs, Defense, Social Insurance, Social Welfare, Cultural Affairs, Education, Communication, Agriculture, Economic Affairs, Labour, and Housing. *Parliamentary System*, SMORGASBORD: THE SHORTCUT TO SWEDEN.

## Term of Office and Eligibility of Members

Constitutions usually provide that elected legislative representatives serve for a specific and fixed length of time.<sup>25</sup> Longer terms can provide more stability and allow legislators more freedom of action because they are not as preoccupied or concerned with re-election. Longer terms may also make legislators less susceptible to sudden, but temporary, shifts in public opinion. By contrast, shorter terms ensure greater responsiveness to public opinion because elections are more frequent. Many constitutions also establish basic eligibility criteria for political office.

For discussion of the election of the legislature, please see Chapter VI: Building an Electoral System (Procedure for Electing the Legislature).

### Sample Language: Term and Eligibility of Members

**Members of the [Legislature] shall serve [X year] terms, unless the [Legislature] is dissolved in accordance with this Constitution.**

**Any eligible voter who has reached the age of [30] by Election Day may serve as a member of the [Legislature].**

## Dissolution of the Legislature

Many constitutions contain provisions for the dissolution of the legislature under extreme circumstances.<sup>26</sup> Such provisions are often linked to votes of no

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<sup>25</sup> Lijphart explains that elected legislative representatives serve terms that range from four to nine years in the second chamber and two to five years for the first chamber. Lijphart notes that in Australia, The Netherlands, and Japan, one half of the membership of the second chamber is renewed every three years. In the United States and France, one third of the membership of the second chamber is renewed at periodic intervals. Members of the Austrian, German, and Swiss federal chambers are elected at irregular intervals, in a staggered manner. A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, (1999).

<sup>26</sup> Article 35 of the Czech Constitution provides that the president can dissolve the Legislature if: a) the Chamber of Deputies passes a vote of no-confidence in a newly appointed Government, the Premier of which was appointed by the President of the Republic on the suggestion of the suggestion of the Chamber of Deputies, b) the Chamber of Deputies fails to decide within three months on a Government bill, with the discussion of which the Government links the question of confidence, c) a session of the Chamber of Deputies is adjourned for a longer period than admissible, or d) the Chamber of Deputies has not reached a quorum for a period longer than three months, although its session was not adjourned and although it was repeatedly called to session during this period. The Chamber of Deputies cannot be dissolved three months before the expiration of its election term. In these circumstances, Article 17(2) provides that elections for a new Chamber take place within sixty days. CZECH REPUBLIC CONST. arts. 17(2), 25.

confidence, or when the legislature fails to meet its responsibilities set forth by the constitution or law.

### **Sample Language: Dissolution of the Legislature**

**The [President or Prime Minister] in accordance with this Constitution shall dissolve the [Legislature] when it fails a vote of confidence. The [President or Prime Minister] will call for new elections.**

**New elections shall be arranged within [30/60/90] days from the dissolution of the [Legislature].**

**The dissolved [Legislature] shall continue to serve until the new [Legislature] is elected. Once the new [Legislature] is elected, the members of the dissolved [Legislature] must relinquish their seats.**

### **Sample Language: Dissolution of the Legislature (Parliamentary System)**

**The [Legislature] shall be dissolved within [30/60/90] days of a new session if no candidate has received a [two-thirds] majority for Prime Minister.**

**The [Legislature] shall be dissolved if within [20] days of a new session if no candidate has received a [two-thirds] majority for Prime Minister.**

### **Additional Options**

States may include a number of other provisions in their constitutions regarding the legislative branch. Such provisions may include: (1) a code of ethics; (2) legislative immunity; and (3) quorum requirements.

#### *Code of Ethics*

Many constitutions provide for a legislative code of conduct and ethics. These rules generally include broad provisions that set out goals and objectives for legislators' conduct.<sup>27</sup> To prevent corruption, these rules often include mandatory

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<sup>27</sup> In South Africa, for instance, the code of conduct encourages members of the legislature to "maintain the highest standards of propriety to ensure that their integrity and that of their political institutions in which they serve are beyond question." *Code of Conduct in regard to Financial Interests* sec. 1 (South Africa, 1996). Article 233(1) of

financial disclosure requirements for elected and appointed officials, restrictions on gifts that members may accept, and limits on outside employment during and after their tenure.<sup>28</sup> Enforcement mechanisms generally take one of three forms: (1) a regulatory commission that is independent from and external to the legislative branch; (2) a regulatory commission within the legislature, composed of members of the legislature and independent persons; or (3) self-enforcement, whereby the members of the legislature police themselves.<sup>29</sup>

### Sample Language: Code of Ethics

**Members of the [Legislature] must conduct themselves at all times in a manner that reflects creditably on the [Legislature], and maintains and strengthens the public's trust and confidence in the integrity of the [Legislature].**

**Members of the [Legislature] shall maintain the highest standards of propriety to ensure that their integrity and that of the political institutions in which they serve are beyond question.**

**When any doubt exists as to the scope, application or meaning of any aspect of this code, the good faith of the member concerned must be the guiding principle.**

***Optional:* Members of the [Legislature] shall disclose their financial records.**

***Optional:* Members of the [Legislature] shall not receive more than [\$2000] in gifts from one individual.**

***Optional:* The [Legislature] shall establish a regulatory commission to enforce the code of ethics.**

***Optional:* There shall be an independent regulatory commission to enforce the code of ethics.**

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the Ugandan Constitution authorizes Parliament to establish a code of conduct for its members. UGANDA CONST. art. 233(1).

<sup>28</sup> National Democratic Institute, *Legislative Ethics: A Comparative Analysis*, 10 (1999), available at [http://www.accessdemocracy.org/files/026\\_ww\\_legethics.pdf](http://www.accessdemocracy.org/files/026_ww_legethics.pdf).

<sup>29</sup> National Democratic Institute, *Legislative Ethics: A Comparative Analysis*, 10 (1999), available at [http://www.accessdemocracy.org/files/026\\_ww\\_legethics.pdf](http://www.accessdemocracy.org/files/026_ww_legethics.pdf).

*Legislative Immunity*

Many constitutions enumerate protections and immunities for members of the legislature. Such provisions are designed to promote the independence of the legislature and its ability to represent the interests of the electorate. These provisions commonly include: (1) guarantees of the freedom of legislative speech; and (2) immunity from legal liability while in office.

Freedom of Legislative Speech

Some constitutions protect freedom of legislative speech to promote free discussion between legislators and citizens about their concerns.<sup>30</sup> This allows legislators to represent the interests of the people more effectively, without risk of legal liability.

Immunity from Legal Liability

Legislators may also receive immunity from legal liability while in office.<sup>31</sup> Although the immunity granted rarely is absolute, many states grant general immunity to legislators.<sup>32</sup> As with freedom of speech, such immunity allows legislators to focus on their responsibilities and duties without unnecessary legal distractions. Some states require subsequent laws to define the scope of any official immunity, while others specify the scope of immunity within the constitution itself.<sup>33</sup>

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<sup>30</sup> “No representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Croatian Parliament.” CROATIA CONST. art. 75. “The members of the House of Representatives may never be made responsible for votes cast in the exercise of their function and only by the House of Representatives on the grounds of oral or written utterances made in the course of their function.” AUSTRIA CONST. art. 57. “A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.” BANGLADESH CONST. art. 78.

<sup>31</sup> Article 46 of the German Constitution contains the indemnity and immunity provisions for members of the House of Representatives. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 46. Article 90 of the Constitution of Azerbaijan, proscribes immunity for deputies within the Legislature. AZERBAIJAN CONST. art. 90. Article 83 of the Slovenian Constitution also provides immunity for deputies. SLOVENIA CONST. art. 83. The Pakistani Constitution’s Article 66 provides Members of Parliament privileges and immunities to be defined by law. PAKISTAN CONST. art. 66.

<sup>32</sup> “A member of the Parliament enjoys immunity. Criminal charges can only be brought against him or her on proposal by the Legal Chancellor and with the consent of the majority of the complement of the Parliament.” ESTONIA CONST. art. 76.

<sup>33</sup> Article 57(7) of the Austrian Constitution provides that details of immunity will be settled by federal law. AUSTRIA CONST. art. 57(7). Article 58(2) of the South African Constitution says, “Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.” SOUTH AFRICA CONST. art. 58(2).

**Sample Language: Legislative Immunity**

**No [legislative] representative shall be prosecuted, detained or punished for an opinion expressed or vote cast.**

**A member of the [Legislature] enjoys immunity from legal liability. Criminal charges can only be brought against him or her on proposal by [a designated officer] and with the consent of the majority of the complement of the [Legislature].**

***Optional:* Other privileges and immunities of the [legislative] members may be prescribed by national legislation.**

***Quorum Requirements***

Most constitutions specify quorum requirements necessary for the legislature to conduct business.<sup>34</sup> The term “quorum” refers to the minimum number or ratio of the total legislature that are required to be present to call a session to order. In the absence of a quorum, a legislature cannot conduct official business, as there is not sufficient representation to make decisions affecting the state.

**Sample Language: Quorum Requirements**

**[40/50/60 percent] of the members of the [Legislature] shall represent quorum.**

**Where at any time during a meeting of the [Legislature] there are fewer than [20/80/100] members present, the person presiding shall adjourn the session without question.**

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<sup>34</sup> For instance, in Bosnia Herzegovina, the House of Peoples has fifteen members: five Bosniacs, five Croats, and five Serbs. Nine delegates, three from each group, are required to satisfy quorum requirements. BOSNIA AND HERZEGOVINA CONST. art. IV(1). The Costa Rican Constitution provides in Article 117 that the “Assembly may not hold its sessions unless they are attended by two-thirds of the total membership.” COSTA RICA CONST. art. 117.

**CHAPTER V: CREATING A JUDICIARY SYSTEM**

All post-conflict constitutions establish an independent judiciary to uphold the constitution and enforce the laws of the rebuilt state. Post-conflict states generally include extensive provisions addressing the role and structure of the judiciary to ensure its independence and transparency. These provisions include: (1) powers and functions of the judiciary; (2) judicial independence; (3) judicial authority; (4) international legal obligations; (5) structure of the judiciary; and (6) administration of the judiciary.

**Powers and Functions**

States include general provisions in their constitutions concerning the judiciary's functions to ensure justice and safeguard the rights and interests of the people within its boundaries.<sup>1</sup> States may also specify that the judiciary's function is to administer justice in accordance with the constitution and binding international laws and norms.

**Sample Language: Powers and Functions**

**The courts shall ensure equal justice for all. They shall safeguard the rights and legitimate interests of all citizens, individuals, legal entities, and the State.**

**The courts shall be responsible for the administration of justice in accordance with the Constitution, as well as statutes and binding international laws and norms.**

**Judicial Independence**

Most post-conflict constitutions include provisions for an independent judiciary to support the development of impartial and neutral body to enforce laws and uphold justice.<sup>2</sup> While many constitutions are vague in defining the independence of the judiciary, it is important for states that are rebuilding to be specific about the role of the judiciary and its relationship to other branches of the

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<sup>1</sup> "The judicial branch of government shall safeguard the rights and legitimate interests of all citizens, legal entities, and the state." BULGARIA CONST. art. 117.

<sup>2</sup> "The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan." AFGHANISTAN CONST. art. 116. "The Judiciary is independent and separate from the legislative and executive branches of government. It enjoys financial and administrative autonomy. Justice is rendered in the name of the people and nobody may be a judge in his or her own cause." RWANDA CONST. art. 140.

government. This specificity is especially important as it relates to the protection of human rights, the promotion of political stability, and the establishment of a healthy economy.<sup>3</sup> Ensuring the judiciary is separate from other branches of government is particularly beneficial in establishing the independence of the judiciary.<sup>4</sup>

### *Judicial Council*

Creating a judicial council to oversee the judiciary and to ensure the efficacy and independence of its judges is a recent trend in constitution drafting.<sup>5</sup> State constitutions often address the selection, composition, administration, and financing of a judicial council.<sup>6</sup> Constitutions may specify who is eligible to serve on the council (for instance, judges, representatives of other branches of the government, members of professional associations, and academics), the number of members on the council, and the length of years served on the council. Constitutions also include specific roles and duties of the judicial council, such as oversight of the judiciary's budget, administration of the judiciary, selection of lower court judges, and training and policymaking.<sup>7</sup>

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<sup>3</sup> General Assembly of the United Nations, Resolution 217, A(III) (Dec. 10, 1948).

<sup>4</sup> For instance, Portugal's Constitution separates the judiciary from other branches of government in Article 203, saying "[t]he courts shall be independent and subject only to the law." PORTUGAL CONST. art. 203. In Bahrain's Constitution, Article 104 explains that "[t]he honour of the judiciary, and the probity and impartiality of the judges, is the basis of government and the guarantee of rights and freedoms. No authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with. The law guarantees the independence of the judiciary, and the law shall lay down the guarantees of judges and the provisions pertaining to them." BAHRAIN CONST. art. 104.

<sup>5</sup> Venezuela's Article 217 of the Constitution provides for a Council on the Judiciary, an organ responsible for "ensuring the independence, efficiency, discipline, and decorum of the Courts and of guaranteeing the benefits of a judicial career to judges." VENEZUELA CONST. art. 217. In Article 172, Kenya's Constitution provides for a Judicial Service Commission to "promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice." KENYA CONST. art. 172. Articles 131 and 136 of the Syrian Constitution provides for a High Judicial Council that is charged with the appointment, transfer, and dismissal of judges. SYRIA CONST. arts. 131, 136.

<sup>6</sup> For instance, in Albania's Constitution, Article 147 provides for a High Council of Justice consisting of the President of the Republic, several members of the executive branch, and nine elected judges from all court levels. ALBANIA CONST. art. 147. Similarly, Article 178 of South Africa's Constitution outlines the composition of a Judicial Service Commission, addresses how the members are selected and removed, and specifies particular responsibilities and powers vested in the Commission. SOUTH AFRICA CONST. art. 178. In the Kenyan Constitution's Article 173, the constitutional drafters established a fund for the administration of the Judiciary. KENYA CONST. art. 173. The separate funding for the judicial branch further isolates the judiciary from other branches of government.

<sup>7</sup> Article 131 of Slovenia's Constitution explains that "[t]he Judicial Council is composed of eleven members. The National Assembly elects five members on the proposal of the President of the Republic from among university professors of law, attorneys and other lawyers, whereas judges holding permanent judicial office elect six members from among their own number. The members of the council select a president from among their own number." SLOVENIA CONST. art. 131. The Constitution of the Maldives also provides for a Judicial Service Commission. It assigns the Commission the responsibility to "appoint, promote and transfer Judges . . . to make recommendations to

## Sample Language: Judicial Independence

### Separation of Powers

**The judiciary of [State] shall be autonomous and independent.**

**Judges shall be autonomous, independent, and bound only by the law.**

**Interference with the activities of a judge or the courts of law by any institutions of state power, political parties, public organizations, or citizens, shall be prohibited and incur liability as provided for by law.**

**State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.**

### Judicial Service Commission

**The Judicial Service Commission shall ensure the autonomy, independence, impartiality, competence, and efficiency of the judiciary.**

**The responsibilities of the Judicial Service Commission shall include, but shall not be limited to oversight of the judiciary's budget; the administration of the judiciary; and the appointment, discipline, and removal of prosecutors, deputy prosecutors, and judges, apart from the judges of the Constitutional Court. The composition and additional responsibilities of the Judicial Service Commission shall be defined by law.**

**The Judicial Council is composed of [X] members. On the proposal of the president, the Assembly elects [X] members from among university professors of law, attorneys and other lawyers; judges holding permanent judicial office elect [X] members from among their own number. The members of the council select a president from among their own number.**

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the President on the appointment of the Chief Justice and Judges of the Supreme Court; to investigate complaints about the Judiciary, and to take disciplinary action against them . . . to make rules: regarding schemes for recruitment and procedures for the appointment of Judges; ethical standards of Judges; providing for such matters as are necessary or expedient for the exercise, performance and discharge of the duties and responsibilities of the Commission . . .” MALDIVES CONST. art. 159.

**The Judicial Council shall have responsibility for the appointment, discipline and removal of judges and in their disciplinary responsibilities shall decide in accordance with the Constitution and law.**

### **Judicial Authority**

Constitution typically provide the judiciary with authority to act as a check and balance upon other branches of government. Such authority includes the judiciary's powers of review and the binding nature of judicial decisions are upon other government branches.<sup>8</sup>

#### **Sample Language: Judicial Authority**

**State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.**

**The Courts of Law may render decisions on civil law and criminal law matters, and may review the decisions of administrative bodies.**

**Unless otherwise specified in the applicable law for the purpose of protecting the private lives of the parties, protecting the interests of minors, protecting a business secret, or protecting another important public or security interest, all Courts of Law shall hold proceedings in public and all judicial decisions shall be announced publicly.**

**The judiciary shall in no way be administered by the executive authority, including the Ministry of Justice. The judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law, without interference from the legislative or executive authorities.**

**The three authorities – legislative, executive, and judicial – shall be separate and independent of one another.**

**The Courts of Law may decide that the legislative or executive branch has failed to fulfill a constitutional obligation.**

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<sup>8</sup> SOUTH AFRICA CONST. art. 165.

## Structure of the Judiciary

Constitutional determination of the role and structure of the courts varies from state to state. Most constitutions establish a supreme and/or constitutional court in the constitution. State constitutions may also establish the state's lower courts, or may leave the creation of these courts to the legislature.<sup>9</sup> In cases where the constitution establishes the courts, the constitution generally includes provisions concerning jurisdiction of the courts and standing to bring cases to the various courts.<sup>10</sup> Sections of state constitutions focusing on the structure of the judiciary often include: (1) the role and responsibility of the courts; (2) the existence of national, local, and provincial courts; (3) the independence of the courts from other government agencies, organizations, and individuals; (4) the binding effect of court decisions; (5) an enumeration of some or all of the courts; and (6) authority to issue decisions on civil and criminal law and to review administrative decisions.<sup>11</sup>

### Sample Language: Structure of the Judiciary

#### **Option 1: List of Constitutionally-Recognized Courts**

**The courts shall consist of [provide court names].**

#### **Option 2: Establishment of Courts**

**The Courts of Law shall consist of a Constitutional Court, a Supreme Court, and such District Courts, Municipal Courts and Minor Offence Courts as are established by law.**

#### *Constitutional Court*

Many post-conflict states create a constitutional court to uphold and enforce the constitution.<sup>12</sup> Constitutions generally specify that the constitutional court makes final interpretations of the constitution, defends the constitution, and is the

<sup>9</sup> "The courts are: (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts." SOUTH AFRICA CONST. art. 166.

<sup>10</sup> Articles 167 to 170 of the South African Constitution describe the structure and jurisdiction of the Constitutional Court and the Supreme Court; these articles also describe the jurisdiction of the High Court and Magistrate Courts.

<sup>11</sup> "Judicial power shall be exercised via constitutional, civil, administrative, and criminal legal proceedings and in other forms specified by the of Law." AZERBAIJAN CONST. art. 125.

<sup>12</sup> ETHIOPIA CONST. art. 61; AUSTRIA CONST. art. 137; CHILE CONST. art. 81.

highest court in all constitutional matters.<sup>13</sup> States may include the definition of a constitutional matter to support a broader understanding of issues that can be referred to the constitutional court.<sup>14</sup>

Alternatively, rather than creating a constitutional court, drafters may specify that the state supreme court will exercise powers of constitutional review.<sup>15</sup>

### **Sample Language: Constitutional Court**

**The Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters.**

**The Constitutional Court makes the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.**

**The Constitutional Court is the highest court in all constitutional matters.**

**A constitutional matter includes any issue involving the interpretation, protection, or enforcement of the Constitution.**

**OR**

**The Supreme Court has the power to declare any legal provision or decision by the courts unconstitutional, in the manner and within the scope established in this Constitution and the law.**

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<sup>13</sup> “The Constitutional Court: (a) is the highest court in all constitutional matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.” SOUTH AFRICA CONST. art. 167(3).

<sup>14</sup> “A constitutional matter includes any issue involving the interpretation, protection, or enforcement of the Constitution.” SOUTH AFRICA CONST. art. 167(7).

<sup>15</sup> Article 49(2)(a) of the Eritrean Constitution assigns the role of interpreting and upholding the Constitution to its Supreme Court: “The Supreme Court shall have sole jurisdiction of interpreting this Constitution and the constitutionality of any law enacted or any action taken by government.” ERITREA CONST. art. 49(2)(a). Similarly, Article 132 of the Paraguayan Constitution provides, “The Supreme Court of Justice has the power to declare any legal provision or decision by the courts unconstitutional, in the manner and within the scope established in this Constitution and the law.” PARAGUAYAN CONST. art. 132.

Composition of the Constitutional Court

Constitutions generally set the number of judges on the constitutional court, designate a term length, and articulate grounds for removal or suspension of constitutional court judges.<sup>16</sup>

**Sample Language: Composition of the Constitutional Court**

**The Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and [X] other judges.**

**A matter before the Constitutional Court must be heard by at least [X] judges.**

**A Constitutional Court judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].**

**Constitutional Court judges shall serve until age [X] unless they resign or are dismissed by judgment.**

Selection of Constitutional Court

Constitutions may also provide for the selection process for judges on the constitutional court.

**Sample Language: Selection of the Constitutional Court****Option 1: Nomination and Approval**

**The judges of the Constitutional Court shall be nominated by the [President/Parliament/Judicial Council] and shall require for appointment the approval of a majority of the present and voting members of [one chamber/both chambers of government].**

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<sup>16</sup> “The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.” SOUTH AFRICA CONST. art. 167. “1. The Constitutional Court shall be composed of thirteen judges, ten of whom shall be appointed by the Assembly of the Republic and three co-opted by those ten. 2. Six of those judges who are appointed by the Assembly of the Republic or are co-opted shall obligatorily be chosen from among the judges of the remaining courts, and the others from among jurists. 3. The term of office of judges of the Constitutional Court shall be nine years and shall not be renewable. 4. The judges of the Constitutional Court shall elect its President. 5. Constitutional Court judges shall enjoy the same guarantees of independence, security of tenure, impartiality and absence of personal liability and shall be subject to the same incompatibilities as the judges of the other courts. 6. The law shall lay down the immunities and other rules governing the status of Constitutional Court judges.” PORTUGAL CONST. art. 222.

OR

**Option 2: Appointment or Approval**

**The Judges of the Constitutional Court shall be appointed by the [President] or by [approval of a majority of the present and voting members] of [both chambers] from a list of nominees approved by the Judicial Council.**

Jurisdiction of the Constitutional Court

Constitutions that establish constitutional courts generally establish the jurisdiction of the constitutional court to hear and decide specific matters arising under the constitution. For instance, constitutions may assign to the constitutional court the responsibility to determine issues related to the constitutionality of legislative and executive acts, failure to implement the constitution, constitutional disputes, and the legality of constitutional amendments.<sup>17</sup>

Some constitutions specify how legislative and executive decisions and orders are reviewed and brought before the constitutional court.<sup>18</sup> These provisions are crucial to establishing a system of checks and balances between the branches of the government and ensuring that all legislative and executive acts fall within constitutional boundaries. Constitutions also generally specify that the constitutional court is the body that decides if an agency or government has failed to implement the constitution.<sup>19</sup> If the constitutional court finds that a government official has violated the constitution, the matter is generally referred to the legislative body to act in accordance with impeachment proceedings.<sup>20</sup> Constitutions generally allocate responsibility to the constitutional court to decide

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<sup>17</sup> Article 82 of the Chilean Constitution explains that Constitutional Court “exercise[s] control of the constitutionality of the constitutional organic laws prior to their promulgation, and of the laws that interpret some precept of the Constitution; [and] resolve[s] questions regarding constitutionality which might arise during the processing of bills or of constitutional amendment and of treaties submitted to the approval of Congress . . . .” CHILE CONST. art. 82.

<sup>18</sup> “The Constitutional Court shall decide whether the laws and other acts of the Seimas are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws.” LITHUANIA CONST. art. 102.

<sup>19</sup> “Only the Constitutional Court may decide that Parliament or the President has failed to fulfill a constitutional obligation.” SOUTH AFRICA CONST. art. 167(4)(e).

<sup>20</sup> “The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal as well as the Members of the Seimas who have grossly violated the Constitution or breached their oath, or if it transpires that a crime has been committed, may by a 3/5 majority vote of all the Members of the Seimas be removed from office or their mandate of a Member of the Seimas may be revoked. This shall be performed according to the procedure for impeachment proceedings which shall be established by the Statute of the Seimas.” LITHUANIA CONST. art. 74.

disputes between central and provincial governments over the constitutional status or functions of those governments, the departments, and the agents.<sup>21</sup> Constitutions may also include a provision specifying that the constitutional court decides the constitutionality of any amendments to the constitution.<sup>22</sup>

### **Sample Language: Jurisdiction of the Constitutional Court**

#### **Constitutionality of Legislation and Executive Acts**

**Only the Constitutional Court may review the constitutionality of legislation and constitutional amendments.**

**Only the Constitutional Court may decide on the constitutionality of any parliamentary or provincial legislation. If the executive expresses reservations regarding the constitutionality of legislation, it will refer the legislation back to the parliament or province. While the parliament or province reconsiders the legislation, the executive may continue to hold reservations and refer it to the Constitutional Court.**

**Only the Constitutional Court may decide on the constitutionality of parliamentary or provincial legislation if a member of the Assembly or province applies for an order declaring that all or part of an Act is unconstitutional.**

**The Constitutional Court makes the final decision on whether an act of the Assembly or a province, or conduct of the executive, is constitutional.**

#### **Failure to Implement the Constitution**

**Only the Constitutional Court may decide that the legislative or executive branch has failed to fulfill a constitutional obligation.**

#### **Constitutional Disputes**

**The Constitutional Court may settle disputes between the central government and provinces.**

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<sup>21</sup> “Only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.” SOUTH AFRICA CONST. art. 167(4)(a).

<sup>22</sup> “Only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution.” SOUTH AFRICA CONST. art. 167(4)(d).

**Only the Constitutional Court may decide disputes between the central and provincial governments concerning the constitutional status, powers or functions of any of those governments, their departments and agents.**

**Only the Constitutional Court may certify a province's constitution.**

### **Constitutional Amendments**

**Only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution.**

### **Standing to Bring Cases before the Constitutional Court**

Post-conflict constitutions vary as to considerations of who has standing to bring cases to the constitutional court. Standing refers to permission to bring an issue or question before the constitutional court. Some states allow any person to initiate proceedings if he or she believes that his/her rights, as enumerated under the constitution, have been violated by state legislation, policies, or practices.<sup>23</sup> Some states also allow persons to appeal such issues directly to the constitutional court from any other court.<sup>24</sup> Additionally, constitutions may include provisions for the executive and legislative branches to initiate proceedings in the event of a disagreement of the compatibility of laws with the constitution.<sup>25</sup>

### **Sample Language: Standing before the Constitutional Court**

**National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice, and with leave of the Constitutional Court, to bring a matter directly to the Constitutional**

<sup>23</sup> See BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 19. Another instance is Part IX, Section 159 and 161 of the Spanish Constitution, which allows individuals to lodge direct complaints to the Constitutional Court when an individual has been “discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance, or in situations allowed by law.” SPAIN CONST. arts. 159, 161. Similarly, Chapter 8, Article 167 of the South African Constitution allows individuals to bring cases to the Constitutional Court “when it is in the interest of justice and with leave of the Constitutional Court.” SOUTH AFRICA CONST. art. 167.

<sup>24</sup> “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court: (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.” SOUTH AFRICA CONST. art. 167(6).

<sup>25</sup> “(1) The Government, no less than 1/5 of the members of the Parliament, and the courts shall have the right to address the Constitutional Court concerning legal acts specified in Article 105 (1). (2) No less than 1/5 of the members of the Parliament and the courts shall have the right to address the Constitutional Court concerning the conformity of acts of the President with the Constitution and the laws. (3) No less than 1/5 of the members of the Parliament, the courts, and the President of the Republic of Lithuania shall have the right to address the Constitutional Court concerning the conformity of an act of the Government with the Constitution and the laws.” LITHUANIA CONST. art. 106.

**Court, or to appeal directly to the Constitutional Court from any other court.**

**Any person may initiate proceedings before the Constitutional Court if such person believes that a right or interest belonging to such person and protected by this Constitution has been violated. The Constitutional Court may decide on such a complaint only when the petitioning party has exhausted all other judicial or administrative remedies that are reasonably available.**

**The [President/Assembly] on the motion of [X] of its members may initiate proceedings in the event of disagreement over the compatibility of any law or state action with this Constitution.**

**The Constitutional Court may itself initiate proceedings to assess the constitutionality and legality of state actions, as provided in this Constitution.**

#### Binding Effect of Constitutional Court Rulings

A binding clause is included to assert that rulings made by the constitutional court are final and binding upon all agencies, organizations, official institutions, and individuals.<sup>26</sup>

#### **Sample Language: Binding Effect of Constitutional Court Rulings**

**A ruling by the Constitutional Court shall be universally binding, effective, and final.**

#### *Supreme Court*

Most constitutions include the creation of a supreme court that acts as the state's highest appellate court. States without a constitutional court delegate constitutional review to a supreme court.<sup>27</sup> Supreme court decisions are generally

<sup>26</sup> “The decisions of the Constitutional Court on issues assigned to its jurisdiction by the Constitution shall be final and may not be appealed.” LITHUANIA CONST. art. 107(2). “The Constitutional Court makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.” SOUTH AFRICA CONST. art. 167(3)(c).

<sup>27</sup> The Eritrean Constitution's Article 49(2)(a) assigns the role of interpreting and upholding the Constitution to its Supreme Court: The Supreme Court shall have “sole jurisdiction of interpreting this Constitution and the constitutionality of any law enacted or any action taken by government.” ERITREA CONST. art. 49(2)(a). The

final and binding upon agencies, government entities, and individuals. One of the main functions of the supreme court is to ensure uniform implementation of the law by other courts within the state.<sup>28</sup>

### Sample Language: the Supreme Court

**The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.**

**The Supreme Court shall ensure uniform implementation of the law by the other Courts of Law.**

#### Composition of the Supreme Court

Constitutions generally establish the number of judges, designate the terms of service, and articulate grounds for removal or suspension of judges.<sup>29</sup>

### Sample Language: Composition of the Supreme Court

**Judges of all Courts, including the Supreme Court, shall be appointed, suspended and relieved from duty by the [President/Parliament] with the prior consent of the [Judicial Council/Parliament].**

**Judges of the Supreme Court shall be appointed for a term of [X] years.**

#### Jurisdiction of the Supreme Court

As the highest court of appeal in the state, the supreme court has jurisdiction to hear all claims upon final appeal.<sup>30</sup> Some states allow individuals appealing a case to appeal directly to the supreme court in certain instances. If a supreme court

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Paraguayan Constitution's Article 132 provides: "The Supreme Court of Justice has the power to declare any legal provision or decision by the courts unconstitutional, in the manner and within the scope established in this Constitution and the law." PARAGUAY CONST. art. 132.

<sup>28</sup> Article 215 of the Venezuelan Constitution describes the powers of its Supreme Court, including its power to "settle any conflicts that may exist between different legal provisions and declare which of them is to prevail." VENEZUELA CONST. art. 215.

<sup>29</sup> Article 168(1) of the South African Constitution provides for a Chief Justice and a Deputy Chief Justice, then sets the number of judges to be determined by the legislature. Article 177 also sets provisions for the discharge of judges in general, including Supreme Court judges. SOUTH AFRICA CONST. arts. 168(1), 177. Similarly, Article 139 of the Albanian Constitution provides that the term of a High Court Judge ends when the judge is "convicted of a crime with a final judicial decision; does not appear for duty without reason for more than 6 months; reaches the age of 65; resigns; [or] is declared incompetent to act with a final judicial decision." ALBANIA CONST. art. 139.

<sup>30</sup> Article 168(3) of the South African Constitution provides that the Supreme Court is the highest court of appeal in all matters except constitutional matters. SOUTH AFRICA CONST. art. 168(3).

coexists with a constitutional court, the supreme court may refer cases with constitutional questions to the constitutional court for review and resume review when the constitutional question has been resolved.<sup>31</sup>

### Sample Language: Jurisdiction of the Supreme Court

**The Supreme Court shall have such original jurisdiction as is provided by legislation.**

**The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.**

**The Supreme Court is the highest court in all matters except constitutional matters. Constitutional matters shall be referred to the Constitutional Court.**

### Standing to Bring Cases before the Supreme Court

Constitutions vary as to who has standing to appeal to the supreme court. In some states, individuals are required to go through an intermediary appeals court before they petition the supreme court to hear their cases.<sup>32</sup> In other states, individuals may petition directly to the supreme court.<sup>33</sup> The legislature generally decides rules for appealing to the supreme court.

### Sample Language: Standing before the Supreme Court

**The Supreme Court shall act as a court of first instance or of second instance in the cases prescribed by law.**

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<sup>31</sup> In Germany, and in many other states, when a judge believes that determining the constitutionality of a statute is crucial to the decision in a case, she may refer the constitutional issue to the Constitutional Court. The Constitutional Court then rules on the constitutionality of the law and sends its decision to the normal court, which applies the decision to the facts of the case. Sarah Wright Sheive, *Central And Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW AND POLICY IN INTERNATIONAL BUSINESS, 1212 (1995).

<sup>32</sup> "The courts of law of first instance shall be, as a rule, the district courts, to which the courts mentioned in Article 211(2) shall have an equivalent status. The courts of law of second instance shall be, as a rule, the courts of appeal. The Supreme Court of Justice shall operate as a court of first instance or of second instance in the cases prescribed by law." PORTUGAL CONST. arts. 210(3)-(5).

<sup>33</sup> "The Supreme Court of Justice shall serve as a court of instance in such cases as the law may lay down." PORTUGAL CONST. art. 210(5).

Binding Effect of the Supreme Court

Most states stipulate that supreme court decisions are binding upon the government, the legislature, and individuals.<sup>34</sup>

**Sample Language: Binding Effect of Supreme Court**

**Decisions of the Supreme Court shall be final and binding.**

*Other Courts*

In addition to a constitutional court and the supreme court, some state constitutions provide for the creation of additional courts. These other courts include: (1) administrative courts; (2) security courts; (3) bankruptcy courts; (4) personal status courts; (5) religious courts; (6) criminal courts; and (7) customary law courts.

*Shari'a in the Courts*

A state that aligns with a particular religion may provide for the role of religion in the judiciary within its constitution. For instance, some states have chosen to incorporate *Shari'a* into their constitutions and courts.<sup>35</sup> States may address specific areas of law or the creation of *Shari'a* courts.<sup>36</sup> Constitutions may incorporate *Shari'a* by specifying certain areas of law, such as personal status and family law, as under the jurisdiction of *Shari'a* courts.<sup>37</sup> *Shari'a* courts could address all questions under Islamic personal law or could have jurisdiction only

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<sup>34</sup> “Final decisions on merits, pronounced by the Supreme Federal Court, in declaratory actions of constitutionality of a federal law or normative act, shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial Power, as well as the Executive Power.” BRAZIL CONST. art. 102(2).

<sup>35</sup> “Islamic jurisprudence shall be a major source of legislation.” SYRIA CONST. art. 3 (1973). Similarly, Article 7 of the Constitution of the United Arab Emirates provides that “Islam is the official religion of the Union. The Islamic *Tiara's* shall be a main source of legislation in the Union. The official language of the Union is Arabic.” UNITED ARAB EMIRATE CONST. art. 7.

<sup>36</sup> Malaysia uses separate courts to address religious crimes, which are enforceable only against those who profess being Muslim, and crimes against federal law. The Malaysian Constitution declares, “. . . Syariah courts, which shall have jurisdiction only over person professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so fa[r] as conferred by federal law[], the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.” MALAYSIA CONST. List II, para. 1 (1957). Nigeria also uses a separate court system, reserving “question[s] of Islamic personal law” to the *Shari'a* Court of Appeal. NIGERIA CONST. art. 262 (1999).

<sup>37</sup> The Lebanese Constitution “guarantees that the personal status and religious interests of the population, to whatever religious sect they belong, is respected” and under the laws, specialized courts also known as confessional courts have jurisdiction over personal status issues, including two levels of the *Shari'a* courts (First Instance and Supreme *Shari'a* Court), with Sunni and Shi'a (Jafari) divisions. LEBANON CONST. art. 9.

over those matters delegated in a state's constitution.<sup>38</sup> Alternatively, constitutions may use *Shari'a* courts as general courts with jurisdiction over all legislated matters.<sup>39</sup>

### Administration of the Judiciary

In addition to judicial provisions specific to certain courts, constitutions often contain general provisions for the powers and functions of judges. Constitutions may include a number of provisions, including: (1) impartiality; (2) composition of the courts; (3) appointment of judges; (4) qualifications and diversity; and (5) term of years and removal.

#### *Impartiality*

Constitutions generally provide for the impartiality and independence of judges. For instance, constitutions may include incompatibility provisions providing that judges may not hold positions incompatible with their positions as judges of the courts of law.<sup>40</sup>

#### **Sample Language: Impartiality**

**The Courts of Law shall be autonomous and independent from any organ, authority, office, group of individuals, or individual.**

**During their term of office, judges shall not hold any other public office or engage in any other service or profession that is determined by law to be incompatible with the judicial function.**

#### *Composition of Other Courts*

Some constitutions stipulate the number of judges on each court, specifically the constitutional and supreme courts. Those constitutions that do not specify the

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<sup>38</sup> The Malaysian Constitution, in its State List, identifies specific matters over which the *Shari'a* courts have jurisdiction. MALAYSIA CONST. List II, State List (1957).

<sup>39</sup> All of Saudi Arabia's general courts are *Shari'a* courts. "Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality in accordance with Islamic *Shari'ah*." SAUDI ARABIA CONST. art. 8.

<sup>40</sup> LITHUANIA CONST. art. 109(2).

number of judges provide that the structure and makeup of the courts will be determined by law.<sup>41</sup>

### **Sample Language: Composition of the Other Courts**

**The establishment, scope of activities, jurisdiction, composition, and structure of the Courts of Law shall be regulated by law.**

#### *Appointment of the Judges*

Constitutions may delineate how judges are selected. Three main options exist: (1) cooperative selection; (2) presidential selection with parliamentary approval; and (3) parliamentary selection. Some states use a combination of two or three of the options to select judges for the various courts.<sup>42</sup> In any of the options, the judicial council may play an important role in nominating and/or approving judges.

#### Cooperative Selection

In cooperative selection, the number of judges is constitutionally fixed. The constitution allots a set number of judges to each selecting entity, which could be the parliament, the president, the judicial council, or any combination. For instance, in the Constitution of Bosnia and Herzegovina, the House of Representatives of the Federation chooses four justices, the Assembly of the Republika Srpska chooses two, and the President of the European Court of Human Rights chooses the remaining three members of the high court.<sup>43</sup> The Constitution of East Timor provides for one justice to be elected by parliament, and all others to be selected by a council comprised of representatives of the office of the president, the parliament, and the judicial profession.<sup>44</sup>

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<sup>41</sup> Article 167(1) of the South African Constitution specifies the number of judges on the Constitutional Court: a Chief Justice, a Deputy Chief Justice and nine other judges. However, Articles 168 to 170 leave the number of Supreme Court judges and other judges to be determined by the legislature. SOUTH AFRICA CONST. arts. 167-170. Similarly, Article 103(1) of the Lithuanian Constitution defines the term of years for the Constitutional Court only. LITHUANIA CONST. art. 103(1).

<sup>42</sup> Article 174 of the South African Constitution combines elements of each of these options in its the process for the selection of judges. SOUTH AFRICA CONST. art. 174.

<sup>43</sup> BOSNIA AND HERZEGOVINA CONST. art. 6(1)(a).

<sup>44</sup> EAST TIMOR CONST. art. 125(2).

Presidential Selection

In most presidential selection systems, the president selects the judges and the legislature approves this selection.<sup>45</sup>

Parliamentary Selection

In parliamentary selection models, a supermajority of the parliament selects the judges.

**Sample Language: Appointment of the Judges****Option 1: Cooperative Selection**

**The [Supreme/Constitutional/Other] Court is composed of [nine] judges. The president shall appoint [X] of the judges, the Assembly shall appoint [X] of the judges and the Judicial Council shall appoint [X] of the judges on the [Supreme/Constitutional/Other] Court.**

**Option 2: Presidential Selection**

**Judges of all Courts shall be selected by the president and approved by [one-half/ two-thirds] members of parliament [and the Judicial Council].**

**Option 3: Parliamentary Selection**

**Judges of all Courts shall be selected by [one-half/two-thirds] members of parliament [and approved by the Judicial Council].**

*Qualifications and Diversity*

Most constitutions describe the qualifications of judges in terms of education and high moral character.<sup>46</sup> Others also include provisions for diversity in the courts in an effort to include women and minorities.<sup>47</sup> Post-conflict constitutions

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<sup>45</sup> “The Supreme Court shall be comprised of nine members, appointed by the President and with the endorsement of the House of People.” AFGHANISTAN CONST. art. 117.

<sup>46</sup> “Judges may only be citizens with higher legal education. The conditions and procedures for selection are defined by law.” ALBANIA CONST. art. 136(5). “To be a judge of the National Court of Justice, in addition to the requirements of propriety provided for by law, the following is required: 1. Be an Ecuadorian national and in possession of political rights. 2. Hold a university degree in law legally recognized in the country. 3. Having practiced with notable rectitude the profession of attorney, judge or university instructor in law, for a period of at least ten years.” ECUADOR CONST. art. 183.

<sup>47</sup> “1. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. 2. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.” SOUTH AFRICA CONST. art. 174.

may also include provisions about the role of international judges within the judiciary, especially when the United Nations is involved in the administration of the state. Such provisions may include the qualifications of international judges, and the requirements for training on the state's laws and legal system. In addition to describing the qualifications of judges, constitutions may contain a provision that specifically sets standards for vetting to allow for the creation of a program tasked with vetting candidates.<sup>48</sup>

### **Sample Language: Qualifications and Diversity**

**Judges of all Courts of Law shall be independent and impartial. They shall be distinguished jurists of the highest moral character, with adequate qualifications, including higher legal education. The membership of the judiciary shall reflect the diversity of the people.**

#### **International Judges**

**The same discipline and accountability requirements shall apply to international judges as apply to any other member of the [State's] judiciary.**

**The process for appointment and removal of international judges shall follow the same standards as the process for selecting and removing national judges.**

**International judges shall receive training on the [State's] legal system before assuming their appointments.**

#### *Term of Years and Removal*

Constitutions generally specify the term of years for judges. A judge may have a life term, a set number of years, or an upper age limit for service on the court.<sup>49</sup> Constitutions may also include provisions for the removal of a judge,

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<sup>48</sup> “Within one year after the effective date, Parliament shall enact legislation . . . establishing mechanisms and procedures for vetting . . . the suitability of all judges and magistrates who were in office on the effective date . . .” KENYA CONST. Sixth Schedule, part 5, 23.

<sup>49</sup> In Albania, the High Court judge remains on the Court until (s)he is 65, or is dismissed. ALBANIA CONST. art. 139. In South Africa, a Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire by age 70. SOUTH AFRICA CONST. art. 176. In Slovenia, the office of a judge is permanent, with retirement age and dismissal to be determined by law. SLOVENIA CONST. art. 129.

usually for crimes of moral turpitude/high crimes.<sup>50</sup> Constitutions may also determine which government branch (executive, legislative, or both) has the authority to dismiss a judge.<sup>51</sup>

### **Sample Language: Term of Years and Removal**

**Judges of the Supreme Court shall be appointed for a term of [X] years and may be reappointed to office. The terms of judges of other Courts of Law shall be determined by law.**

**The Judicial Council shall have responsibility for discipline and removal of judges [as provided by law].**

**Judges may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees, provided by law.**

**A judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].**

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<sup>50</sup> “Justices and Judges may be removed . . . for gross misconduct, incompetence and incapacity . . .” SOUTH SUDAN CONST. art. 135.

<sup>51</sup> Article 177 of the South African Constitution grants such authority to the Judicial Service Commission, National Assembly, and the President. SOUTH AFRICA CONST. art. 177.

**CHAPTER VI: INTERNATIONAL LEGAL OBLIGATIONS**

Constitutions often include provisions that incorporate international legal obligations into domestic law or explain the relationship between the two. There are two primary sources of international law: treaties and customary international law.<sup>1</sup> Treaties are negotiated between and among states. States can ratify bilateral treaties, international agreements between two states, and multilateral treaties, agreements signed onto by many states throughout the world. By contrast, customary international law develops organically over time and is described as “evidence of a general practice accepted as law.”<sup>2</sup> Constitutions incorporate international law or explain the relationship between international law and domestic law in three ways: (1) monist; (2) dualist; or (3) a hybrid of these two approaches.

**Incorporating International Law into the Constitution***Monist Approach*

A monist constitution automatically incorporates any treaty or customary international law into domestic law without the need for legislative ratification.<sup>3</sup> Many constitutions incorporate treaties and international agreements directly into domestic law, while fewer reference customary international law.<sup>4</sup> Some constitutions specify certain international agreements as having the force of law.<sup>5</sup>

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<sup>1</sup> *International Court of Justice Statute* art. 38(1)(b) (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>2</sup> *International Court of Justice Statute* art. 38(1)(b), (1945).

<sup>3</sup> Kenya's Constitution provides that “[t]he general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” KENYA CONST. arts. 2(5)-(6).

<sup>4</sup> For instance, Spain's Constitution in Article 96(1) provides that “[v]alidly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be repealed, abolished, modified or suspended in the manner provided for in the treaties themselves or in accordance with the norms of international law.” SPAIN CONST. art. 96(1).

<sup>5</sup> Spain's Constitution in Article 10(2) references the Universal Declaration of Human Rights and other international agreements, although not named. Other states, like Senegal, directly reference international agreements in their preamble: “Affirm their adherence to the Declaration of Human Rights of 1789 as well as to the international instruments adopted by the United Nations and the Organization of African Unity, in particular the Universal Declaration of Human Rights of 10 December 1948, the Convention on the Elimination of all Forms of Discrimination Against Women of 18 December 1979, the Convention on the Rights of the Child of 20 November 1989, and the African Charter on Human and Peoples' Rights of 27 June 1981.” SPAIN CONST. art. 10(2).

**Sample Language: Monist**

**Treaties entered into, consistent with the Constitution, shall be a part of the [internal/federal/national/domestic] legal system. Treaty provisions may only be repealed in a manner consistent with the treaty itself or with the general rules of international law.**

**The general rules of international law shall be part of the [internal/federal/national/domestic] legal system.**

**All international agreements entered into by the [State/Other Title] before the ratification of the Constitution are binding on the [State/Other Title] when this Constitution took effect.**

**Customary international law is enforceable in the Courts of Law unless otherwise inconsistent with the Constitution or an Act of [Branch of Government responsible to promulgate law].**

**The State shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which the State has joined, and the Universal Declaration of Human Rights.**

*Dualist Approach*

A dualist constitution requires the legislature to pass legislation to incorporate treaty obligations or customary international law into domestic law. Dualist constitutions view international law as distinct from domestic law, and, as a result, international law only becomes part of domestic law through specific consent of the state, typically expressed through implementing legislation.<sup>6</sup>

**Sample Language: Dualist**

**Treaties, accords, or international agreements may take effect only after being ratified or approved by a law.**

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<sup>6</sup> For instance, Algeria's Constitution stipulates that the case of "[a]rmistice agreements, peace, alliance and union treaties, treaties related to State borders as well as treaties involving expenses not provided for in the State budget," the President must receive "approval by each of the chambers of the Parliament" before ratification can take place. ALGERIA CONST. arts. 97, 131.

**Treaties entered into by the [executive branch/leader] in the name of the State shall be approved by the [legislative branch], and shall come into force only in accordance with the decision of the [legislative branch].**

**Agreements or treaties relating to armistices, peace, alliances, the borders of the State borders, or expenses not provided for in the State budget are ratified by the [executive] only after explicit approval by the [legislative branch].**

### *Hybrid Approach*

Constitutions need not be entirely monist or entirely dualist. A state may use a hybrid approach and vary incorporation of international law depending on the type of legal obligation.<sup>7</sup> For instance, a state can be monist with respect to treaty law (i.e., once a treaty is signed and ratified, it automatically becomes domestic law), but dualist with respect to customary international law (i.e., only those customary norms that have been affirmatively incorporated into the domestic legal order bind the state's citizens as a matter of domestic law), or the reverse.<sup>8</sup>

## **Regulating the Relationship between International and Domestic Law**

Constitutions often also explain or regulate the relationship between international law and domestic law. Constitutional provisions can give precedent to international law over domestic law,<sup>9</sup> or create parity between international legal

<sup>7</sup> An instance of a mixed monist-dualist system is The Netherlands' Constitution of 1983, which places international treaties above the Constitution, and explicitly explains that domestic statutes that conflict with international law are void. However, The Netherlands' Constitution does not give the same status to customary international law. NETHERLANDS CONST. art. 94. Similarly, in France treaties have higher status than subsequent legislation, but the French Constitution is silent on customary international law. FRANCE CONST. art. 55. By contrast, Article 25 of the German Basic Law holds that customary international law is superior to domestic statutes, but treaties are equal to domestic statutes, with the last-in-time rule determining which is valid. FEDERAL REPUBLIC OF GERMANY art. 25. Russia's Constitution states that the any international law agreed to through treaties or other international instruments will be applied in Russian courts over domestic law. RUSSIA CONST. art. 15(4).

<sup>8</sup> For instance, the German Constitution is monist with respect to customary international law, but dualist with respect to treaties. According to Article 25, "[t]he general rules of public international law constitute an integral part of federal law." With respect to treaty law, however, Article 59 specifies that "[t]reaties which regulate the political relations of the Federation or relate to matters of federal legislation require the consent or participation, in the form of statute, of the bodies responsible competent in any specific case for such federal legislation." FEDERAL REPUBLIC OF GERMANY arts. 25, 59.

<sup>9</sup> Article 90(5) of the Turkish Constitution explains the relationship and precedence of international agreements and domestic law: "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail." TURKEY CONST. art. 90(5). Article 98 of Senegal's Constitution provides that once treaties or agreements

obligations and domestic law.<sup>10</sup> Constitutions can also require that courts interpret the Constitution or domestic law in conformity with international law.<sup>11</sup> Alternatively, constitutions can give precedence to international law over domestic law, but make constitutional provisions superior to international law.<sup>12</sup>

### **Sample Language: Relationship between International and Domestic Law**

**Customary international law is enforceable in the Courts of Law unless otherwise inconsistent with the Constitution or an Act of [Branch of Government responsible to promulgate law].**

**Valid treaties and accords ratified in accordance with [the Constitution/law] and customary international law have the authority [superior/equal to] that of domestic laws.**

**Any international treaty, agreement, or accord in conflict with the Constitution shall not be ratified and have no effect.**

**The Constitution is the supreme law of the land; any law, international or domestic, inconsistent with the Constitution is invalid.**

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have been duly ratified and published, they “have an authority superior to that of the laws, subject, for each treaty and agreement, to its application by the other party.” SENEGAL CONST. art. 98.

<sup>10</sup> Article 91 of Poland’s Constitution explains the framework for regulating conflict of laws: “(1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. (2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. (3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.” POLAND CONST. art. 91.

<sup>11</sup> In Article 233, the Constitution of South Africa stipulates that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” SOUTH AFRICA CONST. art. 233.

<sup>12</sup> For instance, in Article 132 of the Algerian Constitution, “[t]reaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.” But, under Article 165, the Constitutional Court “pronounces on the constitutionality of treaties, laws and regulations, either through an opinion if these are not enforced or, otherwise, through a decision,” and under Article 168, for any “treaty, . . . agreement or . . . convention [that] is not constitutional, its ratification cannot take place.” Thus, constitutional law has precedence over international law, which in turn has precedence over domestic law. ALGERIA CONST. arts. 132, 165, 168. Similarly, the Swiss Constitution in Article 139(3) provides that “If a state initiative violates . . . the mandatory rules of international law, the Federal Parliament declares it invalid, in whole or in part.” SWITZERLAND CONST. art. 139(3).

**When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.**

**CHAPTER VII: BUILDING AN ELECTORAL SYSTEM**

The establishment of a transparent electoral system that encourages full voter participation is an important element of post-conflict constitutions. Constitutions address electoral systems in different ways. Some constitutions describe the electoral system in a specific chapter or article. Others include electoral systems within chapters or articles about the elections of the executive and legislative branches. Post-conflict constitutions may provide for: (1) the type of electoral system; (2) the method of electoral districting; (3) mechanisms for minorities and women; (4) the procedure for elections of the legislative and executive branches; (5) voter enfranchisement; and (6) the role of the electoral commission, the electoral law, and political parties law.

**Type of Electoral System**

States may choose from several different electoral systems when drafting a constitution. The three main systems for post-conflict states are plurality, majority, and proportional systems.<sup>1</sup> Some states use more than one system to elect members of the legislature by combining proportional and majority or plurality systems.<sup>2</sup>

*Plurality System*

Under the plurality system, the candidate who receives the most votes wins the election, regardless of the number of votes.<sup>3</sup> This system is often called “first past the post” because it only takes one vote for one candidate to be elected over another. The plurality system is most often used in single district systems, but may be used in multi-district systems as well.

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<sup>1</sup> Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INTERNATIONAL POLITICAL SCIENCE REVIEW 297 (1997).

<sup>2</sup> Russian electoral law provides that half of the State Duma must be elected by single-seat electoral districts. The other half is elected in the federal electoral district in proportion to the number of votes cast for a federal lists of candidates nominated by political parties or electoral blocs. *Federal Law No. 175-FZ* art. 3 (Russia, 2002), available at <http://legislationline.org/documents/action/popup/id/3952>.

<sup>3</sup> Article 103 of the Slovenian Constitution provides that in direct general elections by secret ballot, the individual with the highest number of valid votes is selected president. SLOVENIA CONST. art. 103. “The person elected from amongst those standing for election in each separate electoral constituency shall be the person receiving the greatest number of votes by secret ballot.” MALDIVES CONST. art. 72(b).

**Sample Language: Plurality System**

**The [President/Representative] shall be elected by secret ballot. To be elected to the position, the candidate must receive the highest number of valid votes.**

**The candidate who obtains a plurality of votes, not counting blank or void votes, shall be considered elected.**

*Majority System*

Under the majority system, the candidate who receives an absolute majority of the votes wins the election (50 percent plus one vote). This differs from the plurality system in that the winner requires a clear majority of the votes instead of simply the highest number of votes. Since candidates need to garner a high percentage of the vote to win, often more than one round of voting is required.<sup>4</sup>

**Sample Language: Majority System**

**The candidate who obtains more than half the votes validly cast shall be elected [President/Representative].**

**If none of the candidates obtains that proportion of the votes, a second ballot shall be held. In the second ballot, only the two candidates who have obtained the most votes in the first ballot and have not withdrawn shall stand for election.**

**The candidate with the majority of votes in this second round of the elections shall become [President/Representative].**

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<sup>4</sup> Article 126 of the Portuguese Constitution provides for two rounds of voting, if in the first round no candidate obtains more than half the votes validly cast. PORTUGAL CONST. art. 126. In Sudan, the candidate who receives a majority of the votes becomes the President. However, if no candidate for President receives a majority or half of the votes then a second round of voting is held between the two candidates receiving the most votes in the first round. The candidate with the majority of votes in this second tier of the elections then becomes the President. SUDAN CONST. art. 38. Similarly, the Afghan Constitution provides that “the President shall be elected by receiving more than fifty percent of votes cast by voters through free, general, secret and direct voting . . . . If in the first round none of the candidates gets more than fifty percent of the votes, elections for the second round shall be held within two weeks from the date election results are proclaimed, and, in this round, only two candidates who have received the highest number of votes in the first round shall participate.” AFGHANISTAN CONST. art. 61.

*Proportional Representation*

A proportional representation system involves the representation of all parties in the legislature in proportion to the number of votes they receive. Unlike the plurality and majority systems, under the proportional representation system, individuals vote for a party or for a list of candidates from one party.<sup>5</sup> States may either choose a closed party list, in which citizens vote for a particular party rather than a particular candidate,<sup>6</sup> or an open party list, in which citizens vote for a particular candidate.<sup>7</sup> The number of votes that a party/candidate wins determines the number of seats they receive. This system requires multi-member districts. The goal of proportional representation systems is to ensure that voters and various groups are fairly represented.

**Sample Language: Proportional Representation**

**Elections to the Assembly shall be held by a national proportional system.**

**The Assembly is composed of representatives of the people, elected, by the proportional system, in each province, territory and district.**

**Electoral Districting**

Electoral districting is a significant factor in the function of elections because it determines how different areas of the state vote and how the residents of those areas are represented. Constitutions generally specify whether the state electoral system is a single- or multi-member district system. In a single-member system, each electoral district elects one representative. In a multi-member system, electoral districts elect multiple representatives. States employing plurality or majority electoral systems typically create single-member electoral districts. Proportional electoral systems, by contrast, typically utilize multi-member districts.<sup>8</sup> Election procedures are often determined by electoral law, and not the constitution.<sup>9</sup>

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<sup>5</sup> “The House of Representatives is formed by representatives of the people, elected by the proportional system in each State, in each Territory and in the Federal District.” BRAZIL CONST. art 45.

<sup>6</sup> South Africa, Israel, Portugal, Spain, and Germany use closed party lists.

<sup>7</sup> Finland, Norway, The Netherlands, Italy, and Sweden use open party lists.

<sup>8</sup> Article 149 of the Portuguese Constitution provides that electoral districts are delineated by law and are designed, either as plurinominal or uninominal electoral districts, so as to ensure proportional representation. It provides that the number of voters enrolled in an electoral district determines the number of deputies allocated to each district.

States often consider how to delineate electoral districts. States may either use existing boundaries of provinces or regions or draw new boundaries. In drawing new boundaries, states often consider factors such as population, geography, history, ethnicity, religion, and race.

### *Single-Member District System*

In a single-member district system, the state is divided into a number of electoral districts in which voters elect one member to serve in the legislature. Each district is represented by one member.

States that use a majority system may require multiple rounds of elections. If no candidate receives a clear majority in the first round, the two candidates who received the most votes participate in a second round. The winner of the second round becomes the representative of the district.<sup>10</sup>

### **Sample Language: Single-Member District System**

**[One] representative shall be selected from the district to represent the people.**

***Option for Majority System: If there is no clear majority (50 percent plus one) winner, the top two candidates from the first round of voting participate in a second round of voting to determine the representative for the district.***

### *Multi-Member District System*

In a multi-member district system, the state is divided into a number of electoral districts in which voters elect multiple representatives for the district.<sup>11</sup>

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Article 152 provides that deputies represent the entire country, not their electoral district. PORTUGAL CONST. arts. 145, 152.

<sup>9</sup> For instance, the constitutions of Iraq, Iran, Maldives, and Afghanistan leave much of the election procedure to law.

<sup>10</sup> France and some former French colonies use a two round, single member district system. The top two candidates in a first round of elections participate in a second round to determine who is elected from the district. See Joel D. Barkan, Paul Densham, and Gerard Rushton, *Designing Better Electoral Systems: Alternative Forms of Electoral Systems* (2001), available at <http://www.uiowa.edu/~electdis/Alternative.htm>.

<sup>11</sup> “1. Two members for the first five thousand residents registered for each administrative division or two members for administrative divisions with less than five thousand residents; and 2. where the residents registered to an

Each district has a set number of representatives, usually determined by electoral law.

### **Sample Language: Multi-Member District System**

**Seats shall be allocated among electoral districts based on the population of each district, in accordance with the Election Law.**

**Members of the Assembly shall be elected by the people from multi-member state constituencies, representing the various districts in the state.**

#### **Proportional Representation**

**Deputies shall be elected by electoral districts, the boundaries of which shall be laid down by law, which may also provide for the existence of electoral districts in order to ensure the system of proportional representation.**

**The number of deputies allocated to each electoral district, shall be proportionate to the number of voters enrolled in the electoral register for that electoral district.**

### **Minority Mechanisms**

To ensure minority representation, some post-conflict states include in their constitutions mechanisms such as set-asides or specific party requirements. Set-asides are seats reserved for ethnic or religious minorities.<sup>12</sup> Party requirements stipulate that all political parties are required to include candidates from different ethnic or religious groups.

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administrative division exceed five thousand residents, one additional member for each group of five thousand residents in excess of the first five thousand.” MALDIVES CONST. art. 71.

<sup>12</sup> The Slovenian Constitution reserves two seats in the National Assembly, one for a deputy from the Italian national community and the other for a deputy from the Hungarian national community. SLOVENIA CONST. arts. 83-84. The Constitution of Afghanistan also provides for the general and just representation of all the country's constituencies. It provides that “the remaining one third of the members shall be appointed by the President, for a five year term, from amongst experts and experienced personalities, including two members from amongst the impaired and handicapped, as well as two from nomads.” AFGHANISTAN CONST. arts. 83-84.

**Sample Language: Minority Mechanisms**

**[X] percent shall be individuals belonging to the national and religious minorities of the State.**

**There shall be reserved [X] of seats in the National Assembly for each national or religious minority in the State. The number of seats reserved for each minority will reflect the proportion of its representation in society.**

**Mechanisms for Women**

Post-conflict states with historically low representation of women in government may include in their constitutions set-asides or specific party requirements for women.<sup>13</sup>

**Sample Language: Mechanisms for Women**

**[X] percent of each National and State List shall be female candidate(s).**

**There shall be reserved [X] seats in the Assembly for women.**

**Procedure for Electing the Legislature**

Post-conflict constitutions generally include procedures outlining the elections of the legislative branch of the state. Such provisions usually specify: (1) voting requirements; (2) methods of voting; (3) frequency of elections; and (4) the timeframe for the newly elected representatives' powers to take effect. The most commonly chosen legislative systems involve a unicameral or bicameral legislature.

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<sup>13</sup> The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives." IRAQ CONST. art. 49(4). Regarding the House of People, the Afghanistan Constitution provides that "the elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least two females shall be the elected members of the House of People from each province." Regarding the House of Elders, it says, "the President shall appoint fifty percent of these individuals from amongst women. The individual selected as a member of the House of Elders shall lose membership to the related Council, and, another individual shall be appointed in accordance with the provisions of the law." AFGHANISTAN CONST. arts. 83-84.

*Unicameral Legislature*

In states with a unicameral legislature, voters elect legislators to one chamber of parliament.<sup>14</sup> The legislators may represent the interests of a particular region or the interests of the entire polity.

**Sample Language: Unicameral Legislation****Option 1: Single District**

**Citizens will vote for the candidates of their choice. The candidates who receive [plurality/majority] of the votes shall be awarded the seats.**

**Option 2: Multi-District Proportional**

**Citizens will vote for the National List of their choice, and each list shall be awarded seats in proportion to that list's share of the national vote.**

***Optional:* National and State Lists must receive a minimum of [X] percent of the vote to be awarded seats in the Assembly.**

*Bicameral Legislature*

In states with a bicameral legislature, the members of the first chamber usually represent the interests of the entire state, while the members of the second chamber represent the interests of regions, provinces, or other political sub-units of the state.<sup>15</sup> Most states with bicameral legislatures require both chambers to approve legislation, allowing each chamber to act as a check on the other.

In a few bicameral states, such as Australia, Switzerland, and the United States, the general population elects both chambers of the legislature. In many others, such as Bosnia and Herzegovina and South Africa, the population elects only the first chamber, and the president or members of the first chamber appoint the second chamber.<sup>16</sup>

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<sup>14</sup> For instance, Qatar (Advisory Council), Iran (Islamic Consultative Assembly), Syria (People's Assembly), and Pakistan (Majlis-e-Shoora or Parliament).

<sup>15</sup> For instance, Iraq (Council of Representatives and Federation Council), Afghanistan (House of People and House of Elders), Algeria (People's National Assembly and Council of Nation), and Tunisia (Chamber of Deputies and Chamber of Advisors)(subject to revision as of 2012).

<sup>16</sup> "The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives. The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs). The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika

**Sample Language: Bicameral Legislature**

**The first chamber shall have [X] members. Members shall be elected on [proportional/pluralistic/majority] basis.**

**The second chamber shall have [X] members. Members shall be elected on [proportional/pluralistic/majority] basis.**

**Seats in the [first/second] chamber shall be allocated among electoral districts based on the population of each district, in accordance with Election Law.**

**Every district shall be guaranteed at least one seat.**

***Optional:* National and State Lists must receive a minimum of [X] percent of the vote to be awarded seats in the National Assembly.**

**Procedure for Electing the Executive**

Constitutions generally include provisions concerning the elections of the executive. Generally, such provisions include: (1) eligibility for the position (age, citizenship); (2) term length; (3) nomination and re-election requirements; and (4) the percentage of votes required to win the election.

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Srpska. The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.” BOSNIA AND HERZEGOVINA CONST. art. IV(1)-(2). Article V, Section 2 discusses the election of the Council of Ministers: “The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.” BOSNIA AND HERZEGOVINA CONST. art. V(4). The Tunisian Constitution, which as of 2012 was subject to revision, combines the two options by designating some positions in the second chamber for popular election at the regional level, while the rest are appointed by the president. TUNISIA CONST. art. 19. The Afghan Constitution also uses a hybrid system. It designates some seats in the second chamber to members of provincial and district councils (elected by the respective councils), and the rest to be appointed by the president. AFGHANISTAN CONST. art. 84. “The members of the People's National Assembly are elected by means of a universal direct and secret suffrage. Two-thirds (2/3) of the members of the Council of Nation are elected by means of indirect and secret suffrage among and by the members of the People's Communal Assemblies and the People's Wilaya Assembly. One third (1/3) of the members of the Council of Nation is designated by the President of the Republic among the national personalities and qualified persons in the scientific, cultural, professional, economic and social fields.” ALGERIA CONST. art. 101.

The procedure for nominating and electing the executive officers varies from state to state. Some states allow for direct elections of the officers.<sup>17</sup> Others provide for executive appointment by the legislature.<sup>18</sup> Executive elections may require multiple rounds of voting.

### **Sample Language: Procedure for Electing the Executive**

#### **Nomination of the Executive**

**Candidates may be nominated by at least [X] members of the Parliamentary Assembly.**

**Each member of the Parliamentary Assembly may only nominate one candidate for president.**

**OR**

**Nominations for the office of President of the Republic require the support of a minimum of [X] citizens entitled to vote.**

#### **Election of the Executive**

**Each member of the Assembly shall have one vote.**

**To be elected [President/Prime Minister], a candidate must receive a [majority] of the total votes of the members of the Parliamentary Assembly.**

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<sup>17</sup> “1. The President of the Republic shall be elected by universal, direct secret suffrage of all Portuguese citizens who are registered to vote in Portuguese territory and, in accordance with the following paragraph, of all Portuguese citizens who reside abroad. 2. The law shall regulate the right to vote of Portuguese citizens who reside abroad, to which end it shall pay due regard to the existence of ties that effectively link them to the Portuguese community.” Additionally, Article 124 provides: “1. Nominations for President of the Republic shall be put forward by at least seven thousand five hundred and at most fifteen thousand registered electors. 2. Nominations shall be submitted to the Constitutional Court at least thirty days prior to the date set for the election.” PORTUGAL CONST. arts. 121, 124. “The President is elected for a four-year term by the direct vote of the people. His re-election for a successive term is permissible only once . . . . The President is elected by an absolute majority of votes polled by the voters.” IRAN CONST. arts. 114, 117. “The President of the Republic is elected by direct, secret and universal suffrage. The election is acquired through the absolute majority of the expressed votes.” ALGERIA CONST. art. 71.

<sup>18</sup> In Italy, the President is elected in a joint session of Parliament. The Constitution indicates that three delegates from each political region (elected so as to ensure minority representation) participate in the election, which is by secret ballot and requires a two-thirds majority. By the third ballot, only a simple majority is required. ITALY CONST. art. 83. “The Council of Representatives shall elect a President of the Republic from among the candidates by a two-thirds majority of the number of its members. If none of the candidates receive the required majority vote then the two candidates who received the highest number of votes shall compete and the one who receives the majority of votes in the second election shall be declared President.” IRAQ CONST. art. 70. “The Supreme Council of the Union shall elect from among its members a president and a Vice president of the Union.” UNITED ARAB EMIRATES CONST. art. 51.

**If no candidate receives the required [majority], the Parliamentary Assembly shall hold a second round of voting within [X] days.**

**If a candidate receives the required [majority] in the second round of voting, he or she shall be President.**

**If no candidate receives the required [majority] in the second round, there shall be a run-off between the two candidates who received the most votes in the second round of voting.**

**The candidate who receives a simple majority of the votes in the run-off shall be President.**

**OR**

**Each eligible, registered voter shall have one vote.**

**To be elected [President/Prime Minister], a candidate must receive a [majority] of the total votes.**

**If no candidate receives the required [majority], there shall be a second round of voting within [X] days.**

**If a candidate receives the required [majority] in the second round of voting, he or she shall be President.**

**If no candidate receives the required [majority] in the second round, there shall be a run-off between the two candidates who received the most votes in the second round of voting.**

**The candidate who receives a simple majority of the votes in the run-off shall be President.**

## Qualifications for Voter Enfranchisement

Many post-conflict constitutions determine suffrage requirements for voters, such as age and citizenship.<sup>19</sup>

### Sample Language: Qualifications for Voter Enfranchisement

**All citizens who have reached [18] years of age shall be eligible to vote in all municipal and national elections and shall be guaranteed universal and equal rights to do so.**

**Elections for members of the National Assembly shall be through universal, equal, direct suffrage, and by secret ballot. All citizens who have reached the age of [18] years have the right to vote.**

## Electoral Commission

States may establish an electoral commission to provide guidance and recommendations to the legislative and executive branches regarding the functioning of the electoral and party systems. The commission is usually independent from the government and composed of members who reflect the state's gender and ethnic demography, as well as the diversity of opinions and interests of the people.<sup>20</sup>

The composition of electoral commissions varies by state. Some states, such as the Central African Republic, establish a mixed electoral commission in which

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<sup>19</sup> "1. Every citizen who has attained the age of eighteen years shall possess the right to vote, save such incapacities as may be provided for in the general law. 2. The right to vote shall be exercised personally and 2. The exercise of the right to vote is personal and shall constitute a civic duty." PORTUGAL CONST. art. 49. "Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office." IRAQ CONST. art. 20. "Any citizen is eligible to vote who is twenty years old, holds Tunisian nationality for at least five years and fulfills the conditions stipulated in the Electoral Code." TUNISIA CONST. art. 20 (subject to revision as of 2012). The constitution of Myanmar specifically lists the requirements and limits on who may vote. MYANMAR CONST. arts. 391-92.

<sup>20</sup> "The Central Election Commission is a permanent organ that prepares, supervises, directs, and verifies all aspects that have to do with elections and referenda and declares their results. 1. The Commission consists of 7 members who are elected with a mandate of 7 years. Two members are elected by the Assembly, 2 by the President of the Republic, and 3 other members by the High Council of Justice. 2. The membership of the Central Election Commission is renewed every three years pursuant to the procedure established by law. 3. The membership in the Commission is incompatible with any other state and political activity. 4. Electoral subjects appoint their representatives to the Commission. They do not have the right to vote. 5. A member of the Commission enjoys the immunity of a member of the High Court. 6. The Commission has its own budget." ALBANIA CONST. arts. 153-54. *See also* KENYA CONST. art. 88; IRAQ CONST. art. 102; AFGHANISTAN CONST. arts. 156- 57.

all political parties participate.<sup>21</sup> Mixed electoral commissions may also include representatives of the international community, who assist with the promotion of free and fair elections. For instance, Sudan's Mixed Electoral Commission was designed to have seven members: three Sudanese citizens, one Egyptian citizen, one citizen of the United Kingdom, one citizen of the United States, and one citizen of India.<sup>22</sup> Post-conflict states may also request the help of international election monitoring institutions for assistance with election monitoring, such as the Organizations for Security and Cooperation in Europe (OSCE).

### **Sample Language: Electoral Commission**

**An Electoral Commission shall be established in order to propose for adoption by the Assembly an electoral and political parties' law that is consistent with this Constitution.**

**The Commission shall be authorized to conduct studies, publish reports, and provide guidance and recommendations to the Assembly regarding the status and effectiveness of the existing electoral and party systems, as well as the need for their reform.**

**The Commission shall be independent of the government and consist of [X] members. The members shall be appointed by the Assembly serving a term of [X] years. In determining the membership on the Commission, efforts will be made to account for the geography, gender, and diversity of opinions and interests of the people.**

**[X] members shall be appointed by the Assembly, [X] by the President and [X] by the Judicial Council.**

**The Election Commission shall be a permanent body that shall prepare, supervise, direct and verify all aspects that have to do with elections and referenda and shall declare their results.**

**Membership in the Election Commission shall be incompatible with any other political activity.**

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<sup>21</sup> United States Department of State, *Central African Republic Human Rights Practices* (1994), available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_africa/CentralAfricanRepublic.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/CentralAfricanRepublic.html).

<sup>22</sup> Human Rights Committee, *Second Periodic Report of States Parties: Due in 1992: Sudan Addendum, delivered to the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/75/Add.2 (Mar. 13, 1997), available at <http://www.unhchr.ch/tbs/doc.nsf/0/1321353755974268802564bc003eb86e?Opendocument>.

**The Election Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by any authority or any person.**

**Any person, natural or legal, may petition or complain to the Election Commission concerning issues in the sphere of its jurisdiction. A decision of the Election Commission with respect to such a petition or complaint may be appealed to the Constitutional Court.**

## **Electoral Law**

Electoral law establishes rules and procedures to govern the administration of elections. The law may determine election dates, registration and voter identification requirements, and mechanisms for counting votes and resolving disputes.<sup>23</sup> Electoral law may also aim to achieve fair representation among minority groups.<sup>24</sup> Some states include a separate provision for electoral law in the constitution, but many states designate the drafting and implementation of electoral law as one of the duties of the electoral commission.<sup>25</sup>

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<sup>23</sup> For instance, the Pakistani Constitution contains election law provisions within its text. PAKISTAN CONST. art. 222-26.

<sup>24</sup> The Afghan Constitution leaves election issues to election law, but sets out basic guidelines. "Electoral constituencies as well as other related issues shall be determined by the elections law. The elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least two females shall be the elected members of the House of People from each province." AFGHANISTAN CONST. art. 83. Similarly, the Iraqi Constitution provides that "a law shall regulate the requirements for the candidate, the voter, and all that is related to the elections. The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives." IRAQ CONST. art. 49(3).

<sup>25</sup> "General Principles of Electoral Law: 1. As a general rule, the officeholders of the bodies that exercise sovereign power, of regional authorities and of local authorities shall be appointed by direct, secret and periodic suffrage. 2. Without prejudice to the provisions of Article 15(4) and (5) and Article 121(2), electoral registration shall be officious, compulsory and permanent and there shall be a single registration system for all elections that are held by direct, universal suffrage. 3. Election campaigns shall be governed by the following principles: a. Freedom of propaganda; b. Equal opportunities and treatment for all candidatures; c. The impartiality of public bodies towards all candidatures; d. The transparency and scrutiny of electoral accounts. 4. Citizens shall possess the duty to cooperate with the electoral authorities in such ways as the law may lay down. 5. Votes cast shall be converted into seats in accordance with the principle of proportional representation. 6. Any act which dissolves a collegiate body that is based on direct suffrage shall also set the date of a new election thereto. Such elections shall be held within the following sixty days and in accordance with the electoral law that is in force at the time of the dissolution, failing which they shall be legally invalid. 7. The power to rule on the correctness and validity of electoral acts shall pertain to the courts" PORTUGAL CONST. art. 113.

**Sample Language: Electoral Law**

**The electoral law shall establish the rules and procedures to govern the conduct of elections, including, but not limited to, the date of the elections, requirements for voter identification and registration, and mechanisms for counting votes and resolving disputes.**

***Optional:* The electoral law shall aim to achieve the goal of having women constitute no less than [X] of the members of the National Assembly and having fair representation for all communities of the state.**

**Political Parties Law**

Like electoral law, states may include the law pertaining to political parties in the constitution or designate it as the function of the electoral commission. The purpose of the law of political parties is twofold: (1) to promote the right of free association; and (2) to promote unity through political ideas and opinions that reflect the interests of all citizens.<sup>26</sup> The law generally establishes the conditions for the organization and registration of political parties and the requirements for submitting lists of candidates for elections.<sup>27</sup>

**Sample Language: Political Parties Law**

**To promote the right of free association and to advance political ideas and opinions, the law of political parties shall establish the conditions of**

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<sup>26</sup> “Political parties contribute to supervising citizens, in order to organize their participation in political life, and they should be established on democratic foundations. Political parties must respect the sovereignty of the people, the values of the republic, human rights, and the principles pertaining to personal status. Political parties pledge to prohibit all forms of violence, fanaticism, racism and discrimination. No political party may take religion, language, race, sex or region as the foundation for its principles, objectives, activity or programs. It is prohibited for any party to be dependent upon foreign parties or interests. The law sets the rules governing the establishment and organization of parties.” TUNISIA CONST. art. 8 (subject to revision as of 2012).

<sup>27</sup> “To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with provisions of the law. The people of Afghanistan shall have the right, in accordance with provisions of the law, to form political parties, provided that: 1. Their manifesto and charter shall not contravene the Holy religion of Islam and principles and values enshrined in this constitution; 2. Their organizations and financial resources shall be transparent; 3. They shall not have military or quasi-military aims and organizations; and 4. They shall not be affiliated with foreign political parties or other sources. Formation and operation of a party on the basis of tribalism, parochialism, language, as well as religious sectarianism shall not be permitted. A party or association formed according to provisions of the law shall not be dissolved without legal causes and the order of an authoritative court.” AFGHANISTAN CONST. art. 35; *see also* EAST TIMOR CONST. art. 70; MYANMAR CONST. arts. 404-09; PORTUGAL CONST. art. 114; SOUTH SUDAN CONST. art. 25.

**organization and registration for political parties, as well as the requirements for submitting all lists of candidates for elections.**

**The law of political parties shall aim to achieve the goal of the development of parties and electoral candidates that seek to represent the interests of all the regions, communities, and citizens of the state in a manner that promotes national unity.**

**CHAPTER VIII: FINANCIAL MATTERS AND THE CENTRAL BANK**

Following conflict, states often face the challenge of restructuring and stabilizing the economy. The ability to convince consumers and investors regarding the coherence, stability, and predictability of the policies adopted and implemented is crucial.<sup>1</sup> Additionally, transparency and accountability in government institutions become essential because the credibility and efficiency of state organs affect the legitimacy of economic policy.<sup>2</sup> To maintain peace and deter conflict, states take great care to distribute economic resources and obligations equitably. If certain groups perceive governmental discrimination, renewed tension or violence may ensue.<sup>3</sup> Thus, in drafting post-conflict constitutions, many states include in their constitutions mechanisms to promote a healthy, stable economy.<sup>4</sup> Specifically, many states' constitutions address: (1) the collection of revenue and taxes; (2) the creation and approval of a budget; (3) the requirements for audits of public accounts; and (4) the establishment of a central bank.

**Collection of Revenue and Taxes**

Many post-conflict constitutions include provisions detailing means to collect taxes and other revenues. Such collection is an essential element of any government's economic power, and an effective tax collection system demonstrates the state's commitment to invest financially in its economic recovery.<sup>5</sup> Additionally, governments require revenue from taxes to promote projects that serve the whole population, thus promoting the legitimacy of the state government among citizens.<sup>6</sup> For the purpose of flexibility, however, many

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<sup>1</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, sec. 5.3.4 (1998), available at [http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/).

<sup>2</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, sec. 5.3.4 (1998).

<sup>3</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, sec. 5.3.4 (1998).

<sup>4</sup> For instance, Albania, Zimbabwe, South Africa, and Portugal provide for these provisions in their constitutions. See ALBANIA CONST. parts 13-14; ZIMBABWE CONST. ch. 11; SOUTH AFRICA CONST. ch. 13; PORTUGAL CONST. part II.

<sup>5</sup> Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, sec. 5.3.4 (1998).

<sup>6</sup> "It is the duty of every individual to pay taxes and to make an equitable contribution to public expenditures." TUNISIA CONST. art. 16 (subject to revision as of 2012); "Low income earners shall be exempted from taxes in a way that guarantees the preservation of the minimum income required for living. This shall be regulated by law." IRAQ CONST. art. 28.

constitutions leave the specific details regarding taxation, such as incidence, rate, and concessions, to law.<sup>7</sup>

States typically establish a treasury or central revenue fund for all government income and expenses.<sup>8</sup> Many states grant legislatures the authority to exclude funds from the central revenue fund if they find that the exclusion is necessary to facilitate budgetary flexibility. Additionally, post-conflict constitutions often contain a prohibition against retroactive taxes.<sup>9</sup>

### Sample Language: Revenue Fund and Taxes

#### **Revenue Fund**

**There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of the [Assembly].**

#### **Taxes**

**Taxes shall be imposed under law, which shall determine the incidence, rates, concessions, and guarantees for taxpayers.**

**No one shall be compelled to pay any tax that is retroactive in effect.**

### **Budget**

Many post-conflict constitutions also detail the requirements to draft, approve, and amend the state's budget.<sup>10</sup> Such constitutions often specify the time

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<sup>7</sup> "Fees, taxes and other financial obligations, national and local, reductions or exemptions of certain categories of taxpayers from paying them as well as the method of their collection are specified by law." ALBANIA CONST. art. 155; "Taxes shall be created by laws, which shall determine their applicability and rate, fiscal benefits and such guarantees as may accrue to taxpayers." PORTUGAL CONST. art. 103. "Every Afghan shall pay taxes and duties to the state in accordance with the provisions of the law." AFGHANISTAN CONST. art. 42; *see also* SYRIA CONST. art. 18; TUNISIA CONST. art. 34 (subject to revision as of 2012); UNITED ARAB EMIRATES CONST. part 8.

<sup>8</sup> "Every kind of tax, duty as well as paid incomes shall be deposited to a single state account." AFGHANISTAN CONST. art. 42; *see also* SOUTH AFRICA CONST. art. 216; ZIMBABWE CONST. sec. 101.

<sup>9</sup> For instance, Portugal and Algeria. "No tax, contribution or duty of any nature can be laid down with a retrospective effect." ALGERIA CONST. art. 64.

<sup>10</sup> The Albanian Constitution (Article 159-60), the Portuguese Constitution (Article 109), and the Colombian Constitution (Article 346) all contain provisions regarding budget preparation. ALBANIA CONST. arts. 259-160. PORTUGAL CONST. art. 109. COLOMBIA CONST. art. 346. "The state budget and development program of the government shall be submitted, through the House of Elders to the House of People along with its advisory views. The decision of the House of People shall be implemented without presentation to the House of Elders, after endorsement by the President. If for some reasons the budget is not approved before the beginning of the new fiscal year, the budget of the year before shall be applied pending the passage of the new budget. The Government shall present during the fourth quarter of the financial year the budget for the next year, with the brief account of the

frame for creation and approval of a national budget (usually annual),<sup>11</sup> and a requirement for legislative approval of the budget before it takes effect.<sup>12</sup>

### **Sample Language: Budget**

**Principles and procedures for drafting and implementing the draft budget are defined by law.**

**The budget shall be prepared, structured, enacted and implemented [annually/biannually].**

**Implementation of the budget shall be the subject of review by the [Assembly].**

### **Auditing Requirement**

Many post-conflict constitutions require regular audits of public accounts and specify that such audits be conducted by an Auditor General. The Auditor General ensures accountability of the government by conducting independent audits of its operations. Typically, states require that the Auditor General issue annual reports to the legislature to provide members with objective information to

current year budget, to the National Assembly. The precise account of the previous year financial budget shall be presented to the National Assembly during the next six months according to the provisions of the law. The House of People shall not delay approval of the budget for more than one month after receiving it and give permission to obtain or grant loans not included in the budget, for more than fifteen days." AFGHANISTAN CONST. art. 98; *see also* SOUTH SUDAN CONST. art. 88; SYRIA CONST. arts. 79-82; TUNISIA CONST. art. 28 (subject to revision as of 2012); UNITED ARAB EMIRATES CONST. part 8.

<sup>11</sup> "1. The Budget law shall be drawn up, organised, put to the vote and implemented in accordance with the applicable framework law . . .". PORTUGAL CONST. art. 106; "The State Budget of Ukraine shall be annually approved by the Verkhovna Rada of Ukraine for the period from 1 January to 31 December, or for a different period under special circumstances. The Cabinet of Ministers of Ukraine shall submit a draft law on the State Budget of Ukraine for the succeeding year to the Verkhovna Rada of Ukraine not later than 15 September of each year. The report on the course of the execution of the State Budget of Ukraine in the current year shall be submitted along with the draft law." UKRAINE CONST. art. 96; *see also* ALBANIA CONST. art. 158; COLOMBIA CONST. art. 349.

<sup>12</sup> "The Budget's execution shall be scrutinized by the Audit Court and the Assembly of the Republic. Following receipt of an opinion to be issued by the Audit Court, the Assembly of the Republic shall consider the General State Accounts, including the social security accounts, and shall put them to the vote." PORTUGAL CONST. art. 107. "1. The Prime Minister, on behalf of the Council of Ministers, presents to the Assembly the draft law on the budget during the autumn session, which cannot close without approving it. 2. If the draft law is not approved until the beginning of the next financial year, the Council of Ministers implements every month one-twelfth of the budget of the previous year, until the new budget is approved. 3. The Assembly approves the new budget within three months from the last day of the previous financial year, except when extraordinary measures have been decided. 4. The Council of Ministers is obligated to present to the Assembly a report about the implementation of the budget and about the state debt from the previous year. 5. The Assembly takes a final decision after having also listened to the High State Control report." ALBANIA CONST. art. 158; *see also* ZIMBABWE CONST. art. 103; COLOMBIA CONST. arts. 347-49.

help examine the government's financial activities.<sup>13</sup> Constitutions may explicitly list the duties of the Auditor General<sup>14</sup> or provide that the duties be determined by law.<sup>15</sup>

Many post-conflict constitutions also specify the process for appointing an Auditor General and the term of the appointment. The Auditor General is frequently appointed by the executive, often with confirmation by the legislature.

### **Sample Language: Auditing Requirement**

#### **Duties of Auditor General**

**There shall be an Auditor General who audits the revenues and expenditures and other financial operations of government and who reports [annually] his findings to the [Assembly].**

**The Auditor General shall be accountable to the [Assembly].**

**The detailed powers, duties and organization of the Auditor General shall be [determined by law/listing of duties].**

#### **Appointment of Auditor General**

**The Auditor General shall be appointed for a period of [X] years by the [President] with the approval of the [Assembly].**

### **Central Bank**

Many post-conflict constitutions establish a central bank to regulate the state monetary system.<sup>16</sup> Such provisions typically outline the bank's: (1) purpose; (2) powers and functions; (3) independence; and (4) form of governance.

<sup>13</sup> The Algerian Constitution requires the Audit Office to report annually to the president. ALGERIA CONST. art. 170. The constitution of South Sudan requires the Auditor General to report annually to the president and national legislature. SOUTH SUDAN CONST. art. 184(8).

<sup>14</sup> Article 105 and 106 of the Zimbabwean Constitution establishes the position of Auditor General and enumerates his or her duties. *See also* IRAQ CONST. art. 106.

<sup>15</sup> Article 54 of the Eritrean Constitution provides that the Auditor General's duties shall be established by law. ERITREA CONSTITUTION art. 54. "An independent Union department headed by an Auditor-General who shall be appointed by decree, shall be established to audit the accounts of the Union and its organs and agencies, and to audit any other accounts assigned to the said department for that purpose in accordance with the law. The law shall regulate this department and shall define its jurisdiction and the competence of those working therein, and the guarantees to be given to it, its head and the employees working in it in order that they may carry out their duties in the most efficient manner." UNITED ARAB EMIRATES CONST. art. 136. *See also* MAURITIUS CONST. art. 110; SOUTH SUDAN CONST. art. 184(10).

<sup>16</sup> For instance, POLAND CONST. art. 227, SOUTH AFRICA CONST. art. 223, ALBANIA CONST. art. 162-65; COLOMBIA CONST. art. 371, SOUTH SUDAN CONST. art. 180, and ERITREA CONST. art. 56. "Da Afghanistan Bank shall be

*Purpose*

Generally, the purpose of a central bank is two-fold: (1) to manage monetary policy to attain price stability; and (2) to preserve and enhance the stability of the banking and financial system. Many post-conflict constitutions acknowledge these goals by including the goals within a broad, general statement of purpose.<sup>17</sup>

**Sample Language: Purpose of the Central Bank**

**The Central Bank of [State] is the central bank of the nation. The primary object of the Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth.**

*Powers and Functions*

A post-conflict state may grant the central bank powers, in the state's constitution or in national legislation, that enable it to manage the state's monetary system.<sup>18</sup> Such powers include: (1) the sole authority to issue and organize currency circulation and to formulate and implement the state's monetary policy; (2) supervisory authority over operations of other banks; and (3) regulatory powers over the operations of finance companies or similar institutions.<sup>19</sup>

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independent and the central bank of the state. Currency issuance as well as formulating and implementing the monetary policy of the country shall be, according to provisions of the law, the authority of the central bank. The central bank shall consult the economic committee of the House of People about printing of money. The organization and operation method of Central Bank shall be regulated by law." AFGHANISTAN CONST. art. 12.

<sup>17</sup> "The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic." SOUTH AFRICA CONST. art. 224. "There shall be a National Bank, which performs the functions of a central bank, controls the financial institutions and manages the national currency." ERITREA CONST. art. 56(1). "Ensuring the stability of the monetary unit shall be the major function of the central bank of the State — the National Bank of Ukraine." UKRAINE CONST. art. 99.

<sup>18</sup> "Currency issuance as well as formulating and implementing the monetary policy of the country shall be, according to provisions of the law, the authority of the central bank." AFGHANISTAN CONST. art. 12.

<sup>19</sup> "The Central State Bank is the Bank of Albania. It has the exclusive right to issue and circulate the Albanian money, to independently implement monetary policy, and maintain and administer the exchange reserves of the Republic of Albania." ALBANIA CONST. art. 161. "The following will be the basic functions of the Bank of the Republic: To regulate the money supply, international exchanges, and credit; to issue legal tender; to administer the international reserves; to be the lender of last resort and banker of the credit institutions; and to serve as the government's fiscal agent." COLOMBIA CONST. art. 371. "The . . . National Bank of Poland . . . shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The National Bank of Poland shall be responsible for the value of Polish currency." POLAND CONST. art. 227. "The Bank of South Sudan shall use the market-based banking instruments developed by the Bank to regulate and supervise the implementation of the national monetary policy in South Sudan in relation to the following: (a) formulating monetary policy; (b) issuing currency; (c) promoting and maintaining price stability; (d) maintaining a stable exchange rate; (e) maintaining sound, effective and efficient banking and credit system; (f) chartering and supervising financial institutions in South Sudan; and (g) performing any other functions as may be prescribed by law . . . . All financial

**Sample Language: Powers and Functions of the Central Bank**

**The Central Bank of [State] is the sole authority to issue and organize currency circulation and promote the stability of a good national currency.**

**The Bank shall formulate and implement the monetary policy of the state.**

**The Bank shall have supervision over the operations of other banks throughout the nation and shall exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.**

*Independence*

To promote effective monetary policy, central banks are typically granted independence from the government. Post-conflict constitutions typically grant this independence.<sup>20</sup> To ensure that the bank remains accountable to the state, post-conflict constitutions also provide for central bank accountability to the government, typically through regular government consultations and reporting.<sup>21</sup>

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institutions shall be subject to rules and regulations set by the Bank of South Sudan as well as to internationally recognized regulatory and prudential standards for finance. All financial institutions shall be bound to implement monetary policies set by the Bank of South Sudan.” SOUTH SUDAN CONST. arts. 180(3), (5), (6).

<sup>20</sup> “The Bank of the Republic will exercise the functions of a central bank. It will be organized as a legal public entity with administrative, patrimonial, and technical autonomy, subject to its own legal regime.” COLOMBIA CONST. art. 371. “The Congress will stipulate the law which will regulate the Bank of the Republic for the exercise of its functions and the regulations under which the government will issue the statutes of the Bank. These will determine, among other things, the form of its organization, its legal regime, the functioning of its executive board and its board of directors, the term of the director, the rules for the constitution of its reserves; including rules for exchange and monetary stabilization, and the future application of its earnings.” COLOMBIA CONST. art. 372. “The Bank shall be an independent corporate legal entity . . . . The Bank of South Sudan shall be independent in the performance of its functions and the exercise of its powers.” SOUTH SUDAN CONST. arts. 180(1), (4). “Da Afghanistan Bank shall be independent and the central bank of the state.” AFGHANISTAN CONST. art. 12.

<sup>21</sup> “The Bank will give a report to Congress on the execution of the policies for which it is responsible and on other matters requested from it.” COLOMBIA CONST. art. 371. “The Board of Directors shall be the highest policy-making body of the Bank and shall be responsible to the President.” SOUTH SUDAN CONST. art. 180(10). “The central bank shall consult the economic committee of the House of People about printing of money.” AFGHANISTAN CONST. art. 12.

**Sample Language: Independence of the Central Bank**

**The Bank, in pursuit of its primary objective, must perform its functions independently and without fear, favor or prejudice.**

**However, the Bank is accountable to the [Assembly] and there must be regular consultation between the Bank and the [Cabinet Minister/Committee] responsible for national financial matters.**

*Governance*

Post-conflict constitutions often establish the governance of the central bank by detailing requirements for the composition and eligibility of the governing body and the appointment or election of representatives. Central banks are typically administered by a governing board or chairperson.<sup>22</sup> The constitution may detail the number of members on the board, as well as the process by which board members are appointed or elected.<sup>23</sup> The constitution may also include eligibility requirements for the chairperson or governing board member.<sup>24</sup> Alternatively, a state may leave such details to be decided by the legislature.<sup>25</sup>

**Sample Language: Governance of the Central Bank****Appointment of Chairman of Governing Board**

**The [President/Prime Minister] of [State] shall introduce to the [Assembly] a candidate for appointment to the office of the Chairman of the Bank. The [President/Prime Minister] also submits to the [Assembly] proposals to relieve the Chairman of the Bank of his duties.**

<sup>22</sup> “The Bank of South Sudan shall be headed by a Governor and assisted by two Deputy Governors, appointed by the President. The Governor of the Bank of South Sudan shall appoint other senior officers within the Bank of South Sudan in consultation with the Board of Directors and in accordance with the law. There shall be established a Board of Directors for the Bank of South Sudan appointed by the President. It shall consist of nine members as follows: (a) Governor of the Bank of South Sudan, Chairperson; (b) two Deputies of the Governor, members; and (c) six non-executive, highly qualified, competent and experienced South Sudanese who are not employees of the Bank, members.” SOUTH SUDAN CONST. arts. 180(7)-(9).

<sup>23</sup> “(2) The National Bank shall have a Governor appointed by the President with the approval of the National Assembly. There shall be a Board of Directors whose members shall be appointed by the President.” ERITREA CONST. art. 56(2). “The Bank of Albania is directed by a council, which is chaired by the Governor. The Governor is elected by the Assembly for 7 years, upon proposal of the President of the Republic, with the right of reelection.” ALBANIA CONST. art. 161(2); *see also* COLOMBIA CONST. art. 372; POLAND CONST. art. 227.

<sup>24</sup> “The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.” POLAND CONST. art. 227(4).

<sup>25</sup> “The organization and operation method of Central Bank shall be regulated by law.” AFGHANISTAN CONST. art. 12. *See also* ERITREA CONST. art. 56.

**Appointment of Governing Board Members**

**There shall be [X] members on the Bank's governing board appointed by the [Assembly] upon a list of candidates proposed by the [President/Prime Minister].**

**Qualifications of Governing Board Members**

**Each governing board member must be a natural-born citizen of [State] and shall be of known probity, integrity, and patriotism.**

**The majority of governing board members shall come from the private sector.**

**Governing board members shall be subject to such other qualifications and restrictions as may be prescribed by law.**

**CHAPTER IX: PROTECTING HUMAN RIGHTS**

State constitutions typically establish citizens' human rights, as well as the obligations of the state to respect, protect, and fulfill them. The delineation of human rights within the constitution is particularly important in post-conflict states to underscore the state's commitment to preventing human rights violations and instituting mechanisms to address future violations. International norms and conventions often guide post-conflict states' considerations regarding the incorporation of human rights into the states' constitution. The fundamental human rights contained in these conventions include civil, political, economic, social, and cultural rights. Further, constitutions establish the limitations that may be placed on these rights. To enforce these rights, many post-conflict states create oversight mechanisms, which may include ombudsmen, human rights commissions, and/or constitutional courts.

**Mechanisms for Including Human Rights in Post-Conflict Constitutions**

The main mechanisms for protecting human rights in post-conflict constitutions are: (1) the adoption of existing international human rights norms; and (2) the enumeration of fundamental rights and freedoms. States may use one or both of these mechanisms.

*International Human Rights Norms*

Incorporating international human rights norms into the constitution benefits post-conflict states by: (1) establishing a basis for constitutional rights; (2) minimizing discrepancies between national constitutional interpretation and international human rights standards; and (3) increasing interstate cooperation and coherence in the legal interpretation of individual rights.

Post-conflict states may incorporate international norms in different ways. Some states incorporate international human rights doctrines directly into the constitution.<sup>1</sup> Others adopt provisions requiring that constitutional rights be interpreted in accordance with the international treaties the states have ratified. States may place international law equal to domestic law,<sup>2</sup> or provide that

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<sup>1</sup> See, for instance, BOSNIA AND HERZEGOVINA CONST. arts. 1-2.

<sup>2</sup> Chapter IV, Article 75(22) of the Argentine Constitution grants constitutional standing to nine international treaties and provides that domestic law cannot trump an international norm. The provision stipulates that Congress may "approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the

international treaties take precedence over laws promulgated by the legislature.<sup>3</sup> States may also list in the constitution the international treaties to which they are a party.

### Sample Language: International Human Rights Norms

**The state shall respect human rights in accordance with international treaties and conventions to which it is a party.**

**International treaties and conventions ratified by the state are binding on the state and shall take precedence over domestic laws, unless those laws guarantee rights to a greater extent than the applicable treaties and conventions.**

**The state shall ensure all human rights in accordance with, or to a greater degree than, those rights guaranteed in the following treaties and conventions:**

**[1948 Convention on the Prevention and Punishment of the Crime of Genocide;]**

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International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. To attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.” ARGENTINA CONST. chap. IV, art. 75(22). Argentina’s Constitution also contains verbatim replicas of some international human rights treaties. One instance is Chapter II, Article 37 which says, “actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system.” ARGENTINA CONST. chap. II, art. 37. This incorporates the American Convention on Human Rights and the International Covenant on Civil and Political Rights. *American Convention on Human Rights* arts. 23, 24, (1969), available at [http://www.hrcr.org/docs/American\\_Convention/oashr.html](http://www.hrcr.org/docs/American_Convention/oashr.html); *International Covenant on Civil and Political Rights* arts. 3, 25, Mar. 23, 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm>. The internalization of international human rights doctrines in Argentina is a result of the severe human rights abuses that occurred from 1976 through 1983, during a military dictatorship. Levin explains that during the 1994 constitutional reform, drafters hoped that explicitly incorporating human rights treaties would strengthen the protection of fundamental rights. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?* 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 281, 288-89 (1999).

<sup>3</sup> The Paraguayan Constitution ranks international treaties below the Constitution, but above laws determined by Congress. PARAGUAY CONST. art. 137. Levit evaluates the effectiveness of the internalization of international law, focusing on Argentina. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?* 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 281, 288-89 (1999).

**[1949 Geneva Conventions I-IV on the Protection of the Victims of War and the 1977 Geneva Protocols I-II thereto;]**

**[1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;]**

**[1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto;]**

**[1957 Convention on the Nationality of Married Women;]**

**[1961 Convention on the Reduction of Statelessness;]**

**[1965 International Convention on the Elimination of All Forms of Racial Discrimination;]**

**[1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto;]**

**[1966 Covenant on Economic, Social and Cultural Rights;]**

**[1979 Convention on the Elimination of All Forms of Discrimination against Women;]**

**[1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;]**

**[1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;]**

**[1989 Convention on the Rights of the Child;]**

**[1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;]**

**[1992 European Charter for Regional or Minority Languages;]**

**[1994 Framework Convention for the Protection of National Minorities;]**

**[other conventions or treaties].**

### *Fundamental Rights*

Many states list individual rights in the constitution to ensure that basic and fundamental rights are constitutionally protected.<sup>4</sup> Most rights generally fall into the following categories: (1) civil rights; (2) political rights; (3) economic rights; (4) social rights; and (5) cultural rights. States may also include a clause concerning respect for all human rights not listed in the constitution.<sup>5</sup>

#### **Sample Language: Fundamental Rights**

**All people are possessed of certain inalienable rights. This charter is not intended to be an exclusive list of the peoples' rights, and recognizes that people possess rights that may not be listed in this charter, and that those rights which are not listed in the charter deserve the same protection as those that are listed/included.**

### Civil Rights

Civil rights are the most basic rights listed in post-conflict constitutions. These rights may include the right to life, human dignity, equality, access to justice, and freedom and security of person.<sup>6</sup> Most civil rights are non-derogable, meaning that they cannot be limited by constitutional or legislative language.

#### **Sample Language: Civil Rights**

### **Right to Life**

**All people have the right to life and the right not to be arbitrarily deprived of their lives.**

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<sup>4</sup> Article 5 of the Brazilian Constitution provides that its citizens have the right to gender equality, freedom from torture, privacy, religion, thought, travel, work, and more. BRAZIL CONST. art. 5. Likewise, Article 35 through Article 37 of the Chinese Constitution list numerous fundamental rights including the freedom of speech, press, assembly, association, religious belief, and from unlawful search. CHINA CONST. art. 37.

<sup>5</sup> For instance, Article 11 Section 7 of Ecuador's Constitution provides that "[r]ecognition of the rights and guarantees set forth in the Constitution and in international human rights instruments shall not exclude the other rights stemming from the dignity of persons, communities, peoples and nations that might be needed for their full development." ECUADOR CONST. art. 11(7).

<sup>6</sup> Civil rights are outlined comprehensively in the International Covenant on Civil and Political Rights, which is available at <http://www2.ohchr.org/english/law/ccpr.htm>.

**Human Dignity**

**All people deserve to be treated with dignity and respect by virtue of their humanity. This dignity is secured through the protection of certain rights, including but not limited to:**

**The right of all people to bear and be registered under a name;**

**The right to be free from torture and from cruel, unusual or inhuman treatment or punishment, and the right to have one's physical, mental and moral integrity respected;**

**The right of prisoners to appropriate treatment;**

**The right to have one's honor and reputation protected from defamation;**

**The right to be free from incitement of discrimination, hatred or violence, and to be protected through the prohibition of national, racial or religious discrimination;**

**The right to claim nationality and avail oneself of the protection of a person's state of residence;**

**The right to conscientiously object to perform compulsory military service for reasons of conscience or profound religious, ethical or similar convictions;**

**The right to perform an alternative service of a civil nature in lieu of compulsory military service;**

**The right not to be subjected to slavery, involuntary servitude, or forced or compulsory labor, or any form of exploitation or trafficking.**

**Equality**

**All people are equal and entitled to equality before the law.**

**All people have the right not to be subjected to discrimination based on race, gender, religion, social group, political belief, or any other characteristic, belief or practice that is a fundamental part of their character, or impossible, impractical, or unreasonable to change.**

**Access to Justice**

**All people have the right to be recognized as a person before the law.**

**All people have the right to petition the court for redress of their claims.**

**All people accused of a crime have the right to legal representation of their choice, and to be provided with representation if they cannot afford it.**

**All people accused of a crime have the right be heard and present a defense in person.**

**All people have the right to have their conviction and sentence reviewed by a higher tribunal.**

**All people accused of a crime have the right to a public trial before a competent, impartial, and independent judicial authority without undue delay.**

**Administration of Justice**

**All people have the right not to be deprived of life, liberty, or property except by procedures prescribed by law, including but not limited to notice and an opportunity to contest the deprivation.**

**All people who are accused of a crime have the right to be informed of the charges against them, and are presumed to be innocent until proven guilty.**

**People may not be compelled to give evidence against themselves.**

**All people in legal proceedings have the right to access relevant information.**

**All people involved in legal proceedings have the right to adequate time and facilities to prepare a defense.**

**All people involved in legal proceedings have the right to privileged and confidential communication with their attorney, free from interference by the government or opposing parties.**

**All people involved in legal proceedings are entitled to a reasonable opportunity to present their case before the court, under conditions which do not place them at a disadvantage vis-à-vis their opponent.**

**All people accused of a crime have the right to confront and cross examine their accuser and the witnesses against them, and to challenge the evidence presented against them.**

**All people have the right not to be tried more than once for the same offense.**

**No one may be subjected to a heavier penalty than the one applicable at the time the offense was committed.**

**No one may be subjected to retroactive laws.**

**All people have the right not to be deprived of property, except according to procedures prescribed by law, including notice and an opportunity to be heard, and to receive just compensation for property taken for public use.**

#### **Freedom and Security of Person**

**All people have the right to liberty.**

**All people have the right not to be held against their will without just cause or formal charges, and the right to challenge the appropriateness of their detention.**

**All people are entitled to an effective means of redress before the authorities in case of violations of guaranteed rights and freedoms.**

**All people are entitled to be protected from abuse of authority.**

**All people have the right to be secure in one's person, home, papers, communications, and effects against unreasonable searches and seizures, except upon issuance of a warrant which specifically details the nature and limits of the search or seizure.**

**All people have the right to travel and move about as they see fit, and to enter and leave the state.**

**All people have the right to live where they choose.**

**All people are entitled to obtain compensation in case of a miscarriage of justice.**

**No one may be subjected to medical or scientific experiments without freely and competently given consent.**

**No one may be imprisoned due to debt.**

**No one may be arbitrarily exiled.**

**All people have the right to receive, seek, and impart information, and the right to publish and publicize information and opinions through writing, printing, electronic media, or any other means.**

### Political Rights

Political rights are the rights of individuals to participate in the government and the political process, and are often critical to establishing a stable state following a conflict. States emerging from conflict often either temporarily suspended political rights or denied them altogether. Post-conflict constitutions typically enumerate political rights, including the right to vote and to participate in the political process, to promote public trust in the state's commitment to human rights and democracy.<sup>7</sup> Political rights may be limited by the constitution and legislation, but any limitations placed on political rights must be clearly defined and temporary.

### **Sample Language: Political Rights**

**All people have the right to freely hold opinions, including religious and political beliefs, and to freedom of conscience.**

**All people have the right to express their opinions and beliefs freely.**

**All people have the right to assemble peacefully, and to associate with others.**

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<sup>7</sup> Political rights are outlined comprehensively in the International Covenant on Civil and Political Rights, which is available at <http://www2.ohchr.org/english/law/ccpr.htm>.

**All people have the right to vote in elections.**

**All people have the right to political participation, including but not limited to campaigning for and participating in party politics.**

**People are entitled to hold free and periodic elections to choose their government.**

**All people have the right to equal access to public service, including the right to be elected to office.**

### Economic Rights

Post-conflict states may include provisions for economic rights to ensure a viable and productive environment for stability and quality of life. These provisions may include individual freedoms, such as the right to work and own property, and may also include state obligations to the individual, such as adequate healthcare, social security, and nutrition.<sup>8</sup>

### **Sample Language: Economic Rights**

**All people have the right to work, and the right to choose their employment.**

**All people have the right to have their health protected by the state, including immunization and protection against disease.**

**All people have the right to own property.**

**All people have the right to adequate standards of living.**

**All people have the right to be educated.**

**All people have the right to social security.**

**All people have the right to insurance.**

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<sup>8</sup> Economic rights are outlined comprehensively in the International Covenant on Economic, Social and Cultural Rights, which is available at <http://www2.ohchr.org/english/law/cescr.htm>.

**All people have the right to social and medical assistance.**

**All people have the right to adequate nutrition.**

**All people have the right to enjoyment of scientific advancements.**

### Social Rights

Post-conflict states may include constitutional provisions for social rights, which outline the rights of individuals to marry and establish a family. The protection of social rights may be particularly important in states with a history of forced marriage or restrictions on children and family planning.<sup>9</sup>

### **Sample Language: Social Rights**

**All people have the right to establish a family, and to engage in family planning if they choose.**

**All people have the right to marry, and the right not to enter into marriage without giving free and full consent.**

**The family has the right to respect and protection as the fundamental unit of society.**

### Cultural Rights

Post-conflict constitutions may also include provisions for cultural rights, especially regarding respect for language, culture, and religion.<sup>10</sup> Cultural rights may provide assurances to minority communities that all communities will be provided with the freedom to maintain and preserve their cultural identity.

### **Sample Language: Cultural Rights**

### **Language**

**All people have the right to speak their own language, and to teach and publicly communicate in their own language.**

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<sup>9</sup> Social rights are outlined comprehensively in the International Covenant on Economic, Social and Cultural Rights, which is available at <http://www2.ohchr.org/english/law/cescr.htm>.

<sup>10</sup> Cultural rights are outlined comprehensively in the International Covenant on Economic, Social and Cultural Rights, which is available at <http://www2.ohchr.org/english/law/cescr.htm>.

**Culture**

**All individuals within the State shall have the right to teach and maintain their language and cultural customs of choice.**

**All individuals within the State have the right to participate in the cultural life of their community in accordance with their customary practices.**

**The freedom of cultural originality includes the freedom to engage in intellectual, artistic, and scientific originality with equal protection of the law.**

**Religion**

**All people have the right to practice the religion of their choice free from government interference, or to practice no religion.**

**Places of worship shall be independent of the State and are free to perform their own worship and organize as they determine.**

**No one shall be questioned by any authority about his/her religious convictions or observance except for statistical purposes and shall not be forced to testify about religious beliefs or ideologies.**

**Limitations on Human Rights**

Constitutions often provide for the development of implementing legislation on issues of governance and state structure. The need for such legislation is typically noted through phrases such as “in accordance with law” or “as determined by law.”<sup>11</sup> The use of these phrases with regard to human rights, however, may result in limitations on human rights protections, which may conflict with international human rights norms and standards.<sup>12</sup> To ensure that implementing legislation does not limit human rights protections, states typically clearly identify which rights are non-derogable, and may not be limited.

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<sup>11</sup> “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.” SOUTH AFRICA CONST. art. 36.

<sup>12</sup> Article 36 of the Lithuanian Constitution has limiting language “as provided by law” for some rights, such as the freedom to assemble when “necessary to protect the security of the State or the community, public order, people's health or morals, or the rights and freedoms of other persons.” LITHUANIA CONST. art. 36.

The impact of limiting phrases on the protection of human rights has been extensively discussed in past constitutional negotiations and opinions issued by international human rights institutions. In these past negotiations, the matter was addressed by including a provision that: (1) acknowledges that some rights and freedoms can be limited under specific circumstances for limited periods of time; and (2) provides that other rights and freedoms can never be limited, even in times of state emergencies (that is, they can never be subject to “derogation”).<sup>13</sup>

### **Sample Language: Potentially Limiting Language**

**The fundamental rights and freedoms affirmed in this Constitution may be limited only insofar as it is in the interests of national security, public safety or health, for the prevention of public disorder or crime, or for the protection of the rights and freedoms of others.**

**Any law providing for the limitation of the fundamental rights and freedoms affirmed in this Constitution must be consistent with the principles of democracy and justice, clearly specify the extent of such limitation, and identify the article or articles of the Constitution that provide the authority to enact such limitation.**

**The following rights shall *not* be subject to limitation or derogation, even in times of state emergencies:**

**Right to life;**

**Prohibition on slavery and servitude;**

**Right to juridical personality;**

**Prohibition on torture or cruel, inhuman or degrading treatment or**

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<sup>13</sup> Article 37(5) of the South African Constitution includes a Table of Non-Derogable Rights, rights that are protected even during a state of emergency. The table enumerates the rights and explains to what extent they are protected. For instance, “equality” is protected “[w]ith respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language” while “human dignity” and “life” are protected entirely. SOUTH AFRICA CONST. art. 37(5). Chapter 44 of Malawi’s Constitution also provides for nine specific non-derogable rights: the right to life, protection from cruel punishment, protection from genocide, protection from slavery, protection from detention for debt, protection from retroactive laws, the right to equality, the right to freedom of conscience (religion), and the right to *habeas corpus* relief. MALAWI CONST. chap. 44. Article 14 of the Indian Constitution provides for the right to “equality before law.” INDIA CONST. art. 14. Article 14 of the Iraqi Constitution states that “Iraqis are equal before the law.” IRAQ CONST. art. 14.

**Punishment;**

**Freedom from retroactive application of law;**

**Prohibition on imprisonment for failure to pay a debt;**

**Right to equality before the law;**

**Right to non-discrimination on the basis of race, color, ethnic or social origin, sex, religion, or language; and**

**Freedom of thought, conscience, and belief.**

### **Enforcement Mechanisms for Human Rights**

Post-conflict constitutions often provide for oversight mechanisms to protect fundamental human rights and monitor government administration. Oversight mechanisms may consist of an ombudsman's office, a human rights commission, a combination of the two, and/or a constitutional court. These institutions provide avenues for individuals to seek redress for human rights violations.

#### *Ombudsman*

Many post-conflict states establish an ombudsman's office to monitor the conduct of public administration and to prevent human rights abuses perpetrated by the government.<sup>14</sup> Such officials are typically known as Ombudsman, Public Protector, or Investigator General.<sup>15</sup> Constitutions may include specific provisions about the appointment and function of the ombudsman, including the measures the ombudsman takes when investigating complaints of human rights abuses, or may leave the specific detail to law.<sup>16</sup>

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<sup>14</sup> Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions In Good Governance and Human Rights Protection*, 13 HARVARD HUMAN RIGHTS JOURNAL 1, 8-9 (2000).

<sup>15</sup> Articles 182 and 183 of the South African Constitution gives the Ombudsman office the title "Public Protector." The Public Protector has the power to investigate public complaints against government agencies or officials. It also may recommend corrective action and issue reports. Under the South African Constitution, the Public Protector is appointed by the President, on the recommendation of the National Assembly, for a non-renewable period of seven years. SOUTH AFRICA CONST. arts. 182-183. Other names for Ombudsman offices include Public Complaints Commission (Nigeria), Investigator-General (Zambia), Parliamentary Commissioner for Administration (United Kingdom), and Inspector-General of Government (Uganda).

<sup>16</sup> Articles 242 to 243 of the Constitution of Thailand specify that the Ombudsman shall be three people appointed by the King, and that they should be people who are publicly known to have "knowledge and experience in the administration of the State affairs, enterprises or activities of common interest of the public and with apparent integrity." The Ombudsmen are given the power to investigate complaints dealing with failure of a Government

**Sample Language: Ombudsman**

**The Ombudsman's office shall be the primary office charged with protection of individual and collective rights.**

**There shall be one state level Ombudsman's office in the State, regulated by law.**

**The Ombudsman shall have the power to file a request for institution of proceeding to local courts for the protection of rights and to enforce implementation of their decisions.**

**The Ombudsman shall investigate complaints dealing with failure of a government official, employee, or agency to comply with the law, or the performance or omission of an act by a government official, employee, or agency that causes unjust harm to the complainant.**

**If the complaint raises a question of constitutionality, the Ombudsman is required to submit the case to the Constitutional Court.**

*Human Rights Commissions*

Post-conflict states may create human rights commissions to monitor a state's compliance with domestic and international human rights law. The commission's duties may also include recommending changes and providing services to assist the public in exercising their human rights. Commissions are generally composed of experts from diverse backgrounds, and the state establishes the specific requirements for the selection of its members.<sup>17</sup>

Post-conflict constitutions may establish the duties of a human rights commission, such as advocating and promoting human rights, recommending changes to state policy and legislation to promote compliance with international human rights norms and obligations of the state, resolving unlawful discrimination claims, and protecting human rights in accordance with United Nations and

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official, employee or agency to comply with the law, or the performance or omission of an act by a Government official, employee or agency that causes unjust harm to the complainant. Under the Thai Constitution, if the Ombudsmen think that the complaint raises a question of constitutionality, they are required to submit the case to the Constitutional Court. THAILAND CONST. arts. 242-243.

<sup>17</sup> National Institutions for the Promotion and Protection of Human Rights, *Fact Sheet No.19*, OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, available at <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>.

international human rights obligations.<sup>18</sup> Constitutions may explicitly list the duties of the human rights commission and explain the mechanisms by which the commission develops policy and implementation or leave such detail to law.<sup>19</sup> Several constitutions include a complaint mechanism to which individuals can bring claims when they feel their rights have been violated.<sup>20</sup>

### Sample Language: Human Rights Commissions

**There shall be established by law a Commission on Human Rights. The Commission shall have the power to monitor, investigate, file cases, research, educate, lobby, advise, comment on and propose legislation, and report on issues concerning the promotion and protection of the rights affirmed in this Constitution and recognized by the principles of international law.**

**Every individual has a right to complain to the Commission, alleging that a fundamental right or freedom has been threatened or denied.**

***Optional:* To assist in carrying out these functions, within the Commission there shall be established a Subcommittee on Human Rights.**

#### *Hybrid Human Rights Commissions*

Some post-conflict constitutions combine elements of the ombudsperson and human rights commission to create a hybrid human rights commissions whose responsibilities include both the protection of human rights and monitoring of

<sup>18</sup> See, for instance, New Zealand's Human Rights Commission, *available at* <http://www.hrc.co.nz/>.

<sup>19</sup> The South African Constitution explicitly lists the duties of its independent Human Rights Commission. Section 184 of the Constitution gives the Commission the power to investigate and report human rights offenses, take steps to secure redress, research human rights, and educate the public. SOUTH AFRICA CONST. art. 184. South Africa's Human Rights Commission is composed of two sections: (1) the Commission, which develops policy, and (2) the Secretariat, which applies policy. The Human Rights Commission Act also requires the Commission to set up a standing committee to advise and assist the institution. South Africa's Human Rights Commission, *available at* <http://www.sahrc.org.za/home/>.

<sup>20</sup> The Kenyan Constitution's Article 59 provides for a human rights commission that, among other duties, hears individual complaints because "[e]very person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." KENYA CONST. art. 59. Similarly, Article 58 of the Constitution of Afghanistan establishes an independent human rights commission "[t]o monitor respect for human rights in Afghanistan as well as to foster and protect it . . . Every individual shall complain to this Commission about the violation of personal human rights. The Commission shall refer human rights violations of individuals to legal authorities and assist them in defense of their rights." AFGHANISTAN CONST. art. 58.

government administration.<sup>21</sup> This structure combines the function of an ombudsman with the function of a human rights commission to create an institution that addresses individual human rights complaints and advocates on a national level to ensure compliance with human rights treaties and conventions.

Some constitutions create this hybrid oversight body by granting the ombudsman's office additional power to investigate complaints of human rights violations by both government officials and private persons. Additionally, constitutions may grant the ombudsman oversight over other areas, such as civil, political, economic, social, and cultural rights.<sup>22</sup>

### **Sample Language: Hybrid Human Rights Commissions**

**The Ombudsman may provide legal assistance or other assistance to individuals who claim violations of fundamental rights.**

**The Ombudsman has the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant by an official in the employ of any organ of government (whether central or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive, or unfair in a democratic society.**

**The Ombudsman shall have the power to monitor, investigate, file cases, research, educate, lobby, advise, comment on and propose legislation, and report on issues concerning the promotion and protection of the rights affirmed in this Constitution and recognized by the principles of international law.**

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<sup>21</sup> States with hybrid human rights commissions include Georgia (Public Defender), Ghana (Commissioner for Human Rights and Administrative Justice), Colombia (office of the Defensor del Pueblo), Guatemala (the Procurador de los Derechos Humanos), and Romania (Advocate of the People).

<sup>22</sup> The ombudsman office in Namibia is another instance of a hybrid human rights commission. Established in Articles 25 and 91 of Namibia's 1990 Constitution, the Namibia ombudsman office has extra powers not granted to traditional ombudsmen. In addition to regulating government conduct, the office has the authority to investigate complaints of human rights violations by both government officials and private persons or entities. Additionally, the Namibian Constitution lists a variety of civil, political, economic, social and cultural rights that can all be examined by the ombudsman. NAMIBIA CONST. arts. 25, 91.

*Constitutional Courts*

Constitutional courts are responsible for settling disputes on constitutional issues. These courts protect human rights by preserving constitutionally enumerated rights and freedoms.<sup>23</sup> The constitutional court acts as a vehicle for redress if the constitution allows individuals to appeal directly to the court in cases of human rights violations. These courts may also hear appeals from other agencies and the ombudsman's office.

**Sample Language: Constitutional Courts**

**Individuals shall have the right to file a [request for institution of proceedings] [to a special chamber] of the Constitutional Court, for protection of those rights guaranteed in the Constitution.**

**The Constitutional Court shall be required to issue a ruling on an individual's request within [number of] days.**

**Political parties, municipal councils, city councils, civil society organizations, and other legal entities may also file a [request for institution of proceedings] to the Constitutional Court for the protection of the rights of individuals and/or groups.**

**The Ombudsman may file a [request for institution of proceedings] directly to the Constitutional Court on behalf of individuals and groups for protection of their rights.**

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<sup>23</sup> In Costa Rica, a Constitutional Chamber of the Supreme Court examines the constitutionality of legislation, executive decrees and all *habeas corpus* warrants. Since the Chamber's creation in 1989, it has extinguished a number of laws that it found inconsistent with the American Convention on Human Rights and other human rights treaties. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 211, 218 (1997). Composed of nine judges, the Macedonian Constitutional Court determines whether statutes preserve particular rights and freedoms of individuals, and analyzes whether statutes conform to the Constitution. REPUBLIC OF MACEDONIA CONST. art. 110. The duties listed in Article 110 of Macedonia's Constitution include the protection of "the freedoms and rights of the individual and citizen relating to the freedom of communication, conscience, thought and activity as well as to the prohibition of discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation." Similarly, Article 125 of the Russian Constitution provides for 19 judges for the Constitutional Court with jurisdiction "upon complaints about violations of constitutional rights and freedoms of citizens and upon court requests shall check, according to the rules fixed by the federal law, the constitutional of a law applied or subject to be applied in a concrete case." Since the Russian Constitutional Court's beginning, it has confirmed the supremacy of international human rights law validating fundamental rights. For instance, the Court has preserved the guarantee of legal protection, the right to be protected against discrimination, and the right to property. RUSSIAN FEDERATION CONST. art. 125.

## CHAPTER X: PROTECTING MINORITY RIGHTS

Many states emerging from conflict provide for minority rights in their constitutions. Minority rights may be particularly important in states where minorities have been historically disadvantaged, as they provide assurances of the state's commitment to developing an inclusive society. Some states include general anti-discrimination and fundamental rights provisions, which apply to the population as a whole, while others explicitly enumerate the rights of minorities, including freedom of religion and culture.

Constitutions may also provide mechanisms to ensure minority representation, such as: (1) set-asides or party requirements within electoral systems; (2) group vetoes; and (3) expanded powers of local governance within ethnic communities. States might also seek to include language guaranteeing that the minority rights granted in the constitution will not be manipulated or derogated, while other rights may be limited under certain circumstances such as national security.

### General and Specific Minority Protections

As citizens of the state, minority communities are entitled to equal protection of the fundamental human rights enumerated in the constitution.<sup>1</sup> In many constitutions, however, states specifically enumerate minority rights to underscore the state's commitment to protecting minority communities.<sup>2</sup> Specific minority rights may include protection from discrimination and the rights to freedom of culture, religion, and language.<sup>3</sup>

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<sup>1</sup> "The citizens of Afghanistan, both men and women, have equal rights and duties before the law." AFGHANISTAN CONST. art. 22. "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." SOUTH AFRICAN CONST. art. 9(3). "All people shall be equal before the law, the court, and other State institutions and officials. The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views." LITHUANIA CONST. art. 29.

<sup>2</sup> The Preamble of Cameroon's Constitution includes both a general non-discrimination provision and a specific provision guaranteeing equal rights for minorities: "all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development; the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law." CAMEROON CONST. preamble.

<sup>3</sup> Article 66 of Guatemala's Constitution identifies specific rights reserved for indigenous groups: "Guatemala is made up of various ethnic groups among which are native groups of Mayan descent. The State recognizes, respects, and promotes their form of life, customs, traditions, forms of social organization, the wearing of Indian dress by men and women, their languages and dialects." GUATEMALA CONST. art. 66. Articles 1 and 2 of Mexico's Constitution provides separate guarantees of both non-discrimination and minority rights: "Discrimination based on ethnical or national origin as well as discrimination based on gender, age, disabilities of any kind, social status, health

**Sample Language: General Minority Protections**

**All individuals have equal rights and duties under this Constitution, regardless of nationality, language, ethnicity, race, color, tribal status, religion, sex, or political opinion.**

**All persons shall have equal rights and obligations.**

**Sample Language: Specific Minority Protections**

**The members of national minorities shall not be discriminated against on the basis of their national minority status.**

**The State shall ensure the protection of minorities and shall preserve the rights of [indigenous/tribal] populations in accordance with the law.**

**Members of national minorities shall have the right to foster their cultural heritage through the use of their language and alphabet and the fostering of their cultural institutions and associations, in accordance with the law.**

**All citizens/residents belonging to national or religious minorities shall have the right to the full and effective exercise, [individually, as well as in community with others], of the rights affirmed by this Constitution and recognized by the principles of international law. Such rights include, but are not limited to the right to:**

**Maintain their distinct identities and characteristics and pass these on to their children;**

**Practice and pass on their cultural traditions and customs;**

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condition, religious opinions, preferences of any kind, civil status or any other reason which attempts against human dignity and which is directed to either cancel and restrain the individuals' privileges and immunities, shall be prohibited. . . . The Nation has a multicultural integration based on its indigenous peoples which are those inhabiting the country since ever before the conquest took place and who have lived according to their own social, economic, cultural and political institutions. . . . The right to self determination of indigenous people shall be granted within a general framework of autonomy according to the Constitution and in a way which preserves the national unity." MEXICO CONST. arts. 1-2.

**Practice and pass on their spiritual and religious traditions, customs and ceremonies;**

**Use and pass on to future generations their languages and alphabet (including the right to educate their children in their language and the right to understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation); and**

**Maintain their own institutions (including local governing, juridical and educational institutions) to the extent that they are consistent with this Constitution.**

**The exercise of these rights by members of national minority groups may not discriminate against other citizens.**

### *Freedom of Religion and Culture*

Post-conflict constitutions generally include provisions about freedom of religion and culture for minority communities.<sup>4</sup> Religious freedom generally includes the freedom to practice religion and the freedom to associate with others in the practice of religion. Post-conflict constitutions may also include a provision about the independence of places of worship from the state.<sup>5</sup>

Cultural freedom generally includes the right of individuals to use and preserve their language of choice and participate in the cultural customs of their choice.<sup>6</sup> Additionally, cultural freedom includes the freedom to associate with

<sup>4</sup> “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” SOUTH AFRICA CONST. art. 30. “The right of Indian peoples to preserve and to develop their ethnic identity in their respective habitat is hereby recognized and guaranteed. They also have the right to freely apply their systems of political, socioeconomic, cultural, and religious organization, and to voluntarily observe customary practices in their domestic coexistence as long as they do not violate the fundamental rights established by this Constitution. Indian customary rights will be taken into account when deciding conflicts of jurisdiction.” PARAGUAY CONST. art. 63.

<sup>5</sup> “The independence and autonomy of all churches and religious denominations, without restrictions other than those imposed by this Constitution and the law, are hereby guaranteed.” PARAGUAY CONST. art. 24(3). “Churches and other religious communities shall be separate from the State and are free to organize themselves and to perform their ceremonies and their worship.” PORTUGAL CONST. art. 41(4).

<sup>6</sup> “Everyone has the right to use the language and to participate in the cultural life of their choice.” SOUTH AFRICA CONST. art. 30. “(1) The comprehensive development of citizens representing national minorities or ethnic groups in the Slovak Republic is guaranteed, particularly the right to develop their own culture, together with other members of the minority or ethnic group, the right to disseminate and receive information in their mother tongue, the right to associate in national minority associations, and the right to set up and maintain educational and cultural institutions.” SLOVAKIA CONST. art. 34(1).

others who share the same culture and language.<sup>7</sup> Constitutions may include freedom of cultural originality, meaning that ethnic minorities may freely engage in intellectual, artistic, and scientific originality, which will be equally protected as provided by law.<sup>8</sup>

### **Sample Language: Religious Rights**

**All individuals shall enjoy freedom of religion and worship.**

**Places of worship shall be independent of the State and are free to perform their own worship and organize as they determine.**

**No one shall be questioned by any authority about his/her religious convictions or observance except for statistical purposes and shall not be forced to testify about religious beliefs or ideologies.**

### **Sample Language: Cultural Rights**

**All individuals within the State shall have the right to teach and maintain their language, alphabet, and cultural customs of choice.**

**[Minorities] have the right to participate in the cultural life of their community in accordance with their customary practices.**

**The freedom of cultural originality includes the freedom for minorities to engage in intellectual, artistic, and scientific originality with equal protection of the law.**

### **Potentially Limiting Language**

As noted with respect to the protection of human rights, constitutions frequently include phrases such as “in accordance with law” or “as determined by

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<sup>7</sup> “The comprehensive development of citizens representing national minorities or ethnic groups in the Slovak Republic is guaranteed, particularly the right to develop their own culture, together with other members of the minority or ethnic group, the right to disseminate and receive information in their mother tongue, the right to associate in national minority associations, and the right to set up and maintain educational and cultural institutions.” SLOVAKIA CONST. art. 34(1).

<sup>8</sup> “1. Intellectual, artistic and scientific originality shall not be restricted. 2. This freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic works and shall include the protection of copyright by law.” PORTUGAL CONST. art. 42.

law” to allow for the subsequent development of more specific legislation.<sup>9</sup> Clarification of which rights are non-derogable, even in the case of an emergency, and which rights can be limited under specific circumstances, is therefore an important element for states to consider when drafting post-conflict constitutions.

Please see Chapter VIII: Protecting Human Rights for a further discussion and sample language regarding potentially limiting language.

## Mechanisms to Ensure Representation

Post-conflict constitutions may also contain provisions that address mechanisms to ensure minority representation. These mechanisms are most often used in states emerging from inter-ethnic conflict, or where adequate representation of minority communities is necessary to promote stability. Mechanisms to ensure minority representation include: (1) set-asides and party requirements within electoral systems; (2) group vetoes; and (3) powers of local or regional self-governance.

### *Set-Asides or Party Requirements within Electoral Systems*

Many post-conflict states include set-asides or specific party requirements in the constitution.<sup>10</sup> Set-asides are seats reserved for ethnic or religious groups, which may be elected or appointed.<sup>11</sup> Party requirements may stipulate that all political parties must include candidates from different ethnic groups or regions. For instance, the constitutions of Spain and Italy provide additional representation

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<sup>9</sup> “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.” SOUTH AFRICA CONST. art. 36.

<sup>10</sup> In the Indian Constitution, Part 16 provides for set-asides for members of certain classes, including representatives of “scheduled castes” and “scheduled tribes” equal to the proportion of those populations as compared to the total State population. INDIA CONST. part 16. In the Ethiopian Constitution’s Article 54, minorities are included in the electoral process because “Provisions shall be made by law for special representation for minority Nationalities and Peoples. Members of the House, on the basis of population and special representation of minority Nationalities and Peoples, shall not exceed 550; of these minority Nationalities and Peoples shall have at least 20 seats.” ETHIOPIA CONST. art. 54.

<sup>11</sup> Article 80 of the Slovenian Constitution reserves two seats in the National Assembly, one for a deputy from the Italian national community and the other for a deputy from the Hungarian national community. SLOVENIA CONST. ART. 80. The Constitution of Afghanistan also provides for “the general and just representation” of all the country’s constituencies. AFGHANISTAN CONST. art. 83.

for particular regions and communities to ensure that the structure of the government adequately represents the population.<sup>12</sup>

### Sample Language: Set-Asides or Party Requirements

**[X] percent shall be individuals belonging to the national and religious minorities of the State.**

**There shall be reserved [X] of seats in the National Assembly for each national or religious minority in the State. The number of seats reserved for each minority will reflect the proportion of its representation in society with at least one seat reserved for [minorities with less than one percent of the national population].**

**[Representatives] shall be elected on a regional basis.**

#### *Group Vetoes*

Some states provide group vetoes, which enable minority groups to block laws they feel are not in the interest of the groups' members.<sup>13</sup> Group vetoes are typically limited to certain issues, such as self-governance, to ensure that they do not result in deadlock within the legislative process.<sup>14</sup> Members of one branch of

<sup>12</sup> "The senate is elected on a regional basis except for the seats assigned to the constituency of Italians abroad." ITALY CONST. art. 57(1). Article 69 of the Spanish Constitution: "1. The Senate is the chamber of territorial representation. 2. In each province, four Senators will be elected by universal, free, equal, direct and secret suffrage under the terms established by an organic law. 3. In the island provinces, each island or grouping of them with a representation or insular council shall be a voting district for the purposes of the election of senators, three of them going to each of the major islands -Gran Canaria, Mallorca and Tenerife- and one each to the following islands or groupings: Ibiza-Formentera, Menorca, Fuerteventura, Gomera, Hierro, Lanzarote and La Palma. 4. The cities of Ceuta and Melilla shall elect two Senators each. 5. The Autonomous Communities shall also designate one Senator and one additional Senator for each million inhabitants in their respective territories. The designation shall be made by the Legislative Assembly or in its absence, by the higher collective body of the Autonomous Community pursuant to the provisions of the Statutes, which in any case, shall insure adequate proportional representation." SPAIN CONST. art. 69.

<sup>13</sup> In the Constitution of Bosnia and Herzegovina, for instance, Article 4 Paragraph 3 requires that, while parliamentary decisions are made by majority vote, "[t]he Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote." BOSNIA AND HERZEGOVINA CONST. art. 4(3).

<sup>14</sup> Amendments X, XIV, XV, XVI, and XVIII of the Macedonian Constitution allow for a type of minority veto within the National Assembly on particular issues, such as local self-government, the rights of member communities, and the selection of Supreme Court justices. For laws on these issues to pass, they must receive both a majority of total Representative votes, as well as "a majority of the votes of the Representatives attending who belong to communities not in the majority in the population of Macedonia." REPUBLIC OF MACEDONIA CONST. amends. X, XIV, XV, XVI, XVIII.

the legislature or the executive may invoke the veto.<sup>15</sup> Most states provide a right of appeal to the constitutional court to determine the validity of the group's interest in invoking the veto.<sup>16</sup>

### **Sample Language: Group Vetoes (*Optional*)**

**The constituent minorities of [State] have an inherent right to protect their national interests.**

**National interests shall be protected at the state level through group vetoes.**

**Group vetoes may be invoked regarding:**

**The rights of all constituent people to be adequately represented in legislative, executive, and judicial authorities;**

**The identity of a constituent people;**

**Constitutional amendments;**

**Organization of the bodies of public authority;**

**Equal rights of the constituent peoples in decision-making processes;**

**Territorial organization;**

**Education of citizens;**

**Use of languages and scripts;**

**National symbols and flags;**

**Spiritual heritage, particularly the fostering and affirmation of religious and cultural identity and traditions;**

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<sup>15</sup> BOSNIA AND HERZEGOVINA CONST. arts. 4-5.

<sup>16</sup> BOSNIA AND HERZEGOVINA CONST. art. 4.

**Preservation of the integrity of the State;**

**Public information systems;**

**Any other issues if so claimed by [two-thirds] of the government representatives in one of the chambers.**

**Option 1: Bicameral and Modified Unicameral**

**The veto may be invoked by a simple majority of the representatives of one of the constituent peoples in the [Second Chamber] or a member of the executive. [X] of the representatives of one of the constituent peoples must invoke the veto.**

**If a majority of the representatives of one of the other constituent peoples or a member of the executive believes that the veto was improperly invoked, they may appeal to the [First Chamber].**

**The [First Chamber] shall mediate disputes regarding the use of the veto.**

**The [First Chamber] shall mediate between the representatives or member of the executive that originally invoked the veto and the parliamentary representatives or member(s) of the [executive] that opposed the use of the veto.**

**The [First Chamber] shall develop its [binding decision] by consensus of all of its members.**

**The [First Chamber] shall report on its decision to the [Second Chamber] and executive within [X] days from the day the matter is referred.**

**The decision of the [First Chamber] shall be written as a law and submitted to the [Second Chamber] after it is reported to the [Second Chamber] and executive.**

**Upon its return to the [Second Chamber], the decision may not be subject to a veto.**

**Members of the [Second Chamber] shall vote on the [First Chamber's] decision, unless the decision is appealed to the Constitutional Court.**

**If the decision is not appealed, and it is approved by [X] of the [Second Chamber], the decision shall become law.**

**Option 2: Unicameral (invoked by the legislature and disputes referred to ad hoc/standing committee)**

**The veto may be invoked by a simple majority of the representatives of one of the constituent peoples in the legislature or a member of the executive. [X] of the representatives of one of the constituent peoples must invoke the veto.**

**If a majority of the representatives of one of the other constituent peoples or a member of the executive believes that the veto was improperly invoked, they may appeal to an [ad hoc/standing] committee.**

**The [ad hoc/standing] committee shall mediate disputes regarding the use of the veto.**

**The committee shall mediate between the representatives or member of the executive that originally invoked the veto and the parliamentary representatives or member(s) of the executive that opposed the use of the veto.**

**The committee shall develop its [binding decision] by consensus of all of its members.**

**The committee shall report on its [decision] to the [Legislature] and [Executive] within [X] days from the day the matter is referred to the committee.**

**The decision of the committee shall be written as a law and submitted to the legislature after it is reported to the legislature and executive.**

**Upon its return to the Legislature, the decision may not be subject to veto.**

**Members of the legislature shall vote on the committee's decision, unless it is appealed to the Constitutional Court.**

**If the decision is not appealed, and it is approved by [X] of the legislative branch, the decision shall become law.**

**The committee shall be composed of [X] representatives from the Legislature.**

**Members of the committee shall be nominated by the executive and approved by [X] of the members of legislature.**

**Constitutional Court Review of Veto:**

**If one of the constituent peoples or members of the executive party to the committee's mediation determines that the committee decision violates its veto, [or that the use of the veto was improper,] it may file a request for institution of proceedings to the Constitutional Court for protection of its veto.**

**The Constitutional Court, through a special chamber, shall determine whether the veto was invoked properly.**

**The special chamber shall be composed of [X] members.**

**Procedures for appointing the special chamber shall be regulated by law.**

**Determinations by the Constitutional Court on the invocation of the veto shall be binding.**

**If the Constitutional Court determines that the disputed law does violate a vital national interest, the law shall fail and shall be returned to the proponent. The proponent may not resubmit the original law.**

**If the Constitutional Court determines that no vital national interest is involved, the law is deemed to be adopted/may be adopted by a simple majority.**

*Local and Regional Self-Governance*

In states where minority communities are clustered in particular regions or localities, states may provide them with powers of local or regional self-governance. Local or regional self-governance promotes increased representation and participation of minority communities, and may satisfy minority interests in overseeing their affairs within the structure of the state government.<sup>17</sup> In addition, states may provide for educational and economic development for rural or economically disadvantaged areas to support minority communities in participating in the government.

**Sample Language: Local and Regional Self-Governance**

**Members of the [X] communities shall establish their own self-governing communities in their geographic areas. The state government may authorize certain functions under national jurisdiction and provide funds for such functions. The obligations of the local communities in self-governance shall be regulated by law.**

**The State shall provide for the educational and economic development of areas with high minority populations as described by law. Funding will be guaranteed by the Constitution and administered by the legislature as described by law.**

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<sup>17</sup>“(1) The autochthonous Italian and Hungarian national communities and their members shall be guaranteed the right to use their national symbols freely and, in order to preserve their national identity, the right to establish organisations and develop economic, cultural, scientific and research activities, as well as activities in the field of public media and publishing. In accordance with laws, these two national communities and their members have the right to education and schooling in their own languages, as well as the right to establish and develop such education and schooling. The geographic areas in which bilingual schools are compulsory shall be established by law. These national communities and their members shall be guaranteed the right to foster relations with their nations of origin and their respective countries. The state shall provide material and moral support for the exercise of these rights. (2) In order to exercise their rights, the members of these communities shall establish their own self-governing communities in the geographic areas where they live. On the proposal of these self-governing national communities, the state may authorise them to perform certain functions under national jurisdiction, and shall provide funds for the performing of such functions. (3) The two national communities shall be directly represented in representative bodies of local self-government and in the National Assembly. (4) The position of the Italian and Hungarian national communities and the manner in which their rights are exercised in the geographic areas where they live, the obligations of the self-governing local communities for the exercise of these rights, and those rights which the members of these national communities exercise also outside these areas, shall all be regulated by law. The rights of both national communities and their members shall be guaranteed irrespective of the number of members of these communities. (5) Laws, regulations and other general acts that concern the exercise of the constitutionally provided rights and the position of the national communities exclusively, may not be adopted without the consent of representatives of these national communities.” SLOVENIA CONST. art. 64.

## CHAPTER XI: PROTECTING WOMEN'S RIGHTS

In addition, post-conflict constitutions often provide for women's rights. Such provisions promote women's active involvement in state, and underscore the state's commitment to protecting women's rights and promoting gender equality. Provisions protecting women's rights include: (1) protections against discrimination; (2) political rights and freedoms; (3) familial rights and freedoms; (4) social and moral rights and freedoms; and (5) rights and freedoms in labor, commerce, and industry. As with the protection of human and minority rights, states may provide that the women's rights will not be manipulated or derogated, or that limitations can arise only under specific circumstances.

**General and Specific Provisions**

States address women's rights in three primary ways. One option is to use gender-neutral language or include a clause noting that gender-specific language applies to both genders. States using this approach also typically include anti-discrimination and equal opportunity clauses. A second option is to enumerate the state's binding international obligations to respect, protect, and fulfill women's rights, including international conventions and treaties. A third option is to enumerate specific rights provided to women.

*Gender-Neutral Language in the Constitution*

Some states maintain gender-neutral language throughout the constitution or include a provision indicating that gender-specific language applies to males and females.<sup>1</sup> These states also usually include general anti-discrimination and equal opportunity provisions.<sup>2</sup>

**Sample Language: Gender-Neutral Language**

**All residents are equal under the law without distinction of any kind, such as race, color, sex [gender], language, religion, political or other opinion, national or social origin, property, birth, or other status.**

<sup>1</sup> The Portuguese Constitution is careful about its use of "his" and "her." Instead, it uses non-gender specific terms such as "every citizen" and "all." *See generally* PORTUGAL CONST.

<sup>2</sup> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth." SOUTH AFRICA CONST. art. 9(3); *see also* NAMIBIA CONST. art. 10; CANADIAN CHARTER OF RIGHTS AND FREEDOMS art. 15; PARAGUAY CONST. art. 48.

**Discrimination is forbidden on such distinctions. Equal opportunities are granted to all in accordance with the law.**

**Gender-specific language in this Constitution shall apply equally to male and female.**

*Referencing the State's Binding International Obligations*

States may also enumerate binding international human rights treaties and conventions to which the state is a party and by which the state intends to abide.<sup>3</sup> Such conventions typically include the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), which outlines the specific obligations of states to respect, protect, and fulfill the rights of women.<sup>4</sup>

**Sample Language: General Fundamental Rights and Freedoms**

**All individuals are guaranteed the basic rights and freedoms enumerated in this Constitution and in the international treaties and conventions to which the State is party.**

**Basic rights and freedoms guaranteed in this Constitution and international treaties and conventions to which the State is party shall be secured to all persons in the State without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.**

**The State shall respect human rights in accordance with international treaties and conventions to which it is a party.**

**International treaties and conventions ratified by the State are binding on the State and shall take precedence over laws, unless those laws guarantee rights to a greater extent than applicable treaties and conventions.**

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<sup>3</sup> “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” CAMBODIA CONST. art. 31.

<sup>4</sup> The full text of the Convention to Eliminate All Forms of Discrimination Against Women is available at <http://www.un.org/womenwatch/daw/cedaw/>.

**The State shall ensure all human rights in accordance with, or to a greater degree than, those rights guaranteed in the following treaties and conventions:<sup>5</sup>**

**[1957 Convention on the Nationality of Married Women;]**

**[1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto;]**

**[1966 Covenant on Economic, Social and Cultural Rights;]**

**[1979 Convention on the Elimination of All Forms of Discrimination against Women;]**

**[Other conventions.]**

*Specific Provisions about the Rights of Women*

An alternative approach is to include a section enumerating specific rights for women.<sup>6</sup> The rights enumerated clarify how civil and political rights<sup>7</sup> and

<sup>5</sup> European states may also choose to include the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto; the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and the 1992 European Charter for Regional or Minority Languages.

<sup>6</sup> Article 24 of the Constitution of Malawi combines the five elements: “(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right (a) to be accorded the same rights as men in civil law, including equal capacity - to enter into contracts; to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and to acquire and retain citizenship and nationality. (b) On the dissolution of marriage - to a fair disposition of property that is held jointly with a husband; and to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children. (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property, including property obtained by inheritance.” MALAWI CONST. art. 24.

<sup>7</sup> “Men and women have equal civil, political, social, and cultural rights. The State will foster the conditions and create the mechanisms adequate for making this equality real and effective by removing those obstacles that prevent or curtail its realization, as well as by promoting women's participation in every sector of national life.” PARAGUAY CONST. art. 48. “(1) Citizens of either sex have the right to participate in public matters, directly or through their representatives, in accordance with the provisions of the Constitution and the law. (2) The access of women to public functions will be promoted.” PARAGUAY CONST. art. 117. “Direct and active participation in politics by men and women is a fundamental instrument in the consolidation of the democratic system, and the law shall promote both equality in the exercise of civic and political rights and the absence of gender-based discrimination in access to political office. PORTUGAL CONST. art. 109.

economic, social, and cultural rights<sup>8</sup> apply to women, and underscore that women and men should be granted equal protection of these rights.

### Civil and Political Rights

Constitutions that include specific provisions about the rights of women may include individual rights and freedoms such as individual will, freedom of expression, and freedom of association. In addition, constitutions may include provisions about women's participation in the political system, such as the right to vote and the right to hold office.

### **Sample Language: Civil and Political Rights for Women**

**Women shall enjoy equal freedom of individual will.**

**Women shall enjoy equal freedom of expression.**

**Women shall enjoy equal freedom of association and freedom to travel within and outside of the State.**

**Women should be accorded full and equal dignity of the person with men.**

**Women shall enjoy equal rights of citizenship.**

**Women shall enjoy equal rights to due process and equal rights before the courts of law.**

**Women shall enjoy political rights equal to a man, including, without limitation:**

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<sup>8</sup>“(1) The family shall be the basis of society and the State. (2) Family, motherhood, fatherhood, and childhood shall be under the care and protection of the State. (3) Marriage shall be entered into upon the free consent of man and woman . . . (5) In the family, the rights of spouses shall be equal.” LITHUANIA CONST. art. 38. “The aim of the institutions is to ensure equality of rights and duties of all citizens, men and women, by removing the obstacles which hinder the progress of human beings and impede the effective participation of all in the political, economic, social and cultural life.” ALGERIA CONST. art. 31. “(1) Workers of both sexes have the same labor rights and obligations, but maternity will be subject to special protection and will include health care services and the appropriate leave, which will not be less than 12 weeks. A woman may not be removed from her work during pregnancy or during her maternity leave. (2) A law will establish a system of paternity leave.” PARAGUAY CONST. art. 89. Article 59(2)(c) of the Portuguese Constitution provides for “special work-related protection for women during pregnancy and following childbirth.” PORTUGAL CONST. art. 59(2)(c).

**The right to full participation and representation in the political process;**

**The right to an equal vote; and**

**The right to hold any political, executive, legislative, judicial, or administrative office.**

### Economic, Social, and Cultural Rights

To provide clarity on the application of economic, social, and cultural rights to women, constitutions specify how such rights apply to women. Constitutions may include provisions to ensure that women play an active role in the economic growth of the state and have an equal right to own land and to participate in the economy. In addition, constitutions often include provisions about the social rights of women, including equality in marriage and the right to bear and raise children, and the women's rights to maintain their culture.

### **Sample Language: Economic, Social, and Cultural Rights for Women**

#### Economic Rights

**Women shall enjoy equal rights to the ownership, use, alienation, and inheritance of real and personal property. Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased.**

**Women shall enjoy equal rights to enter into contracts and to conduct business and commerce.**

**Women shall enjoy equal rights and opportunities in labor and employment.**

**Women shall enjoy equal rights to independence in economic affairs.**

**Women shall have the right to receive remuneration equal to a similarly qualified man employed in a similar or identical position.**

**Women have the right to paid leave for working mothers during a reasonable period before and after childbirth.**

**Women shall enjoy equal rights to education, to teach and to learn.**

**Women shall enjoy equal rights to social welfare benefits.**

**Social Rights**

**Women have the right to equality in marriage.**

**Women shall enjoy marital rights equal to a man including, without limitation:**

**The right to freely choose a spouse;**

**The right to divorce after due process of law;**

**The right to guardianship of her children;**

**The right to consent to the marriage of any of her children under the age of majority; and**

**The right to legal recourse against those who have wronged her, including her spouse and relations.**

**Women shall enjoy equal rights to social and moral self-determination.**

**Cultural Rights**

**Women shall have the right to teach and maintain their language and cultural customs.**

**Women have the right to participate in the cultural life of their community in accordance with their customary practices.**

*Special Protection in Electoral Provisions*

Some states, especially those in which women's representation and participation in civic life has been historically limited, may include specific mechanisms to guarantee women's representation in the government, equal access to the judicial system, and power within governmental structures. One way for

post-conflict states to provide fair representation is to include party list and set-aside provisions in the constitution.<sup>9</sup>

### **Sample Language: Special Protection in Electoral Provisions**

**[X] percent of each party list shall be female candidate(s).**

**There shall be reserved [X] seats in the National Assembly for women.**

### **Gender Equality Commission**

Some constitutions establish a commission responsible for protecting and promoting gender equality.<sup>10</sup> The commission's duties and powers can be included in the Constitution or prescribed by law.<sup>11</sup>

### **Sample Language: Gender Equality Commission**

**The Commission for Gender Equality shall promote, protect, and foster development for gender equality.**

**The Commission for Gender Equality's powers, functions, and duties shall be prescribed by legislation.**

### **Potentially Limiting Language**

As noted in the sections on protecting human rights, constitutions frequently include phrases such as "in accordance with law" or "as determined by law" to allow for the more specific legislation at a future date.<sup>12</sup> To ensure that these

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<sup>9</sup>Articles 83 to 84 of the Afghan Constitution of Afghanistan provide explicit and specific representation to women in the form of seats in the National Assembly. Two seats per province are reserved for female delegates in the Wolesi Jirga, which works out to be at least 64 seats total for women out of a projected total 220 to 250 delegates. The other house of the Afghani parliament, the Meshano Jirga, allots fifty percent (50%) of the one-third members appointed by the president to female delegates. AFGHANISTAN CONST. arts. 83-84.

<sup>10</sup>Article 187 of South Africa's Constitution establishes a Commission for Gender Equality. It also outlines the organ's functions: to "promote respect for gender equality and the protection, development and attainment of gender equality. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. The Commission for Gender Equality has the additional powers and functions prescribed by national legislation." SOUTH AFRICA CONST. art. 187.

<sup>11</sup>Although Article 187 of Rwanda's Constitution establishes a National Council of Women, "[t]he law shall determine its organization, functions, operation and its relations with other State organs." RWANDA CONST. art. 187.

<sup>12</sup>"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and

provisions do not have a detrimental effect on the protection of women's rights, constitutions typically designate certain rights as non-derogable.

Please see Chapter VIII: Protecting Human Rights for a further discussion and sample language regarding potentially limiting language.

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freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.” SOUTH AFRICA CONST. art. 36.

**CHAPTER XII: DEFENSE AND SECURITY**

Post-conflict constitutions commonly address the defense and security of the nation and include provisions for armed forces.<sup>1</sup> Constitutions may include provisions regarding: (1) the role of armed forces; (2) the organization of armed forces; (3) service requirements for citizens; (4) eligibility for service; (5) the Commander-in-Chief; and (6) neutrality.

**Role of the Armed Forces**

Post-conflict constitutions usually specify that the primary purpose of the armed forces is national defense.<sup>2</sup> Constitutions may also provide a general description of the armed forces and their purpose.<sup>3</sup> States typically also provide that the armed force must act in accordance with the law, and specify how significant military decisions, including a decision to engage in armed conflict are made.

**Sample Language: Role of Armed Forces**

**The armed forces shall act in accordance with this Constitution and the law.**

**The armed forces may cross the State's borders or act over the State's borders only upon a prior decision and approval of the [Legislature].**

**The armed forces have the responsibility for providing the military defense of [the State].**

*Domestic Role of the Armed Forces*

The armed forces play a role in maintaining order within the state. Many states in transition clearly define this role to promote trust of the armed forces. Common purposes of the armed forces include protection of civilian property and

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<sup>1</sup> However, some constitutions (i.e. Afghanistan) do not contain explicit provisions for Armed Forces.

<sup>2</sup> "Citizens shall serve in the armed forces according to the order specified by the Law." AZERBAIJAN CONST. art. 76; "The Armed Forces of the Republic of Poland shall safeguard the independence and territorial integrity of the State, and shall ensure the security and inviolability of its borders." POLAND CONST. art. 26(1); "A war of defence shall be declared as per an Emiri Order. Offence is prohibited." QATAR CONST. art. 71."

<sup>3</sup> The Kenyan Constitution provides a brief description of all national security entities. KENYA CONST. ch. 14.

traffic control functions during defense missions.<sup>4</sup> In addition, the armed forces may also support police measures for protection of civilian property and for defense from armed insurgents.<sup>5</sup> The legislature may discontinue these activities of the armed forces at any time.<sup>6</sup>

### **Sample Language: Domestic Role of the Armed Forces**

**For purposes of defense, the armed forces shall have the power to protect civilian property to the extent necessary to accomplish their defense mission; in these circumstances, the armed forces shall cooperate with the competent authorities.**

**For the purpose of defense, the armed forces shall have the power to perform traffic control functions to the extent necessary to accomplish their mission.**

**In order to avert an imminent danger to the existence of the State, and if the police forces prove inadequate, the government may employ the armed forces to support the police in protecting civilian property and in combating organized armed insurgents. Any such employment of the armed forces shall be discontinued if the legislature so demands.**

**All [LIST Security Sector Members, e.g. Police, Armed Forces, etc.] shall be under civilian control, including all regulation and oversight.**

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<sup>4</sup> “National security is the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.” KENYA CONST. art. 238(1).

<sup>5</sup> “The Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.” PAKISTAN CONST. art. 245(1).

<sup>6</sup> “(3) While a state of defense or a state of tension exists, the Armed Forces have the power to protect civilian property and discharge functions of traffic control insofar as this is necessary for the performance of their defense mission. Moreover, the Armed Forces may, when a state of defense or a state of tension exists, be entrusted with the protection of civilian property also in support of police measures; in this event the Armed Forces shall cooperate with the competent authorities. (4) In order to avert any imminent danger to the existence or to the free democratic basic order of the Federation or a state [Land], the Federal Government may, should conditions as envisaged in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Guard in the protection of civilian property and in combating organized and militarily armed insurgents. Any such use of the Armed Forces has to stop whenever the house of representatives [Bundestag] or the senate [Bundesrat] so demands.” BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY arts. 87(a)(3)-(4).

*Involvement in Humanitarian and Peacekeeping Missions*

Post-conflict constitutions may also provide for the armed forces' involvement with humanitarian and peacekeeping missions.<sup>7</sup>

**Sample Language: International Role of the Armed Forces**

**The armed forces shall be responsible, in accordance with the law, for satisfying the international undertakings of [the State] of a military character.**

**The armed forces shall participate in humanitarian and peace missions undertaken by the international organizations that include [the State].**

**Organization of the Armed Forces**

Some post-conflict constitutions divide the organization of the armed forces into particular branches, such as the army, navy, and air force.<sup>8</sup> Generally, constitutions do not describe in detail the components and responsibilities of each branch.

**Sample Language: Organization of the Armed Forces**

**The armed forces of the State shall be composed of the [army/ground forces/republican guard], [navy/naval force], and [air force/air defense forces/marines/coast guard/border services].**

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<sup>7</sup> The Constitution of the Maldives, article 243(b), refers to the president's authority to submit to the people's Majlis a request for authorization for committing the armed forces to participation in international undertakings. MALDIVES CONST. art. 243(b). The Kenyan National Security Council may "deploy national forces outside Kenya for (i) regional or international peace support operations; or (ii) other support operations." KENYA CONST. art. 240(8)(a).

<sup>8</sup> "The Armed Forces of the Republic of Albania are composed of the army, navy, and air force." ALBANIA CONST. art. 168(1). "For the purpose of defending Zimbabwe, there is Defence Forces consisting of an Army, an Air Force and such other branches, if any, of the Defence Forces as may be provided for by or under an Act of Parliament." ZIMBABWE CONST. art. 96(1). "There shall be the Armed Forces of Ghana which shall consist of the Army, the Navy and the Air Force and such other services for which provision is made by Parliament.." GHANA CONST. art. 210(1). "The Armed Forces are composed of the Army, Navy and Air Force only." CHILE CONST. art. 90.

## Service Requirements for Citizens

It is common practice for post-conflict constitutions to prescribe whether service in the armed forces is compulsory<sup>9</sup> or voluntary.<sup>10</sup> For instance, in Croatia, military service is “the duty of all citizens able to perform it.”<sup>11</sup> In contrast, military service in Portugal can be either voluntary or compulsory as determined by law.<sup>12</sup>

Constitutions may mandate compulsory military service to provide training for citizens, prevent military coups, promote personnel diversity, and generate a greater sense of nationalism. However, constitutions prescribing compulsory military service typically include provisions for alternative work for those who conscientiously object to military service.<sup>13</sup> On these occasions, constitutions may provide anti-discrimination provisions for those who choose alternative service.<sup>14</sup>

Alternatively, constitutions may allow for voluntary military service to ensure higher quality of military personnel and higher morale. Often, states with voluntary military service do not describe the requirements for service at length in their constitutions. Rather, they leave such requirements for the legislature.<sup>15</sup>

### Sample Language: Service Requirements for Citizens

#### **Option 1: Compulsory Service**

**Every capable citizen has the duty to participate in the defense of the State.**

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<sup>9</sup> States with mandatory military service include Afghanistan, Austria, Belarus, Bermuda, Brazil, Bulgaria, Chile, China (PRC), Croatia, Cyprus, Denmark, Eritrea, Finland, Germany, Greece, Israel, Lebanon, Malaysia, Mexico, Norway, Poland, Romania, Russia, Singapore, Slovenia, South Korea, Sweden, Switzerland, Taiwan (ROC), Turkey, Ukraine, and Venezuela.

<sup>10</sup> States that have voluntary military service include Argentina, Australia, Belgium, Canada, Czech Republic, France, Hungary, India, Iraq, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Portugal, Spain, the United Kingdom, and the United States.

<sup>11</sup> CROATIA CONST. art. 47.

<sup>12</sup> PORTUGAL CONST. art. 276(2).

<sup>13</sup> For instance, Article 12(a)(2) of the German Constitution, Article 166(2) of the Albanian Constitution, and Article 47 of the Croatian Constitution provide that citizens who refuse to participate in military service will be required to serve in an alternative way. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 12(a)(2). Albania Const. art. 166(2). CROATIA CONST. art. 47.

<sup>14</sup> “Members of the armed forces or persons who perform an alternative service enjoy all the constitutional rights and freedoms, apart from cases when the law provides otherwise.” ALBANIA CONST. art. 167(2).

<sup>15</sup> Article 182 of the Belgium Constitution specifies that army recruitment methods shall be determined by law. BELGIUM CONST. art. 182. *See also* IRAQ CONST. art. 9(2); KENYA CONST. art. 239(6); MALDIVES CONST. art. 239; SOUTH SUDAN CONST. art. 151(8).

**Citizens who object for reasons of conscience [religious or moral reasons] to serve in the armed forces are obliged to perform an alternative service, as provided by law.**

**Citizens who object for reasons of conscience [religious or moral reasons] to serve in the armed forces and who perform an alternative service enjoy all the constitutional rights and freedoms, apart from cases when the law provides otherwise.**

**Option 2: Voluntary Service**

**[Military/armed forces] recruitment methods are determined by law. The law also establishes matters of promotion and rights and obligations of military personnel.**

### **Eligibility for Service**

Post-conflict constitutions may establish eligibility requirements for service in the armed forces.<sup>16</sup> Many require armed forces personnel to be citizens. In addition, constitutions may not allow women to serve in the armed forces or otherwise make their service non-compulsory.<sup>17</sup> Furthermore, some states prohibit elected or appointed officials from serving in the armed forces,<sup>18</sup> or prohibit armed services personnel from running for office.<sup>19</sup> States may also prohibit individuals convicted of committing war crimes from participating in the armed forces.

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<sup>16</sup> “Males who have attained the age of eighteen years can be required to serve in the Armed Forces, in the Federal Border Guard, or in a civil defense organization.” BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 12(a)(1). However, some constitutions (i.e. Albania) do not include eligibility requirements.

<sup>17</sup> “[Women] may in no case be obliged to render service involving the use of arms.” BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 12(a)(4).

<sup>18</sup> Article 167(1) of the Albanian Constitution does not allow military servicemen to concurrently participate in party or political activity. ALBANIA CONST. art. 167(1). Article 141 of the Lithuanian Constitution also does not allow “[soldier]s in actual military service or alternative service, as well as officers of the national defence, the police and the interior, non-commissioned officers, re-enlistees and other paid officials who have not retired to the reserve may not be Members of the Seimas [Parliament] or members of municipal councils. They may not hold elected or appointed office in State civil service, and may not take part in the activities of political parties and political organisations.” LITHUANIA CONST. art. 141. Such provisions allow the armed forces to remain politically neutral.

<sup>19</sup> “The Iraqi armed forces and their personnel, including military personnel working in the Ministry of Defense or any subordinate departments or organizations, may not stand for election to political office, campaign for candidates, or participate in other activities prohibited by Ministry of Defense regulations. This ban includes the activities of the personnel mentioned above acting in their personal or professional capacities, but shall not infringe upon the right of these personnel to cast their vote in the elections.” IRAQ CONST. art. 9(1)(c).

**Sample Language: Eligibility for Service**

**The armed forces shall be composed exclusively of citizens of [the State].**

**Current members of the armed forces shall not be elected or appointed to public office.**

**Members of the armed forces shall be prohibited from participating in political parties and political organizations.**

***Optional:* Women shall not be required by law to render service in any unit of the armed forces.**

***Optional:* On no account shall women be employed in any service involving the use of arms.**

***Optional:* Individuals convicted of war crimes shall be barred from participating in the armed forces.**

**The Commander-in-Chief**

Many post-conflict constitutions designate the president or prime minister as the Commander-in-Chief of the armed forces.<sup>20</sup> The Commander-in-Chief generally has discretion over the appointment and dismissal of armed forces personnel.<sup>21</sup> The Commander-in-Chief may also have the power to declare war.<sup>22</sup> Some constitutions include provisions for a national security council to advise the Commander-in-Chief on issues of security and defense.<sup>23</sup> Many constitutions provide that the Commander-in-Chief must seek the consent of the Prime Minister or the legislature to exercise his or her power in certain instances, in particular in declaring war.<sup>24</sup>

<sup>20</sup> For instance, in Azerbaijan, the President of the Republic is the Commander-in-Chief of the Armed Forces. AZERBAIJAN CONST. art. 9. *See also* AFGHANISTAN CONST. art. 64(3); SOUTH SUDAN CONST. art. 153(1); SUDAN CONST. art. 43; TUNISIA CONST. art. 44 (subject to revision as of 2012); YEMEN CONST. art. 110.

<sup>21</sup> In Albania, the President as General Commander of the Armed Forces has the discretion to appoint and dismiss the Commander of the Armed Forces upon proposal of the Prime Minister. ALBANIA CONST. arts. 168, 169. In Myanmar, the president appoints the commander-in-chief. MYANMAR CONST. art. 342.

<sup>22</sup> In Croatia, the President of the Republic, who is also the Commander-in-Chief of the armed forces, can declare war and conclude peace. CROATIA CONST. art. 100. *See also* AFGHANISTAN CONST. art. 64(4); SUDAN CONST. art. 43; TUNISIA CONST. art. 48 (subject to revision as of 2012); TURKEY CONST. art. 117 (4).

<sup>23</sup> *See* ALBANIA CONST. art. 168(3). The Albanian Constitution, however, does not include requirements for the selection of the National Security Council.

<sup>24</sup> The Pakistani Constitution gives command and control of the armed forces to the federal government, but names the president as the supreme commander. PAKISTAN CONST. art. 243. In Afghanistan, the president needs the

**Sample Language: The Commander-in-Chief**

**The [President/Prime Minister] of the state shall be Commander-in-Chief of the armed forces.**

**The Commander-in-Chief has the power to appoint and dismiss armed forces personnel.**

**The Commander-in-Chief has the power to declare war with the consent of the [Legislature].**

**The Commander-in-Chief shall act [with the consent/on the proposal] of the [prime minister/legislature].**

***Optional:* The National Security Council shall advise the [Commander-in-Chief] on issues of national security and defense.**

**Neutrality of the Armed Forces**

Many constitutions provide for the neutrality of the armed forces.<sup>25</sup> This may be especially relevant to post-conflict situations and states where the military played a significant role in the conflict, or where there are concerns that the military may be used to support a particular political agenda.

**Sample Language: Neutrality of Armed Forces**

**The armed forces shall observe neutrality regarding political matters.**

**The armed forces shall be strictly non-partisan; their members shall not take advantage of opportunities provided by their weapons, positions, or functions to intervene in political matters.**

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approval of the National Assembly to declare war. AFGHANISTAN CONST. art. 64 (4). In Algeria, the president may declare war with approval from the legislature; however, once war is correctly declared, the Constitution is suspended and the president assumes all powers. ALGERIA CONST. arts. 95-96.

<sup>25</sup> “The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control.” POLAND CONST. art. 26(2).

## Reintegration of Militias

States with a significant militia presence may provide a framework for disarmament and integration in the constitution. These provisions underscore the state's commitment to reintegration of militias, while leaving the specific procedures of reintegration to law.

### Sample Language: Reintegration of Militias

**The State shall provide for the complete reintegration of independent militias and armed groups as described by law.**

**State citizens who participated in the [official name for the revolution] shall be eligible for participation in the armed forces. Procedure and process for membership in the armed forces under this provision shall be controlled by law.**

## CHAPTER XIII: ROLE OF RELIGION IN GOVERNMENT

Wide variation exists among post-conflict states regarding the role of religion in government. States that address religion in their constitutions often outline different approaches to its role in the state. The approach a state selects usually reflects the interests of the state and takes into account the nature of the preceding conflict.<sup>1</sup>

Post-conflict states typically address the role of religion by: (1) determining whether to designate an official state religion; (2) considering whether to use religion as a source of law;<sup>2</sup> and (3) providing for religious freedom.

**Official State Religion**

In many states, constitutions designate official state religions. Official state religions receive protection from the state, and may be utilized as a source of law. In addition to designating an official state religion, states typically provide for religious freedom to ensure that citizens of all faiths may practice their religion freely.<sup>3</sup>

**Sample Language: Official State Religion**

**[Religion] is the official religion of the state.**

**The state protects [Religion]; it orders people to do right and shun evil; it fulfills the duty regarding God's call.**

<sup>1</sup> Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WILLIAM & MARY LAW REVIEW 1179 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1137893](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137893). This source analyzes many states' constitutional treatment of religion, conflicts based on religion in several states, and different approaches to including religion in a constitution.

<sup>2</sup> Refer also to the National Identity section in Chapter I.

<sup>3</sup> The Danish Constitution creates a state religion to be supported by the state (Section 4), but also includes detailed protections for the inclusion of other faiths and for the right for minorities to worship freely (Section 67). Section 67 declares, "the citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done." Section 70 specifies that "no person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty." DENMARK CONST. sec. 67, 70. The Constitution of Qatar provides that "Qatar is an independent Arab state. Islam is the State's religion and the Islamic Shariah is the main source of its legislations . . . All people are equal before the law. There shall be no discrimination on account of sex, origin, language, or religion." QATAR CONST. arts. 1, 35. "First: Islam is the official religion of the State and is a foundation source of legislation. Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabians." IRAQ CONST. art. 2.

**The state respects all religions and freedom of worship is guaranteed.**

**No person shall be persecuted or denied rights on the basis of religion or religious beliefs. The state is the guarantor of the freedom of religious practice.**

*No Official State Religion*

Many constitutions acknowledge the importance of religion, but do not establish an official state religion.<sup>4</sup> These states often have heterogeneous populations with diverse religious communities. Constitutions may provide for universal religious protections, which promote the ability of all citizens to freely practice their religion.<sup>5</sup> Universal religious protections are typically complemented by anti-discrimination clauses protecting the free practice of religion. In states where religion was a significant source of conflict, states may incorporate additional safeguards, including the prohibition of political parties based on religion, to prevent a recurrence of conflict.<sup>6</sup>

**Sample Language: State with No Official Religion**

**No state religion may be recognized.**

**No state religion may be recognized, and church and state are to be separated.**

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<sup>4</sup> “(1) [T]he State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion. (2.1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2.2) The State guarantees not to endow any religion. (2.3) The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.” IRELAND CONST. art. 44. “(1) The State shall respect the Church and the Church shall honor the State. (2) State institutions may not engage in religious activities and the Church may not pursue political activities. (3) The relationship between the State and the Church is regulated by law.” MONGOLIA CONST. art. 9. “The Union recognizes special position of Buddhism as the faith professed by the great majority of the citizen of the Union. The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution. The Union may assist and protect the religions it recognizes to its utmost. MYANMAR CONST. arts. 361-63.

<sup>5</sup> “The state is neutral in questions of belief and conscience, and also, it guarantees the freedom of their expression in public life.” ALBANIA CONST. art. 10. “(1) Every person shall have the right to freedom of thought, conscience and belief. . . . (4) Every person shall have the freedom to practice any religion and to manifest such practice.” ERITREA CONST. art. 19; “(1) Religion and State shall be separate. (2) All religions shall be treated equally and religion or religious beliefs shall not be used for divisive purposes.” SOUTH SUDAN CONST. art. 8; *see also* RWANDA CONST. art. 18; SOUTH AFRICA CONST. art. 15; MYANMAR CONST. art. 34

<sup>6</sup> For instance, KENYA CONST. art. 91(2)(a); MYANMAR CONST. art. 407; SOUTH SUDAN CONST. 25(3)(a).

**All citizens enjoy the freedom of religion.**

**The freedom of religious conscience is inviolable. The enjoyment of civil and individual rights does not depend on the religious conviction of each individual.**

**The state respects all religions and freedom of worship is guaranteed. No person shall be persecuted or denied rights on the basis of religion or religious beliefs. The state is the guarantor of the freedom of religious practice.**

**Every known religion is free and the forms of worship thereof shall be practiced without any hindrance by the state and under protection of the law. The exercise of worship shall not contravene public order or offend morals.**

**All citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, opinion, or social status.**

### **Religion as a Source of Law**

Constitutions may specify that the state's laws shall be derived in whole or in part from religious law. The decision regarding whether to use religion as a source of law is a concern primarily in Islamic societies, where *Shari'a* law governs many aspects of day-to-day life, politics, economics, banking, business or contract law, and social issues.<sup>7</sup> Among post-conflict constitutions that use religion as a source of law, some states specify that religion is the source of law,<sup>8</sup> whereas others declare that religion is one potential source of law.<sup>9</sup>

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<sup>7</sup> See Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WILLIAM & MARY LAW REVIEW 1179 (2008). This article analyzes how various states have implemented *Shari'a* law into daily life.

<sup>8</sup> "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution." SAUDI ARABIA CONST. art. 1. "The religion of the State of the Maldives is Islam. Islam shall be the one of the basis of all the laws of the Maldives." MALDIVES CONST. art. 10. "Islamic Shari'ah is the source of all legislation." YEMEN CONST. art. 3.

<sup>9</sup> "Islamic jurisprudence shall be a main source of legislation." SYRIA CONST. art. 3. "Islam is the religion of the State . . . and is a principal source of legislation." IRAQ CONST. art. 2. "Islam is the State's religion and the Islamic Shariah is the main source of its legislations." QATAR CONST. art. 1.

**Sample Language: Religion as a Source of Law****Option 1: Religion as One Source of Law**

**[Religion] is a fundamental source of law. No law that contradicts the established provisions of [Religion] may be established.**

**Option 2: Religion as the Source of Law**

**[Religion] is the source of law for governing [State]. No law that contradicts the established provisions of [Religion] may be established.**

**Option 3: Broad Reference to Religion**

**The principles of [Religion] will be a basis for legislation.**

**Protection of Religious Freedoms**

Drafters typically enumerate protections of religious freedoms in post-conflict constitutions. Specific enumeration of religious freedoms is particularly useful in states where the conflict was based on religion, as it underscores the state's commitment to recognizing the rights of all religious groups. Usually, such protections include general safeguards, such as freedom of religion and religious expression<sup>10</sup> and prohibition of discrimination on religious grounds.<sup>11</sup>

**Sample Language: Protection of Religious Freedoms****Protection of Religious Freedom and Religious Expression**

**Every citizen is entitled to freedom of thought, conscience, and religion. The freedom to exercise one's religion and beliefs may not be restricted. The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done. The State is the guarantor of the freedom of religious practice.**

<sup>10</sup> ERITREA CONST. art. 19(4); IRAQ CONST. arts. 41-45; KENYA CONST. arts. 32, 45; MALDIVES CONST. arts. 16, 19, 27; MYANMAR CONST. art. 34; PAKISTAN CONST. art. 20; SOUTH SUDAN CONST. arts. 23, 38; AFGHANISTAN CONST. art. 2.

<sup>11</sup> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." SOUTH AFRICA CONST. art. 9. *See also* SOUTH SUDAN CONST. arts. 8, 14, 25; QATAR CONST. art. 35; PAKISTAN CONST. arts. 21-22, 26, 27; MYANMAR CONST. art. 348; KENYA CONST. art. 24; IRAQ CONST. art. 14.

**Prohibition against Religious Discrimination**

**All citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, opinion, or social status. The enjoyment of civil and social rights does not depend on an individual's religious beliefs.**

## CHAPTER XIV: CUSTOMARY LEGAL SYSTEMS

Some post-conflict states' constitutions explicitly recognize customary law as valid legal authority.<sup>1</sup> Customary law can be defined as practices and customs that are "accepted as legal requirements [and] obligatory rules of conduct" by a group of people.<sup>2</sup> Unlike a state's federal or local bodies of law, customary laws are orally held and promulgated, and operate at the community level.<sup>3</sup>

Specific customary authorities and institutions are responsible for creating, implementing, and upholding customary laws. Traditional authorities and institutions, such as chiefs, councils of elders, or customary courts, are often responsible for enforcing customary laws. Community-based, informal or semi-formal legal systems that provide non-adversarial dispute-resolution forums are also common features of legal systems in many parts of the world.<sup>4</sup>

States that incorporate customary laws into the legal system acknowledge that doing so may have advantages for the state as a whole. First, states may gain support from citizens who depend on customary practices by acknowledging the status of customary practices and beliefs as vital and intrinsic to local groups and communities.<sup>5</sup> Second, customary legal systems can function effectively and inexpensively, and benefit from high levels of confidence from local communities.<sup>6</sup> Such systems also have the advantages of being voluntary and consultative rather than adversarial, emphasizing reconciliation to promote social cohesion within a

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<sup>1</sup> "Law" includes any custom or usage having the force of law." PAKISTAN CONST. art. 203B(c). Law includes "any custom or usage having the force of law in Singapore" SINGAPORE CONST. art. 2.

<sup>2</sup> BLACK'S LAW DICTIONARY, 443 (9<sup>th</sup> ed., 2009).

<sup>3</sup> K. Swiderska, Argumendo, A., Song, Y., Li, J., Pant, R., Herrera, H., Mutta, D., Munyi, P., and Vedavathi, S., *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices. Key Findings and Recommendations 2005-2009*, in CUSTOMS AND CONSTITUTIONS: STATE RECOGNITION OF CUSTOMARY LAW AROUND THE WORLD 3 (Katrina Cuskelly, ed. 2011).

<sup>4</sup> Customary law is particularly salient in parts of Africa, Asia, and Latin America. Matt Stephens, *Typologies, Risks and Benefits of Interaction between State and Non-State Justice Systems*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES 143 (United States Institute of Peace, George Washington University, World Bank Conference Packet, 2009)

<sup>5</sup> David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES 41 (United States Institute of Peace, George Washington University, World Bank Conference Packet, 2009)

<sup>6</sup> David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES 41 (United States Institute of Peace, George Washington University, World Bank Conference Packet, 2009)

community, and achieving enforcement through social pressure rather than coercion.<sup>7</sup>

However, the coexistence of a formal legal system and semi-formal customary system can also cause difficulties, including conflicts of law and jurisdictional disputes.<sup>8</sup> Substantive customary laws and practices may not meet certain minimum legal standards, particularly in the protection of human rights.<sup>9</sup> In particular, customary law practices may be harmful to women's rights, as they may discourage women from seeking legal recourse for harms incurred within their families, including gender-based violence and marital rape.<sup>10</sup>

States that recognize customary law typically incorporate it into the constitution, may incorporate traditional authorities into the executive branch of government, and/or may establish special courts to hear cases involving customary law.

### Recognition of Customary Law

A state that recognizes customary law in its constitution may consider taking one of three common approaches. It can: (1) recognize customary law as part of the state's hierarchy of laws; (2) recognize specific legal areas where customary law is applicable; or (3) generally acknowledge traditional and customary practices.

#### *Customary Law as Part of the State's Hierarchy of Laws*

States recognizing customary law in the constitution may establish a hierarchy of laws to eliminate conflicts of law between state legislation and customary laws. Many states that recognize customary law include a constitutional provision outlining that customary law is applicable to the extent that it does not

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<sup>7</sup> Sinclair Dinnen, *Traditional Justice Systems in the Pacific, Indonesia, and Timor-Leste*, in TRADITIONAL AND NON-FORMAL JUSTICE SYSTEMS (UNICEF PNG, 2010), 3.

<sup>8</sup> Giselle Corradi, *Human Rights Promotion in Post Conflict Sierra Leone: Coming to Grips with Plurality in Customary Justice*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES 104 (United States Institute of Peace, George Washington University, World Bank Conference Packet, 2009).

<sup>9</sup> Giselle Corradi, *Human Rights Promotion in Post Conflict Sierra Leone: Coming to Grips with Plurality in Customary Justice*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES 105 (United States Institute of Peace, George Washington University, World Bank Conference Packet, 2009).

<sup>10</sup> Oliver C. Ruppel, *Women's Rights and Customary Law in Namibia: A Conflict Between Human and Cultural Rights?*, 1 (Namibia Resource Center, Southern Africa Library, 2010).

conflict with the constitution.<sup>11</sup> Other states provide more detail by stipulating that the constitution, acts of parliament, statutory laws, and the common law prevail over customary laws whenever these laws conflict.<sup>12</sup> Alternatively, some constitutions expressly provide that customary laws can be repealed or modified by statutes.<sup>13</sup> Further, states may also incorporate a constitutional provision that explicitly declares that customs and practices that do not meet minimum legal standards of human rights are invalid.<sup>14</sup>

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<sup>11</sup> “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.” KENYA CONST. art. 2(4). “Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.” PAKISTAN CONST. art. 8. “Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.” SWAZILAND CONST. art. 252(2).

<sup>12</sup> “The authorities of the indigenous (Indian) peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures provided these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.” COLOMBIA CONST. art. 246. “The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.” EAST TIMOR CONST. art. 2(4). “(1) The laws of Ghana shall comprise (a) this Constitution; (b) enactment made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules, and Regulations made by any person or authority under a power conferred by this Constitutions; (d) the existing law; and (e) the common law. (2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature. (3) For the purposes of this article, “customary law” means the rules of law which by custom are applicable to particular communities in Ghana.” GHANA CONST. art. 11. “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.” NAMIBIA CONST. art. 66(1). “The laws of Sierra Leone shall comprise a. this Constitution; b. laws made by or under the authority of Parliament as established by this Constitution; c. any orders, rules, regulations and other statutory instruments made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law; d. the existing law; and e. the common law. (2) The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the rules of customary law including those determined by the Superior Court of Judicature. (3) For the purposes of this section the expression “customary law” means the rules of law which by custom are applicable to particular communities in Sierra Leone.” SIERRA LEONE CONST. art. 170. “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” SOUTH AFRICA CONST. art. 211(3). “The legitimate authorities of the native peoples shall have the power to apply within their territorial competence levels of administration of justice based on their ancestral traditions and affecting their members only, in accordance to their own rules and proceedings, provided the same are not contrary to this Constitution, law and public order. The manner in which this special competence shall be coordinated with the national judicial system shall be determined by law.” VENEZUELA CONST. art. 260. In France’s Constitution, customary law regarding the electoral system, employment, and personal status is recognized in New Caledonia. FRANCE CONST. 77. *See also* INDIA CONST. arts. 371A, 371G.

<sup>13</sup> “Any part of...customary law may be repealed or modified by Act of Parliament.” NAMIBIA CONST. art. 66(2).

<sup>14</sup> For instance, stipulating that “customs and practices that oppress or cause bodily or mental harm to women are prohibited.” ETHIOPIA CONST. art. 35. “Those customs contrary to the public order or those which promote inequality between citizens are forbidden.” CHAD CONST. art. 161. “All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.” GHANA CONST. art. 26(2). “Gender discrimination in law, customs and practices related to land and property in land” must be eliminated. KENYA CONST. art. 6(f). “Authorities of peasant and native communities, in conjunction with the peasant patrols, shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate

**Sample Language: Hierarchy of Laws****Customary Law is Invalid if it Conflicts with Other Laws**

**Any law, including customary law, that is inconsistent with this Constitution or a statutory law is void to the extent of this inconsistency.**

**Customary laws and practices are valid to the extent that these laws and practices do not conflict with this Constitution or any statutory law.**

**Customary Law is Invalid if Contrary to Human Rights**

**Customs and practices that violate the fundamental rights of the individual are invalid.**

*Specific Recognition of Specific Types of Customary Laws*

Instead of recognizing customary law generally, states may include constitutional provisions that recognize the validity of customary laws as applied to particular fields of law. These fields typically include family law and the adjudication of family disputes.<sup>15</sup> Many states permit the recognition of customary systems of personal and family law, but limit the recognition to those laws to those consistent with the constitution.<sup>16</sup>

**Sample Language: Recognition of Specific Types of Customary Rules****Recognition of Traditional Land Rights**

**Land shall be owned in accordance with the customary land tenure system. All citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by law.**

**Recognition of Customary Family Law**

**Laws recognizing marriages concluded under any tradition, or a system of religious, personal or family law are permitted.**

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the fundamental rights of the individual. The law provides for the way of coordination of such jurisdiction with justice-of-the-peace court and other instances of the Judiciary.” PERU CONST. art. 149.

<sup>15</sup> “(4) In accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary law may be enacted. (5) This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.” ETHIOPIA CONST. art. 34.

<sup>16</sup> The South African constitution, for instance, “does not prevent legislation recognising (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” Such recognition must be “consistent with this section and the other provisions of the Constitution.” SOUTH AFRICA CONST. art. 15(3).

*General Recognition of Traditional and Customary Practices*

Some state constitutions expressly recognize traditional and customary practices. These constitutions often explicitly recognize certain groups' right to fully participate in the state's political, socioeconomic, and cultural life in accordance with both state laws and customary practices.<sup>17</sup> Such general recognition of traditional rights and freedoms is a particularly salient feature in the constitutions of states with sizeable indigenous populations.<sup>18</sup> Another option is to acknowledge the significance of customary law for some communities by creating a constitution that grants these communities the right to apply traditional dispute resolution systems to community level disputes.<sup>19</sup> Alternatively, states may identify the traditions and customs of certain communities as sources of law.<sup>20</sup>

**Sample Language – General Recognition of Traditional and Customary Practices****General Recognition of Customary Law**

**The State recognizes, respects and promotes [designated group] form of life, customs, traditions, forms of social organization [and dispute resolution mechanisms].**

**Constitutional guarantees and state laws shall not be construed to abrogate or derogate from rights and freedoms enjoyed by [communities].**

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<sup>17</sup> For instance, the Paraguay constitution provides that the “right of Indian peoples to participate in the political, socioeconomic, and cultural life of the country in accordance with their customary practices, the Constitution, and the national laws, is hereby guaranteed.” PARAGUAY CONST. art. 65. “Guatemala is made up of various ethnic groups among which are native groups of Mayan descent. The State recognizes, respects, and promotes their form of life, customs, traditions, forms of social organization, the wearing of Indian dress by men and women, their languages, and dialects.” GUATEMALA CONST. art. 66.

<sup>18</sup> This is the case in Canada, where constitutional guarantees “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” CANADA CONST. arts. 25, 35.

<sup>19</sup> This has been the case in several Latin American countries, including Chile, Ecuador, Guatemala, and Peru. Donna Lee Van Cott, *Dispensing Justice at the Margins of Formality: The Informal Rule of Law in Latin America*, in INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA, (Gretchen Helmke and Steven Levitsky, eds., 2006).

<sup>20</sup> “The Sources of legislation in South Sudan shall be (a) this constitution; (b) written law; (c) customs and traditions of the people; (d) the will of the people; (e) any other relevant source.” SOUTH SUDAN CONST. art. 5 (South Sudan's transitional Constitution).

**Customary Law as a Source of State Law**

**Sources of legislation shall include customs, traditions, and customary practices of [the people/communities].**

**Incorporating Customary Authorities in the Executive**

A post-conflict state may recognize customary authorities and institutions in its constitution. States may also constitutionally grant authority to customary dispute resolution bodies.

Post-conflict states may formally recognize the authority of customary leaders. A number of states broadly recognize the role of customary leaders, such as chiefs or elders, who wield authority on the basis of established customary laws and usages.<sup>21</sup> Some states designate specified areas to be governed by customary authorities or allow the existence of self-governance bodies.<sup>22</sup>

Many constitutions recognizing customary laws also contain provisions mandating specific institutional arrangements that accommodate customary authorities. Post-conflict constitutions may recognize customary institutions and grant these institutions jurisdiction over customary affairs, require law makers to consult with customary authorities in certain cases, or guarantee that state organs recognize these institutions.<sup>23</sup> Alternatively, a state may provide for the creation of

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<sup>21</sup> The institution of chieftancy, together with its traditional councils as established by customary law and usage, is hereby guaranteed. Parliament shall have no power to enact any law which in any way detracts or derogates from the honour and dignity of the institution of chieftancy." "The National House of Chiefs shall have appellate jurisdiction in any cause or matter affecting chieftancy which have been determined by the Regional House of Chiefs in a region. GHANA CONST. arts. 270(1)(a), 273(a). "The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs." SOUTH AFRICA CONST. art. 211(1)(2). "The institution of Chieftancy as established by customary law and usage and its non-abolition by legislation is hereby guaranteed and preserved." SIERRA LEONE CONST. art. 72(1).

<sup>22</sup> "Local self-governing shall be the right of a territorial community - residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city - for the purposes of an independent settlement of issues of local character in compliance with the Constitution and laws of Ukraine." UKRAINE CONST. art. 140. Citizens have the right to: . . . elect and to be elected to state authorities and local self governance bodies in accordance with the procedures established by the present Constitution and the law." KYRGYZSTAN CONST. art. 52. *See also* PAKISTAN CONST. art. 246. "

<sup>23</sup> "(2) The National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, alter any of the provisions of this Constitution or affect (a) the designation, recognition, removal of powers of Chiefs, Sub-Chiefs or Headmen; (b) the organization, powers or administration of customary courts; (c) customary law, or the ascertainment or recording of customary law; or (d) tribal organization or tribal property, unless (i) a copy of the Bill has been referred to the House of Chiefs after it has been introduced in the National Assembly; and (ii) a period of 30 days has elapsed from the date when the copy of the Bill was referred to the House of Chiefs." BOTSWANA CONST. art. 88.

ad-hoc advisory committees comprised of members from traditional communities, which are meant to consult with executive or parliamentary decision-makers on relevant matters.<sup>24</sup>

A state's constitution may recognize the authority of customary dispute resolution bodies.<sup>25</sup> These institutions can, for instance, be entitled to petition state authorities to grant amnesties from statutory penalties and punishments in certain cases.<sup>26</sup> Such decentralized entities are sometimes granted wide latitude in wielding traditional authority over their communities.<sup>27</sup> Indigenous groups in states are sometimes granted even greater rights with respect to autonomous organization.<sup>28</sup>

### **Sample Language: Incorporating Traditional Authorities in the Executive**

#### **Option 1: Recognizing Traditional Authorities/Chiefs:**

**The institution of the [Council of Elders/House of Chiefs] is hereby guaranteed according to customary law and usage and is responsible for the application of customary laws and conferring with the executive and legislature on pertinent matters.**

#### **Option 2: Recognizing Traditional Authorities and Institutions:**

**The institutions [status/role] of [customary authority] is [recognized/guaranteed] according to customary laws subject to the Constitution.**

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<sup>24</sup> “Congress may create a consultative body to advise the President on policies affecting indigenous communities, the majority of the members of which shall come from such communities.” PHILIPPINES CONST. art. XVI(12).

<sup>25</sup> Madagascar provides for an appointed dispute-resolution institution, the Circle for the Preservation of Fihavanana, which is called upon to “crises and conflict of all kinds that could affect the ancestral virtues and values among Malagasys with a view to preserving national unity.” MADAGASCAR CONST. art. 2. For an English version: Katrina Cluskelly, *Customs & Constitutions: State Recognition of Customary Law Around the World* (IUNC, 2011). “The Parliament must make provisions for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.” FIJI CONST. art. 186(1).

<sup>26</sup> This is particularly the case when the relevant offense markedly affects and threatens the indigenous community. *See* MADAGASCAR CONST. art. 2.

<sup>27</sup> For instance, they can be entitled to enjoy “administrative freedom and managerial autonomy with regard to their economic, human, financial, and technical resources.” DEMOCRATIC REPUBLIC OF CONGO CONST. art. 3.

<sup>28</sup> “Rural and native communities have legal existence and enjoy legal status. They are autonomous in their organization...as well as in the economic and administrative aspects within the framework as provided by law.” PERU CONST. art. 89.

## Customary Law and the Judiciary

Special courts may be necessary to adjudicate cases involving customary law in states that recognize this type of law. A state include a constitutional provision that establishes specialized courts that only handle cases involving customary law or authorizes state courts to hear cases involving customary law.

Some constitutions establish specialized customary law courts that hear cases involving the application of customary law.<sup>29</sup> For instance, a state may permit customary courts of appeal to exercise jurisdiction in civil proceedings that deal with questions of customary law.<sup>30</sup> Another option is to include a constitutional provision that requires the statutory establishment of customary courts, which tend to be considered subordinate to state courts and may be limited in scope.<sup>31</sup>

Alternatively, a state's constitution can authorize its state courts to apply both statutory and customary laws depending on the subject matter or parties involved in the dispute.<sup>32</sup> Some constitutions provide that laws administered by state courts take officially accepted customary law into consideration.<sup>33</sup> Last, a number of other states that do not establish special customary courts include

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<sup>29</sup> "Religious and customary courts . . . shall be organized on the basis of recognition accorded to them by this Constitution." ETHIOPIA CONST. art. 78(5). "Citizens may exercise popular participation in the administration of justice through institutions of public and customary tribunals and the jury and assessor systems." GHANA CONST. art. 125.

<sup>30</sup> "There shall be for any State that requires it a Customary Court of Appeal for that State [which] shall have appellate and supervisory jurisdiction in civil proceedings involv[ing] questions of Customary law." NIGERIA CONST., arts. 280, 282. "The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments. The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction." ECUADOR CONST. art. 171. "Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts." SPAIN CONST. art. 125.

<sup>31</sup> "Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament." MALAWI CONST. art. 110(3). In Sierra Leone, "inferior and traditional courts" may be established by law. SIERRA LEONE CONST. art. 120(4)

<sup>32</sup> "The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature." LIBERIA CONST. art. 65. *See also* PAKISTAN CONST. art. 203B.

<sup>33</sup> "When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objects of this Chapter." ZIMBABWE CONST. sec. 4.36(2).

safeguard provisions requiring official courts to comply with local customary rules.<sup>34</sup>

### Sample Language: Customary Law and the Judiciary

#### Customary Courts

**[Customary/traditional] courts shall be [organized/recognized] [as proscribed] by the Constitution.**

**[Customary/traditional] courts may exercise jurisdiction over civil cases involving customary law, land tenure, marital disputes, etc.**

#### Customary Laws Applied by State Courts

**[Customary/traditional] laws shall be recognized and enforced by [all] courts except in cases where these laws are inconsistent with the Constitution, statutory laws, or against the public interest.**

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<sup>34</sup> “Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.” MICRONESIA CONST. art. XI(11).

**CHAPTER XV: PROTECTING AND REGULATING NATURAL RESOURCES**

States with significant natural resources may include constitutional provisions to protect and regulate state resources.<sup>1</sup> If natural resources are addressed in a state's constitution, it may be advisable for the constitution to: (1) define the ownership of natural resources; (2) describe the allocation of revenue from the resources; and (3) specify the parties with authority and responsibility over the resources.

**Ownership of Natural Resources**

States utilize various arrangements to determine the ownership of natural resources and the attendant rights to extract and develop these resources. Many states resolve the question of natural resources ownership in the constitution.<sup>2</sup> Although each state's approach is unique, arrangements can be broadly classified into three categories: (1) state ownership,<sup>3</sup> (2) regional ownership,<sup>4</sup> and (3) shared ownership.<sup>5</sup>

*State Ownership*

State ownership vests control of natural resources in the state government. Among oil-producing states, a vast majority maintain state ownership of their oil resources.<sup>6</sup> For post-conflict states with highly centralized governments, state ownership promotes efficient management and government of natural resources. State ownership of natural resources is typically protected by the constitution.<sup>7</sup>

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<sup>1</sup> Nicholas Haysom and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control, and Wealth-sharing*, CENTRE FOR HUMANITARIAN DIALOGUE, 7 (Oct. 2009), available at <http://fr.hdcentre.org/files/Natural%20resources%20crc%20final.pdf>.

<sup>2</sup> For instance, Russia, Norway, Venezuela, Indonesia, Algeria, Angola, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, the United Arab Emirates, Afghanistan, Myanmar, and Yemen all include provisions regarding natural resources in their constitutions. "The land and other natural resources may be in private, state municipal and other forms of ownership." RUSSIA CONST. art. 9.

<sup>3</sup> Algeria, Angola, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, Afghanistan, and Yemen employ this system.

<sup>4</sup> For instance, the United States and the United Arab Emirates. "The natural resources and wealth in each Emirate shall be considered to be the public property of that Emirate. Society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy." UNITED ARAB EMIRATES CONST. art. 23.

<sup>5</sup> For instance, Canada, Iraq, and Pakistan. The Iraqi Constitution provides that "oil and gas are owned by all the people of Iraq in all the regions and governorates." IRAQ CONST. art. 111.

<sup>6</sup> For instance, Algeria, Angola, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, and Yemen.

<sup>7</sup> For instance, Algeria, Angola, Brazil, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, and Yemen. "Mines and other subterranean resources as well as historical relics shall be the property of the state. Protection, management and proper utilization of public properties as well as natural resources shall be regulated by law."

**Sample Language: National Ownership**

**The State of [State] shall own all natural resources, to be used to benefit all the people of all the [provinces] of [State].**

*Regional Ownership*

Some states vest control of natural resources in the people or government of the region where the resources are located. Regional ownership of natural resources is usually found in federal states.

**Sample Language: Regional Ownership**

**The natural resources and wealth in each [province] shall be considered the public property of that [province]. The [province] shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.**

*Shared Ownership*

Shared ownership vests control of natural resources among the state and regional governments.<sup>8</sup> A shared approach provides a compromise between those who desire regional ownership and those who desire state ownership of natural resources, and may build trust between the state and regional governments or the capacity of the regional government to manage natural resources.

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AFGHANISTAN CONST. art. 9; “The Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union.” MYANMAR CONST. art. 37(a).

<sup>8</sup> Russia exercises national ownership over its oil and mineral resources. However, the central government in Moscow has also worked out special arrangements with certain resource-rich republics, e.g., Bashkortan and Tatarstan. Article 72 of the 1993 Russian Constitution allows the execution of bilateral treaties between the central government and subnational entities on power-sharing. For instance, in 1994, the republic of Tatarstan brokered a treaty with the central government in Moscow, where Tatarstan relinquished claim to sovereignty and accepted Russia’s taxing authority in exchange for Russia accepting Tatarstan’s ownership and control over oil and other natural resources and Tatarstan’s right to sign economic agreements with other sovereign nations. RUSSIA CONST. art. 72. The Ukrainian Constitution demonstrates a similar situation: “The land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, natural resources of its continental shelf and of the exclusive (maritime) economic zone shall be the objects of property rights of the Ukrainian people. State authorities and local self-government bodies shall exercise the ownership rights on behalf of the Ukrainian people within the limits determined by this Constitution.” UKRAINE CONST. art. 13; PAKISTAN CONST. art. 161.

**Sample Language: Shared Ownership**

**Ownership of natural resources may be in regional government, central government, or in other forms. The possession, utilization, and management of natural resources are freely exercised by their owners, provided that such exercise does not cause irreparable environmental harm or infringe upon the rights and lawful interests of other persons or the State.**

**Allocation of Revenue**

States may also determine the manner in which to use the wealth garnered from their natural resources.<sup>9</sup> Post-conflict states use several different approaches to allocate natural resource revenue. Some apply the same formula that is used for other budgetary distributions, while others follow criteria such as population, basic needs, or tax capacity. The decision of which approach will be taken is typically left to the legislature.

**Sample Language: Allocation of Revenue**

**Equitable allocation of revenues derived from natural resources shall be carried out in accordance with the law established by the [State] [Assembly].**

**Natural Resource Management**

States may also establish the framework for managing natural resources within the constitution.<sup>10</sup> States often specify: (1) parties with the authority to

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<sup>9</sup> “The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.” IRAQ CONST. art. 112.

<sup>10</sup> “The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields . . . . The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.” IRAQ CONST. art. 112. “The Union . . . shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces.” MYANMAR CONST. art. 37(b). “Under the terms of the law, the States, Federal District, and the Municipalities, as well as the agencies of the direct administration of the Republic are assured of participation in the result of the exploitation of petroleum or natural gas, of hydric resources for the purpose of generating electric energy, and of other natural resources in their

regulate and provide oversight; (2) parties with the authority to grant concessions, licenses, and production agreements; (3) parties with responsibility over production (i.e., extraction, refining, transporting); (4) the method for taxing natural resources (regional and/or central government); and (5) parties tasked with governing the discovery of new natural resources.

### **Sample Language: Authority and Responsibility**

#### **Authority to Regulation and Provide Oversight**

**The State shall have authority to regulate and to provide oversight for all natural resources, including the discovery, production, and distribution of natural resources.**

#### **Authority to Grant Concessions, Licenses, and Product Sharing Agreements**

**[National, Regional] government[s] shall have the authority to grant concessions, licenses, and agreements associated with the production and distribution of [State's] natural resources.**

#### **Authority to Regulate Production**

**[National, Regional] government[s] shall oversee downstream natural resource production including extraction, refining, and transporting of such resources.**

#### **Authority to Tax**

**[National, Regional] government[s] shall have authority to tax natural resources, including the production and distribution of natural resources.**

#### **Authority over Discovery**

**[National, Regional] government[s] shall govern all provisions associated with discovery of natural resources.**

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respective territory, continental shelf, territorial waters, or exclusive economic zone, or financial compensation for such exploitation . . . . It is incumbent, in common, upon the Union, the States, the Federal District, and the Municipalities: to register, monitor, and supervise concessions of rights to research and exploit hydric and mineral resources within their territories.” BRAZIL CONST. arts. 20(1), 23(0)(XI). *See also* KENYA CONST. arts. 69, 71; PAKISTAN CONST. 4th schedule, part 1(18); UKRAINE CONST. arts. 116(3), 138(5).

**CHAPTER XVI: EXTRAORDINARY MEASURES**

Constitutions also include provisions addressing extraordinary measures. These measures include providing for a state of emergency and enacting or amending the constitution.

**Providing for a State of Emergency**

Post-conflict constitutions commonly include provisions relating to states of emergency. Such provisions often contain the following considerations: (1) what constitutes a state of emergency; (2) who may declare a state of emergency; (3) what rights and ordinary functions of government may be suspended during a state of emergency; and (4) how long may a state of emergency last.

*Defining a State of Emergency*

Constitutions typically define what constitutes a state of emergency, including conditions such as an active state of war, an immediate threat to the independence and unity of the state, or a severe natural disaster.<sup>1</sup> Other states leave defining and declaring states of emergency to the discretion of one or more branches of government.<sup>2</sup>

**Sample Language: Defining a State of Emergency****Option 1: Explicit Definition**

**Declaration of a state of emergency may only be made if [the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency]; and the declaration is necessary to restore peace and order.**

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<sup>1</sup> A declaration of state of emergency can only be made when “(1)(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.” SOUTH AFRICA CONST. art. 37. *See also* AFGHANISTAN CONST. art. 143; KENYA CONST. art. 58; MALDIVES CONST. art. 253; MYANMAR CONST. art. 410; PAKISTAN CONST. art. 232; QATAR CONST. art. 69; SOUTH SUDAN CONST. art. 187(1); SUDAN CONST. art. 131; TURKEY CONST. art. 119; YEMEN CONST. art. 121.

<sup>2</sup> Compared to the South African Constitution, the Congolese Constitution leaves more discretion to interpret the definition of state of emergency, providing that “when it appears that an imminent peril resulting in grave results to public order or in the case of events presenting themselves, by their nature and their gravity, the character of the public calamity or natural disaster, the President of the Republic may decree in the Council of Ministers a state of emergency.” CONGO CONST. art. 109(1).

**Option 2: Allow Government to Define**

**When it appears that an imminent peril resulting in grave threats to public order or in the case of events presenting themselves, by their nature and their gravity, the character of the public calamity or natural disaster, the [President/Prime Minister/majority of members in the Assembly] of [State] may declare a state of emergency.**

*Authority to Declare a State of Emergency*

A constitution may include provisions establishing the parties with the authority to declare a state of emergency. Some post-conflict states vest this power solely in the executive branch or in the executive branch on condition of legislative approval, either initially or after a specified period of time.<sup>3</sup> Others require broader consensus, such as the affirmative vote of two-thirds majority of the Assembly, with a contingency plan in case the legislature is unable to meet.<sup>4</sup>

**Sample Language: Authority to Declare****Option 1: Executive May Declare**

**The [President/Prime Minister] may declare a state of emergency.**

**Option 2: Legislature May Declare**

**A state of emergency may be declared by an affirmative vote by [X] of the members of [Assembly].**

**If the [Assembly] cannot be convened during the state of emergency, the [President], with the proposal of the [Council of Ministers], has the right to issue acts that have the force of the law, which have to be approved by the [Assembly] in its first meeting. If the acts are not approved by the [Assembly] during its first meeting following the act's issuance, it shall cease to have the force of law immediately following the vote.**

<sup>3</sup> See AFGHANISTAN CONST. art. 143; ALGERIA CONST. art. 91; KENYA CONST. arts. 58, 132 (4)(d); MALDIVES CONST. arts. 253, 257; MAURITANIA CONST. art. 71.

<sup>4</sup> "In case of danger to the constitutional order and to public security, the Assembly, with request of the Council of Ministers, may decide for a state of emergency in one part or in the whole state territory, which lasts for as long as this danger continues, but not longer than 60 days . . . When the Assembly cannot be convened during the state of war, the President of the Republic, with the proposal of the Council of Ministers, has the right to issue acts that have the force of the law, which have to be approved by the Assembly in its first meeting." ALBANIA CONST. arts. 173, 176. "(1) A state of emergency may be declared only in terms of an Act of Parliament." SOUTH AFRICA CONST. art. 37. See also IRAN CONST. art. 79; IRAQ CONST. art. 61(9)(a).

*Restrictions during a State of Emergency*

The constitution may define the type and scope of restrictions during a state of emergency. One such restriction is to prohibit all amendments to the constitution.<sup>5</sup> Another is to specify that the government may not restrict fundamental rights, such as the right to life, prohibition of torture, cruel or degrading treatment or punishment, or the legal definitions of penal offenses and punishments, during a state of emergency.<sup>6</sup> Constitutions may also prohibit the dissolution or suspension of any state institutions or the state institution's powers during a state of emergency.<sup>7</sup>

**Sample Language: Restrictions****No Constitutional Amendments**

**No revision of the Constitution may be undertaken during a state of emergency.**

**No Constitutional Amendments Regarding Fundamental Rights**

**In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by law.**

**Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.**

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<sup>5</sup> “2. No revision of the Constitution may be undertaken during the time when the extraordinary measures are taken.” ALBANIA CONST. art. 177. “No amendment shall be made to any provision of the Constitution during the existence of a state of emergency.” MALDIVES CONST. art. 267.

<sup>6</sup> “(2) In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by a law. Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.” MONGOLIA CONST. art. 19. *See also* MALDIVES CONST. art. 255. In contrast, the Myanmar Constitution provides that the President, in promulgating an ordinance and declaring a state of emergency “may, if necessary, restrict or suspend as required, one or more fundamental rights of the citizens residing in the areas where the state of emergency is in operation.” MYANMAR CONST. art. 414(b).

<sup>7</sup> “The National Assembly may not be dissolved while the President of the Republic is exercising exceptional powers.” MAURITANIA CONST. art. 39(4). *See also* SOUTH SUDAN CONST. art. 188. In contrast, the Constitution of Sudan provides that the president, in a state of emergency, may “dissolve or suspend any of the State organs or suspend such powers, as may be conferred upon the States under the Constitution. The President of the Republic shall assume the functions of such organs and exercise the powers or prescribe the manner in which the affairs of the State concerned may be managed.” SUDAN CONST. art. 132(b).

**No Dissolution of Government****The [Assembly] may not be dissolved during a state of emergency.***Duration of the State of Emergency*

To provide clarity to the timeframe for declaring a state of emergency and to ensure that a state of emergency may not last indefinitely, states often specify the maximum duration of a state of emergency, as well as the procedures for extending the timeframe.<sup>8</sup>

**Sample Language: Duration**

**The [President/Prime Minister/Council of Ministers] may decide for a state of emergency in one part or in the whole state territory, which lasts for as long as the danger continues, but not longer than [30/60/90/X] days.**

**The extension of the term of the state of emergency may be done only with the consent of [the Assembly], for each [30/X] days, for a period of time not longer than [90/X] days.**

**Constitutional Enactment and Amendment**

Most constitutions establish procedures for enacting and amending a constitution to ensure integrity and stability in the process. The amendment procedure is particularly important because changes to a constitution may alter the state's basic principles and potentially affect much or all of the general population.

*Constitutional Enactment*

Some post-conflict states condition a new constitution's entry into force on its formal adoption.<sup>9</sup> States most commonly adopt constitutions in one of two ways: (1) a vote of the legislature; or (2) a popular referendum. A small number

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<sup>8</sup> "Council of Ministers, may decide for a state of emergency in one part or in the whole state territory, which lasts for as long as this danger continues, but not longer than 60 days . . . The extension of the term of the state of emergency may be done only with the consent of the Assembly, for each 30 days, for a period of time not longer than 90 days." ALBANIA CONST. art. 173. *See also* AFGHANISTAN CONST. art. 143; IRAQ CONST. art. 61(9)(b); QATAR CONST. art. 69; SOUTH SUDAN CONST. art. 189; SUDAN CONST. art. 134.

<sup>9</sup> For instance, the constitutions of Afghanistan, Iraq, Kenya, Lithuania, Macedonia, Hungary, Armenia, and Albania contain provisions for enactment.

of post-conflict constitutions allow for both of these mechanisms.<sup>10</sup> The constitution may also specify the date on which the constitution enters into force.<sup>11</sup>

### Sample Language: Specified Date

**This Constitution shall come into force on [date] or on the date of its publication in the official Gazette, whichever is earlier.**

### Vote of the Legislature

Some post-conflict states enact constitutions through legislative approval, typically by a vote of two-thirds or three-fourths majority.<sup>12</sup> After the required number of legislators approve the constitution, it may come into force on the day the constitution is declared in the legislature.<sup>13</sup> An advantage to the requirement of more than a simple majority is that approval by a higher margin signifies widespread support and assures the public that the constitution represents the will of more than just a narrow majority of parties. This process, in turn, helps promote greater stability.

### Sample Language: Vote of the Legislature

**This Constitution is adopted by a [two-thirds/three-fourths/X] majority vote of the total number of members in the [Assembly].**

**This Constitution comes into force on the day it is declared in the [Assembly].**

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<sup>10</sup> Chapter 8, Article 111 of the Armenian Constitution provides that one method of adoption is a popular referendum, called by the President upon the agreement by the majority of Deputies of the Assembly. *See also* VENEZUELA CONST. art. 71.

<sup>11</sup> *See* MACEDONIA CONST. ch. 9, art. 134. “The Constitution of the Republic of Hungary shall enter into effect on the date of its proclamation; the Government is to see to its implementation. The Government shall propose the Bills necessary for the implementation of this Constitution to the parliament.” HUNGARY CONST. art. 78. Article 183 of the Albanian Constitution stipulates that the Constitution enters into force following promulgation by the President. The Pakistani Constitution provides a latest date by which it will come into force. PAKISTAN CONST. art. 265. The draft constitution of South Sudan provides a specific date. SOUTH SUDAN CONST. art. 196.

<sup>12</sup> The Afghan Constitution provides that the constitution must be approved by the Loya Jirga and “endorsed and proclaimed by the Transitional Government of Afghanistan.” AFGHANISTAN CONST. art. 162. *See also* MACEDONIA CONST. art. 133.

<sup>13</sup> MACEDONIA CONST. art. 134.

Popular Referendum

States may also adopt a new constitution through a popular referendum.<sup>14</sup> If a state selects a popular referendum for enactment, the entire electorate may vote to accept the constitution. The result of the referendum depends on whether the state requires a simple majority or a higher percentage of the vote in favor of the enactment. If the state chooses a simple majority vote, more than 50 percent of all votes cast must be in favor of the enactment. However, if the constitution requires more than a simple majority (such as two-thirds or three-fourths), a greater proportion of the vote is required. A minimum voter turnout requirement may also be imposed for such elections.

**Sample Language: Popular Referendum**

**This Constitution shall become effective the day following the official promulgation of the results of the referendum, provided that in the referendum more than [one-half/two-thirds] of all votes cast were in favor thereof. However, the results of the referendum shall only have force if at least [one-half] of registered voters vote in the referendum.**

*Process for Proposing Amendments*

Constitutions typically specify one or more methods for proposing constitutional amendments. Generally, the options fall into four general categories: (1) vote of the legislature; (2) executive proposal; (3) constituent assembly; or (4) popular referendum. An amendment may be proposed by a vote of a fixed number of members of the state's legislature. This fixed number is often one-fifth,<sup>15</sup> one-third,<sup>16</sup> one-half,<sup>17</sup> or two-thirds of the members.<sup>18</sup> Amendments

<sup>14</sup> For instance, Lithuania (Chapter 15, Article 151) and Armenia (Chapter 8, Article 111) have adopted this approach. LITHUANIA CONST. Chap. 15, art. 151. ARMENIA CONST. Chap. 8, art. 111. *See also* KENYA CONST. art. 263.

<sup>15</sup> For instance, Article 177 of the Albanian Constitution requires that an initiative revising the constitution "may be undertaken by not less than one-fifth of the members of the Assembly." ALBANIA CONST. art. 177. The Iraqi Constitution also requires one-fifth. IRAQ CONST. art. 126(1).

<sup>16</sup> Mozambique allows for one-third of the Deputies to the Assembly to propose an amendment to the Constitution. MOZAMBIQUE CONST. art. 198. Turkey requires proposals amending the constitution in writing by at least one-third of the total number of members of the National Assembly. TURKEY CONST. art. 175.

<sup>17</sup> Afghanistan's Constitution requires proposal of the President and approval of the majority of the National Assembly members to make constitutional amendments. AFGHANISTAN CONST. art. 149.

<sup>18</sup> For instance, the United States requires two-thirds of both houses of the legislature to propose an amendment to the Constitution. UNITED STATES CONST. art. V. Japan's Constitution allows Parliament to propose an amendment through a concurring vote of two-thirds or more of the members of each house. JAPAN CONST. art. 96.

may also be proposed by the executive,<sup>19</sup> or by a constituent assembly, a large group of voting-eligible citizens, whose sole purpose is to propose an amendment.<sup>20</sup> A final option is to allow the general public to propose amendments through a popular referendum. States may select one of these options, or incorporate a combination of these four options.

### Sample Language: Proposing Amendments

#### **Option 1: Vote of the Legislature**

**Initiative for revision of this Constitution may be undertaken by not less than [one-fifth/one-quarter/one-third/one-half/two-thirds/X] of the members of the [Assembly].**

#### **Option 2: Executive Proposal**

**A proposal for the amendment of any provision of this Constitution may be initiated by the [President/Prime Minister].**

#### **Option 3: Constituent Assembly**

**Proposals to amend this Constitution may be made by a [selected group /constituent assembly], composed of [X] eligible voters.**

#### **Option 4: Popular Referendum**

**Proposals to amend this Constitution may be made by the people through a popular referendum.**

#### *Process for Drafting Amendments*

Some post-conflict constitutions include special provisions for drafting a proposed constitutional amendment, and often require the creation of a governmental committee to prepare a draft of the amendment.<sup>21</sup> Others require drafts of the proposed amendment to be submitted to the legislature for debate.<sup>22</sup> Regardless of the procedure selected, states typically consider the need for a high degree of public support to change the constitution, including adequate time for the public and the legislature to understand and debate the proposed change.

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<sup>19</sup> The constitutions of France, Afghanistan, Eritrea, and Mozambique allow the President to propose an amendment to the constitution.

<sup>20</sup> "The Political Constitution of Colombia may be amended by Congress, a Constituent Assembly, or by the people through a referendum." COLOMBIA CONST. art. 374.

<sup>21</sup> AFGHANISTAN CONST. art. 150.

<sup>22</sup> Mozambique employs this option. MOZAMBIQUE CONST. art. 198.

**Sample Language: Drafting Amendments****Option 1: Creation of Special Committee**

**In order to implement proposals regarding the amendment of the constitution, a commission composed of members of the [Government, Assembly, Supreme Court], shall be established by a [presidential] decree, and the commission shall prepare a draft of the amendments.**

**Option 2: Submit Amendments to Legislature**

**Draft amendments must be submitted to the [Assembly] [30/60/90/X days] before the opening of debate.**

*Process for Approving Amendments*

The process for approving amendments to the constitution varies greatly among states. Since constitutions set forth the core principles and basic structures of the state, states usually require a greater level of social and political agreement to amend the constitution than the consensus required for the passage of general legislation.<sup>23</sup> Possible approval scenarios include: (1) approval by a fixed number of members of the legislature;<sup>24</sup> (2) approval by a fixed number of members of the legislature and the endorsement of the executive;<sup>25</sup> (3) approval by a fixed number of members of the legislature followed by ratification by popular referendum;<sup>26</sup> (4) approval by a referendum;<sup>27</sup> (5) approval by a fixed number of the legislatures of the state's constituent units;<sup>28</sup> and (6) approval by a fixed number of members of the legislature followed by public debate and referendum.<sup>29</sup>

<sup>23</sup> For instance, in Sudan, the National Assembly can pass an amendment only if two-thirds of the members agree to pass the amendment. SUDAN CONST. art. 139. Similarly, the Brazilian Constitution may be amended with a three-fifths majority in both chambers of Congress. BRAZIL CONST. art. 60.

<sup>24</sup> Germany requires two-thirds of the members of both houses of Parliament to approve a statute amending the Constitution. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 79. The French Constitution provides that the President can decide to allow the Parliament to approve a constitutional amendment by a three-fifths majority. FRANCE CONST. art. 89.

<sup>25</sup> Afghanistan's Constitution requires two-thirds of the majority of the Grand Council plus the endorsement of the President for approval. AFGHANISTAN CONST. art. 150. *See also* SOUTH SUDAN CONST. art. 197.

<sup>26</sup> States like Spain and France require approval by both houses of Parliament prior to submitting the proposed amendment for ratification by referendum. Spain, for instance, requires approval by a majority of three-fifths of the members of both houses of Parliament when amending certain provisions of the constitution. SPAIN CONST. sec. 167(1). *See also* IRAN CONST. art. 177(3); IRAQ CONST. art. 126(2); KENYA CONST. arts. 255-56.

<sup>27</sup> Article 89 of the French Constitution requires "approval by referendum" for an amendment to come into force.

<sup>28</sup> Amending the United States Constitution requires ratification by the legislatures of three-fourths of the several states or by conventions in three-fourths. UNITED STATES CONST. art. V.

<sup>29</sup> The Mozambique Constitution requires public debate and referendum for proposed amendments implying fundamental changes in rights of citizens or organization of public powers. MOZAMBIQUE CONST. arts. 198, 199.

**Sample Language: Approving Amendments****Option 1: National Legislative Approval**

Constitutional amendments must be approved by a [two-thirds/three-fifths] majority of the [Assembly].

**Option 2: National Legislative Approval Followed by Executive Approval**

Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the [Assembly]. Following the approval of the legislature, the [President/Prime Minister] must endorse the amendment before it comes into force.

**Option 3: National Legislative Approval Followed by Popular Referendum**

Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the [Assembly]. Once the amendment has been passed by the [Assembly], it shall be submitted to ratification by referendum, which shall be conducted according to the [State] referendum law.

**Option 4: Popular Referendum**

The amendment shall become ratified after approval by [two-thirds] of eligible voters in a popular referendum. For the results of the referendum to have force at least [one-half] of registered voters must vote in the referendum.

**Option 5: State Legislative Approval**

The amendment must be ratified by the legislatures of [two-thirds/three-fourths] of the [states/provinces] or by conventions in [two-thirds/three-fourths].

**Option 6: National Legislative Approval Followed by Public Debate and Referendum**

A proposed amendment, after adoption by the [Assembly], shall be submitted to public debate and to a referendum.

*Restrictions*

Since constitutions often embody fundamental and core principles of the state, post-conflict states may also restrict the timing and content of constitutional amendments. For instance, some states do not allow any amendment of the constitution during a state of emergency or war.<sup>30</sup> Others prohibit amendments regarding religion.<sup>31</sup> Many states restrict constitutional amendments that pertain to fundamental rights so that amendment is impossible unless such rights are afforded greater protection.<sup>32</sup> In addition, some states restrict amendments so that they may not alter fundamental aspects of the state.<sup>33</sup> If a proposed amendment is not adopted, states often require a waiting period before the proposal may be submitted again.<sup>34</sup>

**Sample Language: Restrictions****No Amendments During Emergency or War**

**This Constitution may not be amended during [a state of emergency].**

**No Amendments Regarding Religion**

**Amendments regarding the adherence to the fundamentals of the state religion are not permitted.**

**No Weakening of Fundamental Rights**

**The amendments regarding the fundamental rights of the people are permitted only in order to make them more effective.**

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<sup>30</sup> “No revision of the Constitution may be undertaken during the time when the extraordinary measures are taken.” ALBANIA CONST. art. 177. *See also* MALDIVES CONST. art. 267.

<sup>31</sup> For instance, Afghanistan, Algeria, Sudan, and Iran prohibit any amendment regarding Islam.

<sup>32</sup> For instance, Article 79 of the German Constitution prohibits any amendments to the Constitution that affect the basic rights detailed in Article 1 through Article 20, such as human dignity, liberty, and equality. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 79. Similarly, Afghanistan permits the amendment of fundamental rights “only to improve them.” AFGHANISTAN CONST. art. 149. The Algerian Constitution states that a “constitutional revision cannot infringe on . . . fundamental liberties and citizen’s rights.” ALGERIA CONST. art. 178. “Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.” IRAQ CONST. art. 126(2). *See also* KENYA CONST. art. 255; SUDAN CONST. art. 139(3).

<sup>33</sup> Article 178 of the Algerian Constitution declares “any constitutional revision cannot infringe on . . . the republican nature of the State [and] . . . the integrity of the national territory.” ALGERIA CONST. art. 178.

<sup>34</sup> “If the proposal of amendment is initially rejected or the issue of the amendment is rejected, it shall not be discussed again for at least one year since the date of this rejection.” QATAR CONST. art. 144. “If the request is rejected, another request for the amendment of the same articles may not be submitted until the lapse of one year.” YEMEN CONST. art. 156.

**No Change to the Nature of the State:**

**Any constitutional amendment cannot infringe on the nature of the State or the integrity of the national territory.**

## ANNEX I: CONSTITUTIONS

**Afghanistan:**

<http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf>

**Albania:** <http://www.ipls.org/services/kusht/contents.html>

**Algeria:** [http://www.servat.unibe.ch/icl/ag00000\\_.html](http://www.servat.unibe.ch/icl/ag00000_.html)

**Argentina:** <http://www.senado.gov.ar/web/interes/constitucion/english.php>

**Armenia:** <http://www.parliament.am/parliament.php?id=constitution&lang=eng>

**Austria:** [http://www.servat.unibe.ch/icl/au00000\\_.html](http://www.servat.unibe.ch/icl/au00000_.html)

**Azerbaijan:** <http://www.uta.edu/cpsees/AZERCON.htm>

**Bahrain:** [http://www.servat.unibe.ch/icl/ba00000\\_.html](http://www.servat.unibe.ch/icl/ba00000_.html)

**Bangladesh:** <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>

**Belarus:** <http://www.president.gov.by/en/press19332.html>

**Belgium:** [http://www.servat.unibe.ch/icl/be00000\\_.html](http://www.servat.unibe.ch/icl/be00000_.html)

**Bolivia:** <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>

**Bosnia and Herzegovina:** [http://www.servat.unibe.ch/icl/bk00000\\_.html](http://www.servat.unibe.ch/icl/bk00000_.html)

**Botswana:** [http://www.chr.up.ac.za/undp/domestic/docs/c\\_Botswana.pdf](http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf)

**Brazil:** [http://www.servat.unibe.ch/icl/br00000\\_.html](http://www.servat.unibe.ch/icl/br00000_.html)

**Bulgaria:** [http://www.servat.unibe.ch/icl/bu00000\\_.html](http://www.servat.unibe.ch/icl/bu00000_.html)

**Cambodia:** <http://www.constitution.org/cons/cambodia.htm>

**Cameroon:** [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/7e3ee07f489d674dc1256ae9002e3915/\\$FILE/Constitution%20Cameroon%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/7e3ee07f489d674dc1256ae9002e3915/$FILE/Constitution%20Cameroon%20-%20EN.pdf)

**Canada:** <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#cn-tphp>

**Chad:**

[http://www.kituoachakatiba.org/index2.php?option=com\\_docman&task=doc\\_view&gid=127&Itemid=2](http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=127&Itemid=2)

**Chile:** <http://confinder.richmond.edu/admin/docs/Chile.pdf>

**China:** <http://english.people.com.cn/constitution/constitution.html>

**Colombia:** [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf)

**Costa Rica:**

[http://www.costaricalaw.com/legalnet/constitutional\\_law/constitenglish.html](http://www.costaricalaw.com/legalnet/constitutional_law/constitenglish.html)

**Croatia:** [http://www.servat.unibe.ch/icl/hr00000\\_.html](http://www.servat.unibe.ch/icl/hr00000_.html)

**Czech Republic:** <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html>

**Democratic Republic of Congo:** <http://www.constitutionnet.org/files/DRC%20-%20Congo%20Constitution.pdf>

**Denmark:** [http://www.servat.unibe.ch/icl/da00000\\_.html](http://www.servat.unibe.ch/icl/da00000_.html)

**East Timor:** <http://www.etan.org/etanpdf/pdf2/constfnen.pdf>

**Ecuador:** <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

**Eritrea:** [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_126648.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_126648.pdf)

**Estonia:** [http://www.servat.unibe.ch/icl/en00000\\_.html](http://www.servat.unibe.ch/icl/en00000_.html)

**Ethiopia:** [http://www.servat.unibe.ch/icl/et00000\\_.html](http://www.servat.unibe.ch/icl/et00000_.html)

**Fiji:** [http://www.servat.unibe.ch/icl/fj00000\\_.html](http://www.servat.unibe.ch/icl/fj00000_.html)

**Finland:** [http://www.servat.unibe.ch/icl/fi00000\\_.html](http://www.servat.unibe.ch/icl/fi00000_.html)

**France:** <http://www.assemblee-nationale.fr/english/8ab.asp>

**Ghana:** [http://www.judicial.gov.gh/constitution/chapter/chap\\_17.htm](http://www.judicial.gov.gh/constitution/chapter/chap_17.htm)

**Georgia:**

[http://www.parliament.ge/files/68\\_1944\\_951190\\_CONSTIT\\_27\\_12.06.pdf](http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf)

**Germany:** [http://www.servat.unibe.ch/icl/gm00000\\_.html](http://www.servat.unibe.ch/icl/gm00000_.html)

**Greece:** [http://www.servat.unibe.ch/icl/gr00000\\_.html](http://www.servat.unibe.ch/icl/gr00000_.html)

**Guatemala:** <http://www.constitutionnet.org/files/Guatemala%20Constitution.pdf>

**Hungary:** [http://www.servat.unibe.ch/icl/hu00000\\_.html](http://www.servat.unibe.ch/icl/hu00000_.html)

**India:** <http://www.constitution.org/cons/india/const.html>

**Indonesia:** [http://www.servat.unibe.ch/icl/id00000\\_.html](http://www.servat.unibe.ch/icl/id00000_.html)

**Iran:** [http://www.servat.unibe.ch/icl/ir00000\\_.html](http://www.servat.unibe.ch/icl/ir00000_.html)

**Iraq:** [http://www.uniraq.org/documents/iraqi\\_constitution.pdf](http://www.uniraq.org/documents/iraqi_constitution.pdf)

**Ireland:**

[http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20Irel andNov2004.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Irel andNov2004.pdf)

**Israel:** <http://u.cs.biu.ac.il/~koppel/constitution-english-04%5B1%5D.07.06-published.pdf>

**Italy:** [http://www.servat.unibe.ch/icl/it00000\\_.html](http://www.servat.unibe.ch/icl/it00000_.html)

**Japan:** <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>

**Kenya:**

<http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

**Kosovo:**

<http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>

**Krygzstan:**

[http://web.parliament.go.th/parcy/sapa\\_db/cons\\_doc/constitutions/data/Kyrgyzstan/Kyrgyzstan%20Constitution%20of%20the%20Kyrgyz%20Republic.htm](http://web.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Kyrgyzstan/Kyrgyzstan%20Constitution%20of%20the%20Kyrgyz%20Republic.htm)

**Kuwait:** [http://www.servat.unibe.ch/icl/ku00000\\_.html](http://www.servat.unibe.ch/icl/ku00000_.html)

**Latvia:** [http://www.servat.unibe.ch/icl/lg00000\\_.html](http://www.servat.unibe.ch/icl/lg00000_.html)

**Lebanon:** [http://www.servat.unibe.ch/icl/le00000\\_.html](http://www.servat.unibe.ch/icl/le00000_.html)

**Liberia:** [http://www.liberianlegal.com/constitution1986.htm#\\_Article\\_65](http://www.liberianlegal.com/constitution1986.htm#_Article_65)

**Lithuania:** [http://www.servat.unibe.ch/icl/lh00000\\_.html](http://www.servat.unibe.ch/icl/lh00000_.html)

**Macedonia:** [http://www.servat.unibe.ch/icl/mk00000\\_.html](http://www.servat.unibe.ch/icl/mk00000_.html)

**Madagascar:** <http://www.primature.gov.mg/webfiles/Projet-Rev-Constitution.pdf>

**Malawi:** <http://www.sdn.org.mw/constitut/dtlindx.html>

**Malaysia:** <http://confinder.richmond.edu/admin/docs/malaysia.pdf>

**Maldives:**

<http://www.maldivesinfo.gov.mv/home/upload/downloads/Compilation.pdf>

**Mauritania:** [http://www.servat.unibe.ch/icl/mr00000\\_.html](http://www.servat.unibe.ch/icl/mr00000_.html)

**Mauritius:**

<http://www.gov.mu/portal/site/AssemblySite/menuitem.ee3d58b2c32c60451251701065c521ca/>

**Mexico:** <http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf>

**Micronesia:** <http://www.fsmlaw.org/fsm/constitution/>

**Mongolia:** [http://www.servat.unibe.ch/icl/mg00000\\_.html](http://www.servat.unibe.ch/icl/mg00000_.html)

**Morocco:** [http://www.ancl-radc.org.za/sites/default/files/morocco\\_eng.pdf](http://www.ancl-radc.org.za/sites/default/files/morocco_eng.pdf)

**Mozambique:** <http://confinder.richmond.edu/admin/docs/moz.pdf>

**Myanmar:** [http://www.burmalibrary.org/docs5/Myanmar\\_Constitution-2008-en.pdf](http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf)

**Namibia:** <http://www.orusovo.com/namcon/>

**Nigeria:** [http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Powers\\_of\\_Federal\\_Republic\\_of\\_Nigeria](http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Powers_of_Federal_Republic_of_Nigeria)

**The Netherlands:** [http://www.servat.unibe.ch/icl/nl00000\\_.html](http://www.servat.unibe.ch/icl/nl00000_.html)

**Oman:** [http://www.servat.unibe.ch/icl/mu00000\\_.html](http://www.servat.unibe.ch/icl/mu00000_.html)

**Pakistan:** <http://www.pakistani.org/pakistan/constitution/>

**Paraguay:** [http://www.servat.unibe.ch/icl/pa00000\\_.html](http://www.servat.unibe.ch/icl/pa00000_.html)

**Peru:** [www.congreso.gob.pe/\\_ingles/CONSTITUTION\\_29\\_08\\_08.pdf](http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf)

**Philippines:** <http://www.lawphil.net/consti/cons1987.html>

**Poland:** [http://www.servat.unibe.ch/icl/pl00000\\_.html](http://www.servat.unibe.ch/icl/pl00000_.html)

**Portugal:**

[http://app.parlamento.pt/site\\_antigo/ingles/cons\\_leg/Constitution\\_VII\\_revisao\\_definitive.pdf](http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf)

**Qatar:** <http://www.qatarembassy.net/constitution.asp>

**Republic of the Congo:** [http://www.servat.unibe.ch/icl/cf00000\\_.html](http://www.servat.unibe.ch/icl/cf00000_.html)

**Russia:** <http://www.constitution.ru/en/10003000-01.htm>

**Rwanda:** <http://www.rwandahope.com/constitution.pdf>

**Saudi Arabia:** [http://www.servat.unibe.ch/icl/sa00000\\_.html](http://www.servat.unibe.ch/icl/sa00000_.html)

**Senegal:**

[http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20SenegalC%20\\_english%20summary\\_\\_rev\\_.pdf](http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20SenegalC%20_english%20summary__rev_.pdf)

**Sierra Leone:** [www.sierra-leone.org/Laws/constitution1991.pdf](http://www.sierra-leone.org/Laws/constitution1991.pdf)

**Singapore:** [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188428](http://www.wipo.int/wipolex/en/text.jsp?file_id=188428)

**Slovakia:** [http://www.servat.unibe.ch/icl/lo00000\\_.html](http://www.servat.unibe.ch/icl/lo00000_.html)

**Slovenia:** [http://www.servat.unibe.ch/icl/si00000\\_.html](http://www.servat.unibe.ch/icl/si00000_.html)

**Spain:** [http://www.servat.unibe.ch/icl/sp00000\\_.html](http://www.servat.unibe.ch/icl/sp00000_.html)

**South Africa:** <http://www.info.gov.za/documents/constitution/1996/index.htm>

**Sudan:**

<http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf>

**South Sudan:** <http://www.unhcr.org/refworld/docid/4e269a3e2.html%C2%A0>

**Syria:** [http://www.al-bab.com/arab/docs/syria/syria\\_draft\\_constitution\\_2012.htm](http://www.al-bab.com/arab/docs/syria/syria_draft_constitution_2012.htm)

**Sweden:** [http://www.servat.unibe.ch/icl/sw00000\\_.html](http://www.servat.unibe.ch/icl/sw00000_.html)

**Swaziland:** [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_125409.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125409.pdf)

**Switzerland:** [http://www.servat.unibe.ch/icl/sz00000\\_.html](http://www.servat.unibe.ch/icl/sz00000_.html)

**Tanzania:** <http://www.judiciary.go.tz/downloads/constitution.pdf>

**Thailand:** [http://www.servat.unibe.ch/icl/th00000\\_.html](http://www.servat.unibe.ch/icl/th00000_.html)

**Tunisia:** <http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf>

**Turkey:** [http://www.servat.unibe.ch/icl/tu00000\\_.html](http://www.servat.unibe.ch/icl/tu00000_.html)

**Uganda:** [http://www.ugandaembassy.com/Constitution\\_of\\_Uganda.pdf](http://www.ugandaembassy.com/Constitution_of_Uganda.pdf)

**United States:** <http://www.findlaw.com/cascode/constitution/>

**Ukraine:** [http://gska2.rada.gov.ua/site/const\\_eng/constitution\\_eng.htm](http://gska2.rada.gov.ua/site/const_eng/constitution_eng.htm)

**United Arab Emirates:**

<http://www.uaecabinet.ae/English/UAEGovernment/Pages/ConstitutionOfUAE.aspx>

**Venezuela:**

<http://www.helplinelaw.com/law/venezuela/constitution/constitution07.php>

**Yemen:** [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_125895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125895.pdf)

**Zimbabwe:** [http://www.servat.unibe.ch/icl/zi00000\\_.html](http://www.servat.unibe.ch/icl/zi00000_.html)

**Zimbabwe's Draft Constitution:**

<http://www.swradioafrica.com/Documents/COPAC%20%20Draft%20Constitution%20of%20Zimbabwe%202012-1.pdf>

**ANNEX II: SAMPLE LANGUAGE****PREAMBLE PROVISIONS****Sample Language: State Identity**Type of Government

[State] is a [type of government (*e.g.*, parliamentary republic)].

Sovereignty

[State] is an independent, sovereign state. Sovereignty is inalienable, indivisible, non-transferable, and is derived from and vested in the people of [State].

Borders

The borders of [State] are [geographic description of boundaries]. Borders may only be altered in accordance with international law, by peaceful means and by agreement.

**Sample Language: Supremacy of the Constitution**

This Constitution is the supreme law of [State]. Any laws inconsistent with this Constitution shall be void.

**Sample Language: National Identity**

[State] is a state of many ethnicities and nationalities. [State] belongs to all who live in it, united by our diversity, common history, purpose and destiny, and committed to working together to promote the good governance and the welfare of all citizens.

***Optional for States with Significant Arab Presence***Option 1: Affirm Connection to Arab Nation

The Arab majority in [State] considers itself to be an inseparable part of the larger Arab Nation.

Option 2: Acknowledge Arab Character of State

[State] is Arab in its identity.

Option 3: Declare Membership in the Arab League

[State] is a member of the Arab League and is committed to its charter.

**Sample Language: *Shari'a***Option 1: Specific Connection to *Shari'a*

Islam is the official religion of the state and the people and *Shari'a* is the principle source of legislation.

Option 2: Nuanced Reference to *Shari'a*

*Shari'a* is a source of inspiration for legislation.

Option 3: Broad Reference to *Shari'a*

The principles of *Shari'a* will be a basis for legislation.

**Sample Language: International Obligations**

[State] shall observe the principles of neighborliness.

[State] shall uphold its obligations under international law.

In accordance with its obligations under [international law/specific treaty], [state] will seek to combat and prevent terrorism, transnational crime, and other threats to international or regional security.

[State] commits to the maintenance of international peace and security through adherence to the UN Charter, [regional organization], and the general principles of customary international law.

**Sample Language: Citizenship**Option 1: Rights and Duties of Citizenship

All citizens of [state] are equally entitled to the rights, privileges, and benefits of citizenship, and equally subject to the duties and responsibilities of citizenship.

Option 2: Citizenship Requirements

Any person who was born in [state], born to a parent who is a [state] citizen, or who has been naturalized as a citizen of [state], shall be considered a [state] citizen.

**Sample Language: Marriage**Option 1: Citizenship Through Marriage

A person who has been married to a citizen for a period of [X] years is entitled on application to be registered as a citizen.

**Sample Language: Official State Capital, Flag, Anthem, Symbol, and Holidays**Option 1: Specify Official State Capital, Flag, Anthem, Symbol, and Holiday(s) in the Constitution

The capital city of [state] is [Capital City].

The national flag is [description of flag].

The [seal/symbol] of [state] is [description of the seal/symbol].

The national anthem of [state] is [title of national anthem].

The national holiday[s] of [state] [is/are] [title and date of national holiday(s)].

Option 2: Leave Specific Determinations of Official State Capital, Flag, Anthem, Symbol, and Holidays to Law

Determination of the capital city, national holidays, the form and dimensions of the national flag and symbols, the content of the text of the national anthem, and their use shall be regulated by law.

**Sample Language: Official State Language**Option 1: Mandate One or More Official Language(s)

[Language(s)] shall be the official state language[s].

Option 2: Mandate Official Language(s), but Protect All Languages

[Language(s)] shall be the official state language[s], but the protection of all languages in [State] is guaranteed, and citizens of [State] have the right to educate their children in their mother tongue.

**STATE STRUCTURE AND DEVOLUTION OF POWERS****Sample Language: Unitary State**

[State], with its territory and nation, is a unitary state.

**Sample Language: Federal State**

[State] is a federal state.

**Sample Language: Confederation**

State of [Confederation] is a union of [names of joined states]. [Confederation] shall have its own constitution, law, and government institutions. All powers not specifically allocated to the central government shall be reserved to the states.

**Sample Language: Delineating Provinces**

The provinces of [State] are: [list of provinces].

**Sample Language: Exclusive Powers of Central Government**

The central government of [state] shall have exclusive control over matters relating to: [foreign affairs; armed services and national security; immigration and naturalization; communications; transportation; international commerce and trade].

**Sample Language: Exclusive Powers of Provincial Governments**

Provincial governments of [State] shall retain exclusive control over matters relating to: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

**Sample Language: Shared Powers**

The central government of [state] shall exercise joint competencies with the provincial governments over matters relating to: [health; social welfare; education; housing; transportation and traffic regulations; police and prison administration; natural resources].

**Sample Language: Powers Not Specifically Allocated**Option 1: Residual Powers to Central Government

All powers not expressly assigned in this Constitution shall fall under the jurisdiction of the central government.

Option 2: Residual Powers to Provincial Governments

All powers not expressly assigned in this Constitution shall fall under the jurisdiction of the provincial governments.

**Sample Language: Asymmetrical Devolution of Powers**

[Territories] have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.

The court of [Territory] shall adopt decisions and resolutions mandatory for execution in the [Territory].

The following issues shall be under the authority of [Territory]: [list of issues].

[Territories] shall effect normative regulation in the following matters: [list of matters].

During the transitional period, [Region] shall have the authority to govern [matters], until national law indicates otherwise.

**Sample Language: Assuming Powers over Time**

All provinces may assume power and responsibility after [one/three/five] year[s] over the following powers following the entry into force of this Constitution: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

Criteria Used

To assume these powers and responsibilities, the provinces must fulfill certain objective criteria established by law. Such law shall include requirements relating to [the size of the population/the maturity of the public administration and infrastructure/the degree of economic development/a determination of financial capability].

Evaluation of Criteria

Upon a decision of the province(s) to assume additional powers, a panel of independent experts appointed by the [Constitutional Court] shall determine whether the objective criteria have been met.

The decision of the experts shall be forwarded to the [Assembly]. The [Assembly] must approve the assumption of power by a resolution adopted by a majority of its members.

The decision of the [Assembly] may be appealed to the [Constitutional Court].

**Sample Language: Framework Legislation**

With respect to those powers within the exclusive competence of the central government and those powers shared between the central and provincial governments, the central government may adopt legislation that establishes national policy and guidance on particular matters.

The provincial governments are then permitted to enact implementing policies and legislation that are consistent with that framework.

**Sample Language: Harmonization of Provincial Legislation**

When it is necessary in the general interest of the state, the central government may enact legislation that harmonizes the law and policies of the provinces, even in the case of matters over which the power and authority is shared with the central government.

The decision to harmonize legislation in this manner shall require the support of [X] of the [Assembly].

**Sample Language:  
Cooperation between Central and Provincial Governments**

The central government shall have a Special Representative for each province as prescribed by law. The Special Representative shall serve as a liaison between the central government and the province and shall be permitted to observe the sessions of the provincial legislature. The appointment procedures, terms of service and additional duties and functions of these representatives shall be prescribed by law of the [central/provincial] government[s].

Each province shall also appoint a Special Representative. This Special Representative shall serve as a liaison between the provincial government and the central government and shall be permitted to observe the session of the [Assembly]. The appointment procedures, terms of service and additional duties, and functions of these representatives shall be prescribed by law of the [central/provincial] government[s].

### **Sample Language: Dispute Resolution**

The [Constitutional Court] may decide disputes between the central and provincial governments concerning the constitutional status, powers, or functions of any of those governments, their departments, and agents.

The [Constitutional Court] may review the constitutionality of any national or provincial legislation upon application by a member of the [Assembly] or provincial legislature for an order declaring that all or part of a law is unconstitutional.

### **Sample Language: Constitutional Amendments**

An amendment to this Constitution which changes the inherent relationship between the central government and the provinces shall require [X] vote of the Assembly and provincial legislatures/ approval by [X] of eligible voters in a public referendum].

## **THE EXECUTIVE**

### **Sample Language: Presidential System**

The state shall have one president.

The President shall be the Head of State and the representative of the state abroad.

The President shall work cooperatively with the government and Parliamentary Assembly to ensure the regular and efficient functioning of the state.

### **Sample Language: Parliamentary System**

The [Legislature/Parliament/National Assembly] shall elect the Prime Minister.

The Prime Minister shall have day-to-day responsibility for the management of the central government and execution of federal laws.

The Prime Minister determines and is responsible for the general guidelines of policy.

The Prime Minister conducts the proceedings of the central government in accordance with the rules of procedure adopted by the government and approved by the [President].

### **Sample Language: Mixed Presidential/Parliamentary System**

The President of the Republic shall be elected by an [absolute majority/simple majority] of the votes cast.

The President shall act on the advice of the Prime Minister.

Of the Ministers, one shall be the Head of the Government and of the Cabinet of Ministers, one shall be the Prime Minister.

On the proposal of the Prime Minister, the President shall appoint the other members of the government and terminate their appointments.

*Optional:* The President of the Republic shall appoint as the Prime Minister the member of Parliament who is most likely to command the confidence of Parliament.

### **Sample Language: Powers and Functions**

The [President/Prime Minister] protects and upholds this Constitution as the foundation of the state's legal order.

### **Sample Language: Domestic Powers**

#### Essential Powers

The [President/Prime Minister] signs into law bills and regulations passed by the [Legislature/Parliament/National Assembly].

The [President/Prime Minister] promulgates laws.

The [President/Prime Minister] executes laws.

The [President/Prime Minister] can veto legislation passed by the Legislature. The [President/Prime Minister's] veto can be overridden by [one-half/two-thirds] of the [Legislature/Parliament/National Assembly].

The [President/Prime Minister] declares a state of emergency, effective upon the approval of [one-half/two-thirds] of the [Legislature/Parliament/National Assembly].

The [President/Prime Minister] confers titles, orders, and decorations.

The [President/Prime Minister] grants individual pardons and amnesties.

The [President/Prime Minister] appoints state officials and judges.

#### Optional Powers

The [President/Prime Minister] announces elections.

The [President/Prime Minister] calls referenda.

The [President] can dissolve the Parliamentary Assembly, after consultation with and approval from the [Prime Minister], and in accordance with this Constitution.

The [President/Prime Minister] dissolves the Legislature.

#### **Sample Language: Domestic Powers (Mixed Systems)**

The President shall be responsible to Parliament for the due execution and performance of the powers and functions of the Office of President under the Constitution and under any other law.

The President shall declare states of emergency within the state in accordance with the provisions of the Constitution.

The President shall preside at ceremonial sittings of Parliament.

The President shall summon, adjourn, and dissolve Parliament.

The President shall appoint the Prime Minister, the other ministers of the Cabinet of Ministers, and deputy ministers.

The President shall act in a manner consistent with the provisions of the Constitution or written laws.

The President shall act in accordance with international law and custom.

The President may grant full or conditional pardons.

The Prime Minister shall direct the operation of the Cabinet of Ministers.

The Prime Minister shall be responsible for national defense.

The Prime Minister shall ensure the implementation of legislation.

The Prime Minister shall determine the number of ministers and ministries and the assignment of subjects and functions to ministers.

#### **Sample Language: Foreign Affairs Powers**

The [President/Prime Minister] represents the state abroad.

The [President/Prime Minister] negotiates the terms of treaties.

The [President/Prime Minister] appoints ambassadors and envoys.

The [President/Prime Minister] accredits and receives ambassadors and envoys.

#### **Sample Language: The Commander-in-Chief**

The [President/Prime Minister] of the state shall be Commander-in-Chief of the armed forces.

The Commander-in-Chief has the power to appoint and dismiss armed forces personnel.

The Commander-in-Chief has the power to declare war with the consent of the [Legislature/Parliament/National Assembly].

*Optional:* The [National Security Council/Cabinet] shall advise the Commander-in-Chief on issues of national security and defense.

### **Sample Language: Role of the Cabinet or Council of Ministers**

The [President/Prime Minister] shall appoint a [Cabinet/Council of Ministers] who are charged with the direction and control of the matters for which they are responsible.

The ministries have the authority to create administrative rules and regulations.

#### Ministries

Ministry of Foreign Affairs

Ministry of Defense

Ministry of Justice

Ministry of the Interior

Ministry of Oil/Natural Resources

Ministry of Finance

Ministry of Education

Ministry of Public Works

Ministry of Health

Ministry of Trade/Commerce

Ministry of Communication

Ministry of Displacement and Migration

Ministry of Culture

Ministry of Water Resources

Ministry of Labor

[And any other ministries created by the government]

### **Sample Language: Selection and Removal of the Cabinet or Council of Ministers**

Cabinet members shall be appointed by the [President/Prime Minister].

*Optional:* [Cabinet members] must be approved by [two-thirds/more than one-half] of the [Legislature/Parliament/National Assembly].

*Optional:* If the [simple majority/two-thirds] of the [Legislature] passes a motion of no confidence in the [Cabinet], the member[s] of the [Cabinet] must resign.

*Optional:* [Cabinet members] may be removed at the discretion of the [President/Prime Minister].

### **Sample Language: Selection of the President or Prime Minister**

The election of the [President/Prime Minister] shall be under the terms prescribed by the Electoral Law.

The [President/Prime Minister] shall be elected by universal, free, direct, and secret ballot, and by an absolute majority of votes cast.

The [President/Prime Minister] shall be elected by the legislature.

### **Sample Language: Disability or Death of the President or Prime Minister**

In the case that the [President/Prime Minister] is temporarily unable to fulfill his or her duties, the [Vice President] shall temporarily assume his or her duties.

In the case that the [President/Prime Minister] is unable to fulfill his or her duties due to permanent disability or death, new elections shall be called in accordance with the law.

If it is unclear whether the [President/Prime Minister] is able to fulfill his or her duties, the [Council of Ministers/Cabinet] shall make a determination on the [President/Prime Minister]'s fitness.

### **Sample Language: Impeachment of the Executive**

The [Legislature/Parliament/National Assembly] shall have the power to impeach the [President/Prime Minister].

[One-third/one-half/two-thirds] of the [Legislature/Parliament/National Assembly] may introduce a motion to impeach the [President/Prime Minister].

If [X] of the [Legislature/Parliament/National Assembly] vote to impeach the [President/Prime Minister], he or she shall immediately abdicate the office.

New [presidential/executive] elections must be called within [X] days in accordance with the law.

**Sample Language: Term of Office**

The [President/Prime Minister] shall be [elected/appointed] for a term of [four/seven] years.

No individual may serve more than [two/three] terms as [President/Prime Minister].

**Sample Language: Eligibility**

The [President/Prime Minister] must be at least [30/40] years of age.

The [President/Prime Minister] must be a citizen of the State.

The [President/Prime Minister] may not serve in a leadership position of a political party, or any other appointed or elected office, while serving as [President/Prime Minister].

The [President/Prime Minister] may not be a member of any other branch of government or of the government of a [region/governorate].

The [President/Prime Minister] may not hold any other salaried office, or engage in any trade or profession, or belong to the management or advisory board of any enterprise conducted for profit.

**Sample Language: Oath of Office**

Before assuming his or her duty, the [President/Prime Minister] shall take a solemn oath before the [Legislature/Parliament/ National Assembly] swearing loyalty to the State and to the Constitution.

The content of the official oath shall be provided by law.

If the [President/Prime Minister] refuses to take the oath or takes it with a reservation, he or she shall be regarded as not having been elected.

**THE LEGISLATURE****Sample Language: Structure of the Legislative Branch**

Legislative power in [State] shall be vested in the [Legislature/National Assembly].

**Sample Language: Unicameral**

The [Legislature] shall have one [chamber].

The [chamber] shall have [X] members.

**Sample Language: Bicameral**

The [Legislature] shall have two houses. The upper house shall be called the [Senate/Other Name] and the lower house shall be called the [Assembly/Other Name].

The [upper house] shall have [X] members. Members shall be elected every [4-9] years.

The [lower house] shall have [X] members. Members shall be elected every [2-5] years.

*Optional:* Seats in the lower house shall be allocated among electoral districts based on the population of each district, in accordance with the Election Law.

*Optional:* Every district shall be guaranteed at least one seat in the upper house.

**Sample Language: Speaker**

The [Legislature] shall, by a [one-half/two-thirds] majority, select from its members, a Speaker.

*Optional:* The Speaker shall be responsible for the efficient functioning of the [Legislature].

*Optional:* The Speaker shall represent the [Legislature] to other branches of government.

*Optional:* The Speaker shall call extraordinary sessions of [Legislature] as is necessary and prescribed by law.

*Optional:* The Speaker shall perform other duties as defined by law and [Legislature] regulations.

### **Sample Language: Powers and Functions**

The [Legislature] shall be the primary institution of state government charged with representing the goals and interests of the people of the State.

The [Legislature] shall approve legislation by a [simple majority] vote.

Members of the [Legislature] may initiate legislation.

Rules for the [Legislature] shall be established by law and must be approved by [two-thirds] of the [Legislature].

The [Legislature] shall publish a complete record of its deliberations and shall, save in exceptional circumstances in accordance with its rules, deliberate publicly.

General sessions of the [Legislature] shall be determined by law.

The [Legislature] shall be responsible for passing laws and administrative measures.

*Optional:* The [Legislature] shall be responsible for passing constitutional amendments.

*Optional:* The [Legislature] shall by [one-third/ one-half/ two-thirds] vote, remove the [President or Prime Minister] for gross violation of the Constitution, breach of oath, or upon disclosure of the commitment of a felony.

*Optional:* The [Legislature] shall be responsible for deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state.

*Optional:* The [Legislature] shall be responsible for approving a budget for the institutions of the state.

*Optional:* The [Legislature] shall be responsible for ratifying treaties signed by the [President or Prime Minister].

*Optional:* The [Legislature] shall be responsible for overseeing government administration.

*Optional:* The [Legislature] shall be responsible for overseeing government regulatory and spending powers.

*Optional:* The [Legislature] shall be responsible for all other powers assigned by this Constitution.

### **Sample Language: Powers and Functions (Parliamentary System)**

The [Legislature] shall be responsible for electing the [Prime Minister] and the [Council of Ministers] [by secret ballot].

### **Sample Language: Committees**

The [Legislature] shall establish committees. Each committee shall be charged with overseeing assigned areas of law.

After their first reading, bills must be sent to the appropriate committee for review.

Committees have a duty to thoroughly vet each piece of legislation.

After committee review, legislation shall be returned to the Parliament for a vote.

*Optional:* The [Legislature] shall include the following committees: [agriculture], [appropriations], [armed services], [budget], [education], [energy], [finance], [foreign affairs], [judiciary], [rules], and [others].

### **Sample Language: Term and Eligibility of Members**

Members of the [Legislature] shall serve [X year] terms, unless the [Legislature] is dissolved in accordance with this Constitution.

Any eligible voter who has reached the age of [30] by Election Day may serve as a member of the [Legislature].

**Sample Language: Dissolution of the Legislature**

The [President or Prime Minister] in accordance with this Constitution shall dissolve the [Legislature] when it fails a vote of confidence. The [President or Prime Minister] will call for new elections.

New elections shall be arranged within [30/60/90] days from the dissolution of the [Legislature].

The dissolved [Legislature] shall continue to serve until the new [Legislature] is elected. Once the new [Legislature] is elected, the members of the dissolved [Legislature] must relinquish their seats.

**Sample Language: Dissolution of the Legislature (Parliamentary System)**

The [Legislature] shall be dissolved within [30/60/90] days of a new session if no candidate has received a [two-thirds] majority for Prime Minister.

The [Legislature] shall be dissolved if within [20] days of a new session if no candidate has received a [two-thirds] majority for Prime Minister.

**Sample Language: Code of Ethics**

Members of the [Legislature] must conduct themselves at all times in a manner that reflects creditably on the [Legislature], and maintains and strengthens the public's trust and confidence in the integrity of the [Legislature].

Members of the [Legislature] shall maintain the highest standards of propriety to ensure that their integrity and that of the political institutions in which they serve are beyond question.

When any doubt exists as to the scope, application or meaning of any aspect of this code, the good faith of the member concerned must be the guiding principle.

*Optional:* Members of the [Legislature] shall disclose their financial records.

*Optional:* Members of the [Legislature] shall not receive more than [\$2000] in gifts from one individual.

*Optional:* The [Legislature] shall establish a regulatory commission to enforce the code of ethics.

*Optional:* There shall be an independent regulatory commission to enforce the code of ethics.

### **Sample Language: Legislative Immunity**

No [legislative] representative shall be prosecuted, detained or punished for an opinion expressed or vote cast.

A member of the [Legislature] enjoys immunity from legal liability. Criminal charges can only be brought against him or her on proposal by [a designated officer] and with the consent of the majority of the complement of the [Legislature].

*Optional:* Other privileges and immunities of the [legislative] members may be prescribed by national legislation.

### **Sample Language: Quorum Requirements**

[40/50/60 percent] of the members of the [Legislature] shall represent quorum.

Where at any time during a meeting of the [Legislature] there are fewer than [20/80/100] members present, the person presiding shall adjourn the session without question.

## **THE JUDICIARY**

### **Sample Language: Powers and Functions**

The courts shall ensure equal justice for all. They shall safeguard the rights and legitimate interests of all citizens, individuals, legal entities, and the State.

The courts shall be responsible for the administration of justice in accordance with the Constitution, as well as statutes and binding international laws and norms.

**Sample Language: Judicial Independence**Separation of Powers

The judiciary of [State] shall be autonomous and independent.

Judges shall be autonomous, independent, and bound only by the law.

Interference with the activities of a judge or the courts of law by any institutions of state power, political parties, public organizations, or citizens, shall be prohibited and incur liability as provided for by law.

State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.

Judicial Service Commission

The Judicial Service Commission shall ensure the autonomy, independence, impartiality, competence, and efficiency of the judiciary.

The responsibilities of the Judicial Service Commission shall include, but shall not be limited to oversight of the judiciary's budget; the administration of the judiciary; and the appointment, discipline, and removal of prosecutors, deputy prosecutors, and judges, apart from the judges of the Constitutional Court. The composition and additional responsibilities of the Judicial Service Commission shall be defined by law.

The Judicial Council is composed of [X] members. On the proposal of the president, the Assembly elects [X] members from among university professors of law, attorneys and other lawyers; judges holding permanent judicial office elect [X] members from among their own number. The members of the council select a president from among their own number.

The Judicial Council shall have responsibility for the appointment, discipline and removal of judges and in their disciplinary responsibilities shall decide in accordance with the Constitution and law.

**Sample Language: Judicial Authority**

State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.

The Courts of Law may render decisions on civil law and criminal law matters, and may review the decisions of administrative bodies.

Unless otherwise specified in the applicable law for the purpose of protecting the private lives of the parties, protecting the interests of minors, protecting a business secret, or protecting another important public or security interest, all Courts of Law shall hold proceedings in public and all judicial decisions shall be announced publicly.

The judiciary shall in no way be administered by the executive authority, including the Ministry of Justice. The judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law, without interference from the legislative or executive authorities.

The three authorities – legislative, executive, and judicial – shall be separate and independent of one another.

The Courts of Law may decide that the legislative or executive branch has failed to fulfill a constitutional obligation.

**Sample Language: Structure of the Judiciary**Option 1: List of Constitutionally-Recognized Courts

The courts shall consist of [provide court names].

Option 2: Establishment of Courts

The Courts of Law shall consist of a Constitutional Court, a Supreme Court, and such District Courts, Municipal Courts and Minor Offence Courts as are established by law.

**Sample Language: Constitutional Court**

The Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters.

The Constitutional Court makes the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

The Constitutional Court is the highest court in all constitutional matters.

A constitutional matter includes any issue involving the interpretation, protection, or enforcement of the Constitution.

OR

The Supreme Court has the power to declare any legal provision or decision by the courts unconstitutional, in the manner and within the scope established in this Constitution and the law.

### **Sample Language: Composition of the Constitutional Court**

The Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and [X] other judges.

A matter before the Constitutional Court must be heard by at least [X] judges.

A Constitutional Court judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].

Constitutional Court judges shall serve until age [X] unless they resign or are dismissed by judgment.

### **Sample Language: Selection of Constitutional Court**

#### Option 1: Nomination and Approval

The judges of the Constitutional Court shall be nominated by the [President/Parliament/Judicial Council] and shall require for appointment the approval of a majority of the present and voting members of [one chamber/both chambers of government].

OR

Option 2: Appointment or Approval

The Judges of the Constitutional Court shall be appointed by the [President] or by [approval of a majority of the present and voting members] of [both chambers] from a list of nominees approved by the Judicial Council.

**Sample Language: Jurisdiction of the Constitutional Court**Constitutionality of Legislation and Executive Acts

Only the Constitutional Court may review the constitutionality of legislation and constitutional amendments.

Only the Constitutional Court may decide on the constitutionality of any parliamentary or provincial legislation. If the executive expresses reservations regarding the constitutionality of legislation, it will refer the legislation back to the parliament or province. While the parliament or province reconsiders the legislation, the executive may continue to hold reservations and refer it to the Constitutional Court.

Only the Constitutional Court may decide on the constitutionality of parliamentary or provincial legislation if a member of the Assembly or province applies for an order declaring that all or part of an Act is unconstitutional.

The Constitutional Court makes the final decision on whether an act of the Assembly or a province, or conduct of the executive, is constitutional.

Failure to Implement the Constitution

Only the Constitutional Court may decide that the legislative or executive branch has failed to fulfill a constitutional obligation.

Constitutional Disputes

The Constitutional Court may settle disputes between the central government and provinces.

Only the Constitutional Court may decide disputes between the central and provincial governments concerning the constitutional status, powers or functions of any of those governments, their departments and agents.

Only the Constitutional Court may certify a province's constitution.

Constitutional Amendments

Only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution.

**Sample Language: Standing before the Constitutional Court**

National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice, and with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court, or to appeal directly to the Constitutional Court from any other court.

Any person may initiate proceedings before the Constitutional Court if such person believes that a right or interest belonging to such person and protected by this Constitution has been violated. The Constitutional Court may decide on such a complaint only when the petitioning party has exhausted all other judicial or administrative remedies that are reasonably available.

The [President/Assembly] on the motion of [X] of its members may initiate proceedings in the event of disagreement over the compatibility of any law or state action with this Constitution.

The Constitutional Court may itself initiate proceedings to assess the constitutionality and legality of state actions, as provided in this Constitution.

**Sample Language: Binding Effect of Constitutional Court Rulings**

A ruling by the Constitutional Court shall be universally binding, effective, and final.

**Sample Language: The Supreme Court**

The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.

The Supreme Court shall ensure uniform implementation of the law by the other Courts of Law.

**Sample Language: Composition of the Supreme Court**

Judges of all Courts, including the Supreme Court, shall be appointed, suspended and relieved from duty by the [President/Parliament] with the prior consent of the [Judicial Council/Parliament].

Judges of the Supreme Court shall be appointed for a term of [X] years.

**Sample Language: Jurisdiction of the Supreme Court**

The Supreme Court shall have such original jurisdiction as is provided by legislation.

The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.

The Supreme Court is the highest court in all matters except constitutional matters. Constitutional matters shall be referred to the Constitutional Court.

**Sample Language: Standing before the Supreme Court**

The Supreme Court shall act as a court of first instance or of second instance in the cases prescribed by law.

**Sample Language: Binding Effect of Supreme Court**

Decisions of the Supreme Court shall be final and binding.

**Sample Language: Impartiality**

The Courts of Law shall be autonomous and independent from any organ, authority, office, group of individuals, or individual.

During their term of office, judges shall not hold any other public office or engage in any other service or profession that is determined by law to be incompatible with the judicial function.

**Sample Language: Composition of the Other Courts**

The establishment, scope of activities, jurisdiction, composition, and structure of the Courts of Law shall be regulated by law.

**Sample Language: Appointment of the Judges**Option 1: Cooperative Selection

The [Supreme/Constitutional/Other] Court is composed of [nine] judges. The president shall appoint [X] of the judges, the Assembly shall appoint [X] of the judges and the Judicial Council shall appoint [X] of the judges on the [Supreme/Constitutional/Other] Court.

Option 2: Presidential Selection

Judges of all Courts shall be selected by the president and approved by [one-half/two-thirds] members of parliament [and the Judicial Council].

Option 3: Parliamentary Selection

Judges of all Courts shall be selected by [one-half/two-thirds] members of parliament [and approved by the Judicial Council].

**Sample Language: Qualifications and Diversity**

Judges of all Courts of Law shall be independent and impartial. They shall be distinguished jurists of the highest moral character, with adequate qualifications, including higher legal education. The membership of the judiciary shall reflect the diversity of the people.

International Judges

The same discipline and accountability requirements shall apply to international judges as apply to any other member of the [State's] judiciary.

The process for appointment and removal of international judges shall follow the same standards as the process for selecting and removing national judges.

International judges shall receive training on the [State's] legal system before assuming their appointments.

**Sample Language: Term of Years and Removal**

Judges of the Supreme Court shall be appointed for a term of [X] years and may be reappointed to office. The terms of judges of other Courts of Law shall be determined by law.

The Judicial Council shall have responsibility for discipline and removal of judges [as provided by law].

Judges may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees, provided by law.

A judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].

**INTERNATIONAL LEGAL OBLIGATIONS****Sample Language: Monist**

Treaties entered into, consistent with the Constitution, shall be a part of the [internal/federal/national/domestic] legal system. Treaty provisions may only be repealed in a manner consistent with the treaty itself or with the general rules of international law.

The general rules of international law shall be part of the [internal/federal/national/domestic] legal system.

All international agreements entered into by the [State/Other Title] before the ratification of the Constitution are binding on the [State/Other Title] when this Constitution took effect.

Customary international law is enforceable in the Courts of Law unless otherwise inconsistent with the Constitution or an Act of [Branch of Government responsible to promulgate law].

The State shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which the State has joined, and the Universal Declaration of Human Rights.

**Sample Language: Dualist**

Treaties, accords, or international agreements may take effect only after being ratified or approved by a law.

Treaties entered into by the [executive branch/leader] in the name of the State shall be approved by the [legislative branch], and shall come into force only in accordance with the decision of the [legislative branch].

Agreements or treaties relating to armistices, peace, alliances, the borders of the State borders, or expenses not provided for in the State budget are ratified by the [executive] only after explicit approval by the [legislative branch].

**Sample Language: Relationship Between International and Domestic Law**

Customary international law is enforceable in the Courts of Law unless otherwise inconsistent with the Constitution or an Act of [Branch of Government responsible to promulgate law].

Valid treaties and accords ratified in accordance with [the Constitution/law] and customary international law have the authority [superior/equal to] that of domestic laws.

Any international treaty, agreement, or accord in conflict with the Constitution shall not be ratified and have no effect.

The Constitution is the supreme law of the land; any law, international or domestic, inconsistent with the Constitution is invalid.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

**THE ELECTORAL SYSTEM****Sample Language: Plurality System**

The [President/Representative] shall be elected by secret ballot. To be elected to the position, the candidate must receive the highest number of valid votes.

The candidate who obtains a plurality of votes, not counting blank or void votes, shall be considered elected.

### **Sample Language: Majority System**

The candidate who obtains more than half the votes validly cast shall be elected [President/Representative].

If none of the candidates obtains that proportion of the votes, a second ballot shall be held. In the second ballot, only the two candidates who have obtained the most votes in the first ballot and have not withdrawn shall stand for election.

The candidate with the majority of votes in this second round of the elections shall become [President/Representative].

### **Sample Language: Proportional Representation**

Elections to the Assembly shall be held by a national proportional system.

The Assembly is composed of representatives of the people, elected, by the proportional system, in each province, territory and district.

### **Sample Language: Single-Member District System**

[One] representative shall be selected from the district to represent the people.

*Option for Majority System:* If there is no clear majority (50 percent plus one) winner, the top two candidates from the first round of voting participate in a second round of voting to determine the representative for the district.

### **Sample Language: Multi-Member District System**

Seats shall be allocated among electoral districts based on the population of each district, in accordance with the Election Law.

Members of the Assembly shall be elected by the people from multi-member state constituencies, representing the various districts in the state.

Proportional Representation

Deputies shall be elected by electoral districts, the boundaries of which shall be laid down by law, which may also provide for the existence of electoral districts in order to ensure the system of proportional representation.

The number of deputies allocated to each electoral district, shall be proportionate to the number of voters enrolled in the electoral register for that electoral district.

**Sample Language: Minority Mechanisms**

[X] percent shall be individuals belonging to the national and religious minorities of the State.

There shall be reserved [X] of seats in the National Assembly for each national or religious minority in the State. The number of seats reserved for each minority will reflect the proportion of its representation in society.

**Sample Language: Mechanisms for Women**

[X] percent of each National and State List shall be female candidate(s).

There shall be reserved [X] seats in the Assembly for women.

**Sample Language: Unicameral Legislation**Option 1: Single District

Citizens will vote for the candidates of their choice. The candidates who receive [plurality/majority] of the votes shall be awarded the seats.

Option 2: Multi-District Proportional

Citizens will vote for the National List of their choice, and each list shall be awarded seats in proportion to that list's share of the national vote.

*Optional:* National and State Lists must receive a minimum of [X] percent of the vote to be awarded seats in the Assembly.

**Sample Language: Bicameral Legislature**

The first chamber shall have [X] members. Members shall be elected on [proportional/pluralistic/majority] basis.

The second chamber shall have [X] members. Members shall be elected on [proportional/pluralistic/majority] basis.

Seats in the [first/second] chamber shall be allocated among electoral districts based on the population of each district, in accordance with Election Law.

Every district shall be guaranteed at least one seat.

*Optional:* National and State Lists must receive a minimum of [X] percent of the vote to be awarded seats in the National Assembly.

### **Sample Language: Procedure for Electing the Executive**

#### Nomination of the Executive

Candidates may be nominated by at least [X] members of the Parliamentary Assembly.

Each member of the Parliamentary Assembly may only nominate one candidate for president.

OR

Nominations for the office of President of the Republic require the support of a minimum of [X] citizens entitled to vote.

#### Election of the Executive

Each member of the Assembly shall have one vote.

To be elected [President/Prime Minister], a candidate must receive a [majority] of the total votes of the members of the Parliamentary Assembly.

If no candidate receives the required [majority], the Parliamentary Assembly shall hold a second round of voting within [X] days.

If a candidate receives the required [majority] in the second round of voting, he or she shall be President.

If no candidate receives the required [majority] in the second round, there shall be a run-off between the two candidates who received the most votes in the second round of voting.

The candidate who receives a simple majority of the votes in the run-off shall be President.

OR

Each eligible, registered voter shall have one vote.

To be elected [President/Prime Minister], a candidate must receive a [majority] of the total votes.

If no candidate receives the required [majority], there shall be a second round of voting within [X] days.

If a candidate receives the required [majority] in the second round of voting, he or she shall be President.

If no candidate receives the required [majority] in the second round, there shall be a run-off between the two candidates who received the most votes in the second round of voting.

The candidate who receives a simple majority of the votes in the run-off shall be President.

### **Sample Language: Qualifications for Voter Enfranchisement**

All citizens who have reached [18] years of age shall be eligible to vote in all municipal and national elections and shall be guaranteed universal and equal rights to do so.

Elections for members of the National Assembly shall be through universal, equal, direct suffrage, and by secret ballot. All citizens who have reached the age of [18] years have the right to vote.

**Sample Language: Electoral Commission**

An Electoral Commission shall be established in order to propose for adoption by the Assembly an electoral and political parties' law that is consistent with this Constitution.

The Commission shall be authorized to conduct studies, publish reports, and provide guidance and recommendations to the Assembly regarding the status and effectiveness of the existing electoral and party systems, as well as the need for their reform.

The Commission shall be independent of the government and consist of [X] members. The members shall be appointed by the Assembly serving a term of [X] years. In determining the membership on the Commission, efforts will be made to account for the geography, gender, and diversity of opinions and interests of the people.

[X] members shall be appointed by the Assembly, [X] by the President and [X] by the Judicial Council.

The Election Commission shall be a permanent body that shall prepare, supervise, direct and verify all aspects that have to do with elections and referenda and shall declare their results.

Membership in the Election Commission shall be incompatible with any other political activity.

The Election Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by any authority or any person.

Any person, natural or legal, may petition or complain to the Election Commission concerning issues in the sphere of its jurisdiction. A decision of the Election Commission with respect to such a petition or complaint may be appealed to the Constitutional Court.

**Sample Language: Electoral Law**

The electoral law shall establish the rules and procedures to govern the conduct of elections, including, but not limited to, the date of the elections, requirements for

voter identification and registration, and mechanisms for counting votes and resolving disputes.

*Optional:* The electoral law shall aim to achieve the goal of having women constitute no less than [X] of the members of the National Assembly and having fair representation for all communities of the state.

### **Sample Language: Political Parties Law**

To promote the right of free association and to advance political ideas and opinions, the law of political parties shall establish the conditions of organization and registration for political parties, as well as the requirements for submitting all lists of candidates for elections.

The law of political parties shall aim to achieve the goal of the development of parties and electoral candidates that seek to represent the interests of all the regions, communities, and citizens of the state in a manner that promotes national unity.

## **FINANCIAL MATTERS AND THE CENTRAL BANK**

### **Sample Language: Revenue Fund and Taxes**

#### Revenue Fund

There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of the [Assembly].

#### Taxes

Taxes shall be imposed under law, which shall determine the incidence, rates, concessions, and guarantees for taxpayers.

No one shall be compelled to pay any tax that is retroactive in effect.

### **Sample Language: Budget**

Principles and procedures for drafting and implementing the draft budget are defined by law.

The budget shall be prepared, structured, enacted and implemented [annually/biannually].

Implementation of the budget shall be the subject of review by the [Assembly].

### **Sample Language: Auditing Requirement**

#### Duties of Auditor General

There shall be an Auditor General who audits the revenues and expenditures and other financial operations of government and who reports [annually] his findings to the [Assembly].

The Auditor General shall be accountable to the [Assembly].

The detailed powers, duties and organization of the Auditor General shall be [determined by law/listing of duties].

#### Appointment of Auditor General

The Auditor General shall be appointed for a period of [X] years by the [President] with the approval of the [Assembly].

### **Sample Language: Purpose of the Central Bank**

The Central Bank of [State] is the central bank of the nation. The primary object of the Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth.

### **Sample Language: Powers and Functions of the Central Bank**

The Central Bank of [State] is the sole authority to issue and organize currency circulation and promote the stability of a good national currency.

The Bank shall formulate and implement the monetary policy of the state.

The Bank shall have supervision over the operations of other banks throughout the nation and shall exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

**Sample Language: Independence of the Central Bank**

The Bank, in pursuit of its primary objective, must perform its functions independently and without fear, favor or prejudice.

However, the Bank is accountable to the [Assembly] and there must be regular consultation between the Bank and the [Cabinet Minister/Committee] responsible for national financial matters.

**Sample Language: Governance of the Central Bank**Appointment of Chairman of Governing Board

The [President/Prime Minister] of [State] shall introduce to the [Assembly] a candidate for appointment to the office of the Chairman of the Bank. The [President/Prime Minister] also submits to the [Assembly] proposals to relieve the Chairman of the Bank of his duties.

Appointment of Governing Board Members

There shall be [X] members on the Bank's governing board appointed by the [Assembly] upon a list of candidates proposed by the [President/Prime Minister].

Qualifications of Governing Board Members

Each governing board member must be a natural-born citizen of [State] and shall be of known probity, integrity, and patriotism.

The majority of governing board members shall come from the private sector.

Governing board members shall be subject to such other qualifications and restrictions as may be prescribed by law.

**HUMAN RIGHTS****Sample Language: International Human Rights Norms**

The state shall respect human rights in accordance with international treaties and conventions to which it is a party.

International treaties and conventions ratified by the state are binding on the state and shall take precedence over domestic laws, unless those laws guarantee rights to a greater extent than the applicable treaties and conventions.

The state shall ensure all human rights in accordance with, or to a greater degree than, those rights guaranteed in the following treaties and conventions:

[1948 Convention on the Prevention and Punishment of the Crime of Genocide;]

[1949 Geneva Conventions I-IV on the Protection of the Victims of War and the 1977 Geneva Protocols I-II thereto;]

[1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;]

[1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto;]

[1957 Convention on the Nationality of Married Women;]

[1961 Convention on the Reduction of Statelessness;]

[1965 International Convention on the Elimination of All Forms of Racial Discrimination;]

[1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto;]

[1966 Covenant on Economic, Social and Cultural Rights;]

[1979 Convention on the Elimination of All Forms of Discrimination against Women;]

[1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;]

[1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;]

[1989 Convention on the Rights of the Child;]

[1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;]

[1992 European Charter for Regional or Minority Languages;]

[1994 Framework Convention for the Protection of National Minorities;]

[other conventions or treaties].

### **Sample Language: Fundamental Rights**

All people are possessed of certain inalienable rights. This charter is not intended to be an exclusive list of the peoples' rights, and recognizes that people possess rights that may not be listed in this charter, and that those rights which are not listed in the charter deserve the same protection as those that are listed/included.

### **Sample Language: Civil Rights**

#### Right to Life

All people have the right to life and the right not to be arbitrarily deprived of their lives.

#### Human Dignity

All people deserve to be treated with dignity and respect by virtue of their humanity. This dignity is secured through the protection of certain rights, including but not limited to:

The right of all people to bear and be registered under a name;

The right to be free from torture and from cruel, unusual or inhuman treatment or punishment, and the right to have one's physical, mental and moral integrity respected;

The right of prisoners to appropriate treatment;

The right to have one's honor and reputation protected from defamation;

The right to be free from incitement of discrimination, hatred or violence, and to be protected through the prohibition of national, racial or religious discrimination;

The right to claim nationality and avail oneself of the protection of a person's state of residence;

The right to conscientiously object to perform compulsory military service for reasons of conscience or profound religious, ethical or similar convictions;

The right to perform an alternative service of a civil nature in lieu of compulsory military service; and

The right not to be subjected to slavery, involuntary servitude, or forced or compulsory labor, or any form of exploitation or trafficking.

### Equality

All people are equal and entitled to equality before the law.

All people have the right not to be subjected to discrimination based on race, gender, religion, social group, political belief, or any other characteristic, belief or practice that is a fundamental part of their character, or impossible, impractical, or unreasonable to change.

### Access to Justice

All people have the right to be recognized as a person before the law.

All people have the right to petition the court for redress of their claims.

All people accused of a crime have the right to legal representation of their choice, and to be provided with representation if they cannot afford it.

All people accused of a crime have the right be heard and present a defense in person.

All people have the right to have their conviction and sentence reviewed by a higher tribunal.

All people accused of a crime have the right to a public trial before a competent, impartial, and independent judicial authority without undue delay.

### Administration of Justice

All people have the right not to be deprived of life, liberty, or property except by procedures prescribed by law, including but not limited to notice and an opportunity to contest the deprivation.

All people who are accused of a crime have the right to be informed of the charges against them, and are presumed to be innocent until proven guilty.

People may not be compelled to give evidence against themselves. All people in legal proceedings have the right to access relevant information.

All people involved in legal proceedings have the right to adequate time and facilities to prepare a defense.

All people involved in legal proceedings have the right to privileged and confidential communication with their attorney, free from interference by the government or opposing parties.

All people involved in legal proceedings are entitled to a reasonable opportunity to present their case before the court, under conditions which do not place them at a disadvantage vis-à-vis their opponent.

All people accused of a crime have the right to confront and cross examine their accuser and the witnesses against them, and to challenge the evidence presented against them.

All people have the right not to be tried more than once for the same offense.

No one may be subjected to a heavier penalty than the one applicable at the time the offense was committed.

No one may be subjected to retroactive laws.

All people have the right not to be deprived of property, except according to procedures prescribed by law, including notice and an opportunity to be heard, and to receive just compensation for property taken for public use.

#### Freedom and Security of Person

All people have the right to liberty.

All people have the right not to be held against their will without just cause or formal charges, and the right to challenge the appropriateness of their detention.

All people are entitled to an effective means of redress before the authorities in case of violations of guaranteed rights and freedoms.

All people are entitled to be protected from abuse of authority.

All people have the right to be secure in one's person, home, papers, communications, and effects against unreasonable searches and seizures, except upon issuance of a warrant which specifically details the nature and limits of the search or seizure.

All people have the right to travel and move about as they see fit, and to enter and leave the state.

All people have the right to live where they choose.

All people are entitled to obtain compensation in case of a miscarriage of justice.

No one may be subjected to medical or scientific experiments without freely and competently given consent.

No one may be imprisoned due to debt.

No one may be arbitrarily exiled.

All people have the right to receive, seek, and impart information, and the right to publish and publicize information and opinions through writing, printing, electronic media, or any other means.

### **Sample Language: Political Rights**

All people have the right to freely hold opinions, including religious and political beliefs, and to freedom of conscience.

All people have the right to express their opinions and beliefs freely.

All people have the right to assemble peacefully, and to associate with others.

All people have the right to vote in elections.

All people have the right to political participation, including but not limited to campaigning for and participating in party politics.

People are entitled to hold free and periodic elections to choose their government.

All people have the right to equal access to public service, including the right to be elected to office.

### **Sample Language: Economic Rights**

All people have the right to work, and the right to choose their employment.

All people have the right to have their health protected by the state, including immunization and protection against disease.

All people have the right to own property.

All people have the right to adequate standards of living.

All people have the right to be educated.

All people have the right to social security.

All people have the right to insurance.

All people have the right to social and medical assistance.

All people have the right to adequate nutrition.

All people have the right to enjoyment of scientific advancements.

### **Sample Language: Social Rights**

All people have the right to establish a family, and to engage in family planning if they choose.

All people have the right to marry, and the right not to enter into marriage without giving free and full consent.

The family has the right to respect and protection as the fundamental unit of society.

**Sample Language: Cultural Rights**Language

All people have the right to speak their own language, and to teach and publicly communicate in their own language.

Culture

All individuals within the State shall have the right to teach and maintain their language and cultural customs of choice.

All individuals within the State have the right to participate in the cultural life of their community in accordance with their customary practices.

The freedom of cultural originality includes the freedom to engage in intellectual, artistic, and scientific originality with equal protection of the law.

Religion

All people have the right to practice the religion of their choice free from government interference, or to practice no religion.

Places of worship shall be independent of the State and are free to perform their own worship and organize as they determine.

No one shall be questioned by any authority about his/her religious convictions or observance except for statistical purposes and shall not be forced to testify about religious beliefs or ideologies.

**Sample Language: Potentially Limiting Language**

The fundamental rights and freedoms affirmed in this Constitution may be limited only insofar as it is in the interests of national security, public safety or health, for the prevention of public disorder or crime, or for the protection of the rights and freedoms of others.

Any law providing for the limitation of the fundamental rights and freedoms affirmed in this Constitution must be consistent with the principles of democracy and justice, clearly specify the extent of such limitation, and identify the article or articles of the Constitution that provide the authority to enact such limitation.

The following rights shall *not* be subject to limitation or derogation, even in times of state emergencies:

Right to life;

Prohibition on slavery and servitude;

Right to juridical personality;

Prohibition on torture or cruel, inhuman or degrading treatment or punishment;

Freedom from retroactive application of law;

Prohibition on imprisonment for failure to pay a debt;

Right to equality before the law;

Right to non-discrimination on the basis of race, color, ethnic or social origin, sex, religion, or language; and

Freedom of thought, conscience, and belief.

### **Sample Language: Ombudsman**

The Ombudsman's office shall be the primary office charged with protection of individual and collective rights.

There shall be one state level Ombudsman's office in the State, regulated by law.

The Ombudsman shall have the power to file a request for institution of proceeding to local courts for the protection of rights and to enforce implementation of their decisions.

The Ombudsman shall investigate complaints dealing with failure of a government official, employee, or agency to comply with the law, or the performance or omission of an act by a government official, employee, or agency that causes unjust harm to the complainant.

If the complaint raises a question of constitutionality, the Ombudsman is required to submit the case to the Constitutional Court.

**Sample Language: Human Rights Commissions**

There shall be established by law a Commission on Human Rights. The Commission shall have the power to monitor, investigate, file cases, research, educate, lobby, advise, comment on and propose legislation, and report on issues concerning the promotion and protection of the rights affirmed in this Constitution and recognized by the principles of international law.

Every individual has a right to complain to the Commission, alleging that a fundamental right or freedom has been threatened or denied.

*Optional:* To assist in carrying out these functions, within the Commission there shall be established a Subcommittee on Human Rights.

**Sample Language: Hybrid Human Rights Commissions**

The Ombudsman may provide legal assistance or other assistance to individuals who claim violations of fundamental rights.

The Ombudsman has the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant by an official in the employ of any organ of government (whether central or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive, or unfair in a democratic society.

The Ombudsman shall have the power to monitor, investigate, file cases, research, educate, lobby, advise, comment on and propose legislation, and report on issues concerning the promotion and protection of the rights affirmed in this Constitution and recognized by the principles of international law.

**Sample Language: Constitutional Courts**

Individuals shall have the right to file a [request for institution of proceedings] [to a special chamber] of the Constitutional Court, for protection of those rights guaranteed in the Constitution.

The Constitutional Court shall be required to issue a ruling on an individual's request within [number of] days.

Political parties, municipal councils, city councils, civil society organizations, and other legal entities may also file a [request for institution of proceedings] to the Constitutional Court for the protection of the rights of individuals and/or groups.

The Ombudsman may file a [request for institution of proceedings] directly to the Constitutional Court on behalf of individuals and groups for protection of their rights.

## **MINORITY RIGHTS**

### **Sample Language: General Minority Protections**

All individuals have equal rights and duties under this Constitution, regardless of nationality, language, ethnicity, race, color, tribal status, religion, sex, or political opinion.

All persons shall have equal rights and obligations.

### **Sample Language: Specific Minority Protections**

The members of national minorities shall not be discriminated against on the basis of their national minority status.

The State shall ensure the protection of minorities and shall preserve the rights of [indigenous/tribal] populations in accordance with the law.

Members of national minorities shall have the right to foster their cultural heritage through the use of their language and alphabet and the fostering of their cultural institutions and associations, in accordance with the law.

All citizens/residents belonging to national or religious minorities shall have the right to the full and effective exercise, [individually, as well as in community with others], of the rights affirmed by this Constitution and recognized by the principles of international law. Such rights include, but are not limited to the right to:

Maintain their distinct identities and characteristics and pass these on to their children;

Practice and pass on their cultural traditions and customs;

Practice and pass on their spiritual and religious traditions, customs and ceremonies;

Use and pass on to future generations their languages and alphabet (including the right to educate their children in their language and the right to understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation); and

Maintain their own institutions (including local governing, juridical and educational institutions) to the extent that they are consistent with this Constitution.

The exercise of these rights by members of national minority groups may not discriminate against other citizens.

### **Sample Language: Religious Rights**

All individuals shall enjoy freedom of religion and worship.

Places of worship shall be independent of the State and are free to perform their own worship and organize as they determine.

No one shall be questioned by any authority about his/her religious convictions or observance except for statistical purposes and shall not be forced to testify about religious beliefs or ideologies.

### **Sample Language: Cultural Rights**

All individuals within the State shall have the right to teach and maintain their language, alphabet, and cultural customs of choice.

[Minorities] have the right to participate in the cultural life of their community in accordance with their customary practices.

The freedom of cultural originality includes the freedom for minorities to engage in intellectual, artistic, and scientific originality with equal protection of the law.

**Sample Language: Set-Asides or Party Requirements**

[X] percent shall be individuals belonging to the national and religious minorities of the State.

There shall be reserved [X] of seats in the National Assembly for each national or religious minority in the State. The number of seats reserved for each minority will reflect the proportion of its representation in society with at least one seat reserved for [minorities with less than one percent of the national population].

[Representatives] shall be elected on a regional basis.

**Sample Language: Group Vetoes (*Optional*)**

The constituent minorities of [State] have an inherent right to protect their national interests.

National interests shall be protected at the state level through group vetoes.

Group vetoes may be invoked regarding:

The rights of all constituent people to be adequately represented in legislative, executive, and judicial authorities;

The identity of a constituent people;

Constitutional amendments;

Organization of the bodies of public authority;

Equal rights of the constituent peoples in decision-making processes;

Territorial organization;

Education of citizens;

Use of languages and scripts;

National symbols and flags;

Spiritual heritage, particularly the fostering and affirmation of religious and cultural identity and traditions;

Preservation of the integrity of the State;

Public information systems;

Any other issues if so claimed by [two-thirds] of the government representatives in one of the chambers.

#### Option 1: Bicameral and Modified Unicameral

The veto may be invoked by a simple majority of the representatives of one of the constituent peoples in the [Second Chamber] or a member of the executive. [X] of the representatives of one of the constituent peoples must invoke the veto.

If a majority of the representatives of one of the other constituent peoples or a member of the executive believes that the veto was improperly invoked, they may appeal to the [First Chamber].

The [First Chamber] shall mediate disputes regarding the use of the veto.

The [First Chamber] shall mediate between the representatives or member of the executive that originally invoked the veto and the parliamentary representatives or member(s) of the [executive] that opposed the use of the veto.

The [First Chamber] shall develop its [binding decision] by consensus of all of its members.

The [First Chamber] shall report on its decision to the [Second Chamber] and executive within [X] days from the day the matter is referred.

The decision of the [First Chamber] shall be written as a law and submitted to the [Second Chamber] after it is reported to the [Second Chamber] and executive.

Upon its return to the [Second Chamber], the decision may not be subject to a veto.

Members of the [Second Chamber] shall vote on the [First Chamber's] decision, unless the decision is appealed to the Constitutional Court.

If the decision is not appealed, and it is approved by [X] of the [Second Chamber], the decision shall become law.

Option 2: Unicameral (invoked by the legislature and disputes referred to ad hoc/standing committee)

The veto may be invoked by a simple majority of the representatives of one of the constituent peoples in the legislature or a member of the executive. [X] of the representatives of one of the constituent peoples must invoke the veto.

If a majority of the representatives of one of the other constituent peoples or a member of the executive believes that the veto was improperly invoked, they may appeal to an [ad hoc/standing] committee.

The [ad hoc/standing] committee shall mediate disputes regarding the use of the veto.

The committee shall mediate between the representatives or member of the executive that originally invoked the veto and the parliamentary representatives or member(s) of the executive that opposed the use of the veto.

The committee shall develop its [binding decision] by consensus of all of its members.

The committee shall report on its [decision] to the [Legislature] and [Executive] within [X] days from the day the matter is referred to the committee.

The decision of the committee shall be written as a law and submitted to the legislature after it is reported to the legislature and executive.

Upon its return to the Legislature, the decision may not be subject to veto.

Members of the legislature shall vote on the committee's decision, unless it is appealed to the Constitutional Court.

If the decision is not appealed, and it is approved by [X] of the legislative branch, the decision shall become law.

The committee shall be composed of [X] representatives from the Legislature.

Members of the committee shall be nominated by the executive and approved by [X] of the members of legislature.

#### Constitutional Court Review of Veto

If one of the constituent peoples or members of the executive party to the committee's mediation determines that the committee decision violates its veto, [or that the use of the veto was improper,] it may file a request for institution of proceedings to the Constitutional Court for protection of its veto.

The Constitutional Court, through a special chamber, shall determine whether the veto was invoked properly.

The special chamber shall be composed of [X] members.

Procedures for appointing the special chamber shall be regulated by law.

Determinations by the Constitutional Court on the invocation of the veto shall be binding.

If the Constitutional Court determines that the disputed law does violate a vital national interest, the law shall fail and shall be returned to the proponent. The proponent may not resubmit the original law.

If the Constitutional Court determines that no vital national interest is involved, the law is deemed to be adopted/may be adopted by a simple majority.

#### **Sample Language: Local and Regional Self-Governance**

Members of the [X] communities shall establish their own self-governing communities in their geographic areas. The state government may authorize certain functions under national jurisdiction and provide funds for such functions. The obligations of the local communities in self-governance shall be regulated by law.

The State shall provide for the educational and economic development of areas with high minority populations as described by law. Funding will be guaranteed by the Constitution and administered by the legislature as described by law.

**WOMEN'S RIGHTS****Sample Language: Gender-Neutral Language**

All residents are equal under the law without distinction of any kind, such as race, color, sex [gender], language, religion, political or other opinion, national or social origin, property, birth, or other status.

Discrimination is forbidden on such distinctions. Equal opportunities are granted to all in accordance with the law.

Gender-specific language in this Constitution shall apply equally to male and female.

**Sample Language: General Fundamental Rights and Freedoms**

All individuals are guaranteed the basic rights and freedoms enumerated in this Constitution and in the international treaties and conventions to which the State is party.

Basic rights and freedoms guaranteed in this Constitution and international treaties and conventions to which the State is party shall be secured to all persons in the State without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

The State shall respect human rights in accordance with international treaties and conventions to which it is a party.

International treaties and conventions ratified by the State are binding on the State and shall take precedence over laws, unless those laws guarantee rights to a greater extent than applicable treaties and conventions.

The State shall ensure all human rights in accordance with, or to a greater degree than, those rights guaranteed in the following treaties and conventions:<sup>1</sup>

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<sup>1</sup> European states may also choose to include the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto; the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and the 1992 European Charter for Regional or Minority Languages.

[1957 Convention on the Nationality of Married Women;]

[1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto;]

[1966 Covenant on Economic, Social and Cultural Rights;]

[1979 Convention on the Elimination of All Forms of Discrimination against Women;]

[Other conventions.]

### **Sample Language: Civil and Political Rights for Women**

Women shall enjoy equal freedom of individual will.

Women shall enjoy equal freedom of expression.

Women shall enjoy equal freedom of association and freedom to travel within and outside of the State.

Women should be accorded full and equal dignity of the person with men.

Women shall enjoy equal rights of citizenship.

Women shall enjoy equal rights to due process and equal rights before the courts of law.

Women shall enjoy political rights equal to a man, including, without limitation:

The right to full participation and representation in the political process;

The right to an equal vote; and

The right to hold any political, executive, legislative, judicial, or administrative office.

**Sample Language: Economic, Social, and Cultural Rights for Women**Economic Rights

Women shall enjoy equal rights to the ownership, use, alienation, and inheritance of real and personal property. Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased.

Women shall enjoy equal rights to enter into contracts and to conduct business and commerce.

Women shall enjoy equal rights and opportunities in labor and employment.

Women shall enjoy equal rights to independence in economic affairs.

Women shall have the right to receive remuneration equal to a similarly qualified man employed in a similar or identical position.

Women have the right to paid leave for working mothers during a reasonable period before and after childbirth.

Women shall enjoy equal rights to education, to teach and to learn.

Women shall enjoy equal rights to social welfare benefits.

Social Rights

Women have the right to equality in marriage.

Women shall enjoy marital rights equal to a man including, without limitation:

The right to freely choose a spouse;

The right to divorce after due process of law;

The right to guardianship of her children;

The right to consent to the marriage of any of her children under the age of majority; and

The right to legal recourse against those who have wronged her, including her spouse and relations.

Women shall enjoy equal rights to social and moral self-determination.

#### Cultural Rights

Women shall have the right to teach and maintain their language and cultural customs.

Women have the right to participate in the cultural life of their community in accordance with their customary practices.

#### **Sample Language: Special Protection in Electoral Provisions**

[X] percent of each party list shall be female candidate(s).

There shall be reserved [X] seats in the National Assembly for women.

#### **Sample Language: Gender Equality Commission**

The Commission for Gender Equality shall promote, protect, and foster development for gender equality.

The Commission for Gender Equality's powers, functions, and duties shall be prescribed by legislation.

### **DEFENSE AND SECURITY**

#### **Sample Language: Role of Armed Forces**

The armed forces shall act in accordance with this Constitution and the law.

The armed forces may cross the State's borders or act over the State's borders only upon a prior decision and approval of the [Legislature].

The armed forces have the responsibility for providing the military defense of [the State].

**Sample Language: Domestic Role of the Armed Forces**

For purposes of defense, the armed forces shall have the power to protect civilian property to the extent necessary to accomplish their defense mission; in these circumstances, the armed forces shall cooperate with the competent authorities.

For the purpose of defense, the armed forces shall have the power to perform traffic control functions to the extent necessary to accomplish their mission.

In order to avert an imminent danger to the existence of the State, and if the police forces prove inadequate, the government may employ the armed forces to support the police in protecting civilian property and in combating organized armed insurgents. Any such employment of the armed forces shall be discontinued if the legislature so demands.

All [LIST Security Sector Members, e.g. Police, Armed Forces, etc.] shall be under civilian control, including all regulation and oversight.

**Sample Language: International Role of the Armed Forces**

The armed forces shall be responsible, in accordance with the law, for satisfying the international undertakings of [the State] of a military character.

The armed forces shall participate in humanitarian and peace missions undertaken by the international organizations that include [the State].

**Sample Language: Organization of the Armed Forces**

The armed forces of the State shall be composed of the [army/ground forces/republican guard], [navy/naval force], and [air force/air defense forces/marines/coast guard/border services].

**Sample Language: Service Requirements for Citizens****Option 1: Compulsory Service**

Every capable citizen has the duty to participate in the defense of the State.

Citizens who object for reasons of conscience [religious or moral reasons] to serve in the armed forces are obliged to perform an alternative service, as provided by law.

Citizens who object for reasons of conscience [religious or moral reasons] to serve in the armed forces and who perform an alternative service enjoy all the constitutional rights and freedoms, apart from cases when the law provides otherwise.

#### Option 2: Voluntary Service

[Military/armed forces] recruitment methods are determined by law. The law also establishes matters of promotion and rights and obligations of military personnel.

### **Sample Language: Eligibility for Service**

The armed forces shall be composed exclusively of citizens of [the State].

Current members of the armed forces shall not be elected or appointed to public office.

Members of the armed forces shall be prohibited from participating in political parties and political organizations.

*Optional:* Women shall not be required by law to render service in any unit of the armed forces.

*Optional:* On no account shall women be employed in any service involving the use of arms.

*Optional:* Individuals convicted of war crimes shall be barred from participating in the armed forces.

### **Sample Language: The Commander-in-Chief**

The [President/Prime Minister] of the state shall be Commander-in-Chief of the armed forces.

The Commander-in-Chief has the power to appoint and dismiss armed forces personnel.

The Commander-in-Chief has the power to declare war with the consent of the [Legislature].

The Commander-in-Chief shall act [with the consent/on the proposal] of the [prime minister/legislature].

*Optional:* The National Security Council shall advise the [Commander-in-Chief] on issues of national security and defense.

### **Sample Language: Neutrality of Armed Forces**

The armed forces shall observe neutrality regarding political matters.

The armed forces shall be strictly non-partisan; their members shall not take advantage of opportunities provided by their weapons, positions, or functions to intervene in political matters.

### **Sample Language: Reintegration of Militias**

The State shall provide for the complete reintegration of independent militias and armed groups as described by law.

State citizens who participated in the [official name for the revolution] shall be eligible for participation in the armed forces. Procedure and process for membership in the armed forces under this provision shall be controlled by law.

## **ROLE OF RELIGION IN GOVERNMENT**

### **Sample Language: Official State Religion**

[Religion] is the official religion of the state.

The state protects [Religion]; it orders people to do right and shun evil; it fulfills the duty regarding God's call.

The state respects all religions and freedom of worship is guaranteed.

No person shall be persecuted or denied rights on the basis of religion or religious beliefs. The state is the guarantor of the freedom of religious practice.

### **Sample Language: No Official Religion**

No state religion may be recognized.

No state religion may be recognized, and church and state are to be separated.

All citizens enjoy the freedom of religion.

The freedom of religious conscience is inviolable. The enjoyment of civil and individual rights does not depend on the religious conviction of each individual.

The state respects all religions and freedom of worship is guaranteed. No person shall be persecuted or denied rights on the basis of religion or religious beliefs. The state is the guarantor of the freedom of religious practice.

Every known religion is free and the forms of worship thereof shall be practiced without any hindrance by the state and under protection of the law. The exercise of worship shall not contravene public order or offend morals.

All citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, opinion, or social status.

### **Sample Language: Religion as a Source of Law**

#### Option 1: Religion as One Source of Law

[Religion] is a fundamental source of law. No law that contradicts the established provisions of [Religion] may be established.

#### Option 2: Religion as the Source of Law

[Religion] is the source of law for governing [State]. No law that contradicts the established provisions of [Religion] may be established.

#### Option 3: Broad Reference to Religion

The principles of [Religion] will be a basis for legislation.

### **Sample Language: Protection of Religious Freedoms**

#### Protection of Religious Freedom and Religious Expression

Every citizen is entitled to freedom of thought, conscience, and religion. The freedom to exercise one's religion and beliefs may not be restricted. The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good

morals or public order shall be taught or done. The State is the guarantor of the freedom of religious practice.

#### Prohibition against Religious Discrimination

All citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, opinion, or social status. The enjoyment of civil and social rights does not depend on an individual's religious beliefs.

### **CUSTOMARY LEGAL SYSTEMS**

#### **Sample Language: Hierarchy of Laws**

##### Customary Law is Invalid if it Conflicts with Other Laws

Any law, including customary law, that is inconsistent with this Constitution or a statutory law is void to the extent of this inconsistency.

Customary laws and practices are valid to the extent that these laws and practices do not conflict with this Constitution or any statutory law.

##### Customary Law is Invalid if Contrary to Human Rights

Customs and practices that violate the fundamental rights of the individual are invalid.

#### **Sample Language: Recognition of Specific Types of Customary Rules**

##### Recognition of Traditional Land Rights

Land shall be owned in accordance with the customary land tenure system. All citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by law.

##### Recognition of Customary Family Law

Laws recognizing marriages concluded under any tradition, or a system of religious, personal or family law are permitted.

## Sample Language – General Recognition of Traditional and Customary Practices

### General Recognition of Customary Law

The State recognizes, respects and promotes [designated group] form of life, customs, traditions, forms of social organization [and dispute resolution mechanisms].

Constitutional guarantees and state laws shall not be construed to abrogate or derogate from rights and freedoms enjoyed by [communities].

### Customary Law as a Source of State Law

Sources of legislation shall include customs, traditions, and customary practices of [the people/communities].

### **Sample Language: Incorporating Traditional Authorities in the Executive**

#### Option 1: Recognizing Traditional Authorities/Chiefs:

The institution of the [Council of Elders/House of Chiefs] is hereby guaranteed according to customary law and usage and is responsible for the application of customary laws and conferring with the executive and legislature on pertinent matters.

#### Option 2: Recognizing Traditional Authorities and Institutions:

The institutions [status/role] of [customary authority] is [recognized/guaranteed] according to customary laws subject to the Constitution.

### **Sample Language: Customary Law and the Judiciary**

#### Customary Courts

[Customary/traditional] courts shall be [organized/recognized] [as proscribed] by the Constitution.

[Customary/traditional] courts may exercise jurisdiction over civil cases involving customary law, land tenure, marital disputes, etc.

#### Customary Laws Applied by State Courts

[Customary/traditional] laws shall be recognized and enforced by [all] courts except in cases where these laws are inconsistent with the Constitution, statutory laws, or against the public interest.

**NATURAL RESOURCES****Sample Language: National Ownership**

The State of [State] shall own all natural resources, to be used to benefit all the people of all the [provinces] of [State].

**Sample Language: Regional Ownership**

The natural resources and wealth in each [province] shall be considered the public property of that [province]. The [province] shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.

**Sample Language: Shared Ownership**

Ownership of natural resources may be in regional government, central government, or in other forms. The possession, utilization, and management of natural resources are freely exercised by their owners, provided that such exercise does not cause irreparable environmental harm or infringe upon the rights and lawful interests of other persons or the State.

**Sample Language: Allocation of Revenue**

Equitable allocation of revenues derived from natural resources shall be carried out in accordance with the law established by the [State] [Assembly].

**Sample Language: Authority and Responsibility**Authority to Regulation and Provide Oversight

The State shall have authority to regulate and to provide oversight for all natural resources, including the discovery, production, and distribution of natural resources.

Authority to Grant Concessions, Licenses, and Product Sharing Agreements

[National, Regional] government[s] shall have the authority to grant concessions, licenses, and agreements associated with the production and distribution of [State's] natural resources.

Authority to Regulate Production

[National, Regional] government[s] shall oversee downstream natural resource production including extraction, refining, and transporting of such resources.

Authority to Tax

[National, Regional] government[s] shall have authority to tax natural resources, including the production and distribution of natural resources.

Authority over Discovery

[National, Regional] government[s] shall govern all provisions associated with discovery of natural resources.

**EXTRAORDINARY MEASURES****Sample Language: Defining a State of Emergency**Option 1: Explicit Definition

Declaration of a state of emergency may only be made if [the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency]; and the declaration is necessary to restore peace and order.

Option 2: Allow Government to Define

When it appears that an imminent peril resulting in grave threats to public order or in the case of events presenting themselves, by their nature and their gravity, the character of the public calamity or natural disaster, the [President/Prime Minister/majority of members in the Assembly] of [State] may declare a state of emergency.

**Sample Language: Authority to Declare**Option 1: Executive May Declare

The [President/Prime Minister] may declare a state of emergency.

Option 2: Legislature May Declare

A state of emergency may be declared by an affirmative vote by [X] of the members of [Assembly].

If the [Assembly] cannot be convened during the state of emergency, the [President], with the proposal of the [Council of Ministers], has the right to issue

acts that have the force of the law, which have to be approved by the [Assembly] in its first meeting. If the acts are not approved by the [Assembly] during its first meeting following the act's issuance, it shall cease to have the force of law immediately following the vote.

### **Sample Language: Restrictions**

#### No Constitutional Amendments

No revision of the Constitution may be undertaken during a state of emergency.

#### No Constitutional Amendments Regarding Fundamental Rights

In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by law.

Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.

#### No Dissolution of Government

The [Assembly] may not be dissolved during a state of emergency.

### **Sample Language: Duration**

The [President/Prime Minister/Council of Ministers] may decide for a state of emergency in one part or in the whole state territory, which lasts for as long as the danger continues, but not longer than [30/60/90/X] days.

The extension of the term of the state of emergency may be done only with the consent of [the Assembly], for each [30/X] days, for a period of time not longer than [90/X] days.

### **Sample Language: Specified Date**

This Constitution shall come into force on [date] or on the date of its publication in the official Gazette, whichever is earlier.

### **Sample Language: Vote of the Legislature**

This Constitution is adopted by a [two-thirds/three-fourths/X] majority vote of the total number of members in the [Assembly].

This Constitution comes into force on the day it is declared in the [Assembly].

### **Sample Language: Popular Referendum**

This Constitution shall become effective the day following the official promulgation of the results of the referendum, provided that in the referendum more than [one-half/two-thirds] of all votes cast were in favor thereof. However, the results of the referendum shall only have force if at least [one-half] of registered voters vote in the referendum.

### **Sample Language: Proposing Amendments**

#### Option 1: Vote of the Legislature

Initiative for revision of this Constitution may be undertaken by not less than [one-fifth/one-quarter/one-third/one-half/two-thirds/X] of the members of the [Assembly].

#### Option 2: Executive Proposal

A proposal for the amendment of any provision of this Constitution may be initiated by the [President/Prime Minister].

#### Option 3: Constituent Assembly

Proposals to amend this Constitution may be made by a [selected group /constituent assembly], composed of [X] eligible voters.

#### Option 4: Popular Referendum

Proposals to amend this Constitution may be made by the people through a popular referendum.

### **Sample Language: Drafting Amendments**

#### Option 1: Creation of Special Committee

In order to implement proposals regarding the amendment of the constitution, a commission composed of members of the [Government, Assembly, Supreme Court], shall be established by a [presidential] decree, and the commission shall prepare a draft of the amendments.

Option 2: Submit Amendments to Legislature

Draft amendments must be submitted to the [Assembly] [30/60/90/X days] before the opening of debate.

**Sample Language: Approving Amendments**Option 1: National Legislative Approval

Constitutional amendments must be approved by a [two-thirds/three-fifths] majority of the [Assembly].

Option 2: National Legislative Approval Followed by Executive Approval

Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the [Assembly]. Following the approval of the legislature, the [President/Prime Minister] must endorse the amendment before it comes into force.

Option 3: National Legislative Approval Followed by Popular Referendum

Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the [Assembly]. Once the amendment has been passed by the [Assembly], it shall be submitted to ratification by referendum, which shall be conducted according to the [State] referendum law.

Option 4: Popular Referendum

The amendment shall become ratified after approval by [two-thirds] of eligible voters in a popular referendum. For the results of the referendum to have force at least [one-half] of registered voters must vote in the referendum.

Option 5: State Legislative Approval

The amendment must be ratified by the legislatures of [two-thirds/three-fourths] of the [states/provinces] or by conventions in [two-thirds/three-fourths].

Option 6: National Legislative Approval Followed by Public Debate and Referendum

A proposed amendment, after adoption by the [Assembly], shall be submitted to public debate and to a referendum.

**Sample Language: Restrictions**No Amendments During Emergency or War

This Constitution may not be amended during [a state of emergency].

No Amendments Regarding Religion

Amendments regarding the adherence to the fundamentals of the state religion are not permitted.

No Weakening of Fundamental Rights

The amendments regarding the fundamental rights of the people are permitted only in order to make them more effective.

No Change to the Nature of the State:

Any constitutional amendment cannot infringe on the nature of the State or the integrity of the national territory.

## About the Public International Law & Policy Group

The Public International Law & Policy Group is a non-profit organization that operates as a global *pro bono* law firm to provide free legal assistance to states, governments, and groups negotiating and implementing peace agreements, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's primary practice areas are:

- **Peace Negotiations**
- **Post-Conflict Constitution Drafting**
- **War Crimes Prosecution**
- **Policy Planning**
- **Democracy and Governance**
- **Water Diplomacy**

To provide *pro bono* legal advice and policy formulation expertise, PILPG draws on the volunteer services of more than sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on *pro bono* assistance from major international law firms including Baker & McKenzie; Cleary, Gottlieb, Steen & Hamilton; Covington & Burling; Davis, Polk & Wardwell; Debevoise & Plimpton; DLA Piper/New Perimeter; Jones Day Milbank, Tweed, Hadley & McCloy; Orrick, Herrington & Sutcliffe; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom; Sullivan & Cromwell; White & Case; and WilmerHale. Annually, PILPG is able to provide over \$15 million worth of *pro bono* international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance; its members often serve on the delegations of its clients during peace negotiations. PILPG is based in Washington, D.C., with additional offices in New York and Amsterdam. PILPG has also operated field offices in Georgia, Iraq, Kenya, Kosovo, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania and Uganda, and maintains contacts in nearly two dozen key cities around the globe.

PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. In July 1999, the United Nations granted official Non-Governmental Organization status to PILPG.

In January 2005, a half-dozen of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."